International Trade Agreements and Aboriginal Water Rights: How the NAFTA Threatens the Honour of the Crown

by

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A Thesis submitted to
the Faculty of Graduate Studies
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MASTER OF LAWS

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This thesis began as an idea generated through my experiences working at the Centre for Indigenous Environmental Resources (CIER), where I learned daily lessons about the often disheartening, frequently exasperating, always novel environmental challenges and issues faced by First Nation peoples in Canada. The need to review these particular trade and water-related issues solidified in my mind through my participation as a member of the Joint Public Advisory Committee of the Commission for Environmental Cooperation, where I most keenly experienced the challenges of international cooperation on environment-related issues, particularly as they are exacerbated or benefited by trade. As I have worked through to a greater understanding of these issues, I have become more thankful (*very thankful!)* to both of these organisations for the opportunities that they have presented to me to learn and grow.

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ABSTRACT

Water, for both human and ecosystem use, is under increasing threat in Canada. The demand for Canadian water resources is increasing. It is used as a manufacturing or industrial input; rivers are dammed and diverted to create hydroelectric energy, or allocated to assimilate treatment plant effluents; aquifers are mined to meet agricultural irrigation needs; and water is bottled for domestic consumption.

In Canada, Aboriginal water rights continue to exist in most parts of the country, even those areas with land-surrender treaties. Despite this, these rights have not received the necessary legal and political attention to ensure their long-term protection. A 1987 comprehensive federal government review of water in Canada recognised the need to deal with Aboriginal water rights in a comprehensive, inclusive and cooperative manner, with the direct involvement of affected Aboriginal peoples. The public record suggests that Canada has done nothing to fulfill this commitment, despite the Supreme Court of Canada's clear pronouncements that Aboriginal and treaty rights are constitutionally-protected, and that the federal and provincial Crown must honourably discharge their fiduciary, constitutional, and statutory obligations to indigenous peoples. Despite these prescriptions, the Crown has failed to meet any of these requirements regarding Aboriginal water rights in any demonstrable way; it has even fallen far short of fulfilling the commitments it made almost 20 years ago in the *Federal Water Policy*.

Since the federal government committed to and then abandoned the federal water policy, it has committed itself to a number of international trade agreements. These agreements govern the trade of goods, services, and investment across Canadian borders. Most notable of these is the North American Free Trade Agreement (NAFTA). Highly controversial for its expansiveness, and in particular, its inclusion of extraordinarily broad investor and investment rights, the NAFTA application to water is uncertain. It is now clear, however, that water is subject to the NAFTA provisions, given the original intent of the NAFTA to apply to all traded items, that the waters of Canada are used directly or indirectly as a traded good, and that the NAFTA applies to investments in water.

Canada has not ensured that Aboriginal water rights (or any other Aboriginal or treaty rights) are protected from the broad reach of the NAFTA provisions. It is very likely that neither the federal nor provincial governments could fulfill its fiduciary and other obligations to Aboriginal peoples if those obligations conflicted with the rights and obligations under the NAFTA. A compelling illustration arises where Canada wished to limit the export of bottled water in order to protect a water source subject to Aboriginal or treaty water-rights claims. This circumstance has not yet come before the courts, but any protective action of this sort, particularly if foreign-owned water-export contracts were preferentially targeted, would likely violate NAFTA provisions. Because this kind of conflict is potentially imminent, and Canada's complete neglect in the protection of Aboriginal water rights, these rights are at risk.

Further, no current legislation or policy in Canada could prohibit Aboriginal peoples from engaging in expansive use of their water rights. This issue has not

been adjudicated, but current decisions strongly suggest that use of water by an indigenous community to engage in economic development of any sort, (including hydroelectric development or bulk--water export) would be within the scope of protected Aboriginal or treaty rights, and is clearly within the scope of activities under Aboriginal title. If indigenous communities choose to exercise these rights, given the "national treatment" provisions of the NAFTA and the current level of utilisation of water resources in Canada by non-Aboriginal interests, Canada will have no basis upon which to deny non-Canadian investors these same rights.

In response to this situation, a number of remedial actions are proposed:

- The existence of Aboriginal water rights must be recognised by all governments in Canada;
- Canada and the provinces must fulfill their constitutional, fiduciary, and statutory obligations to indigenous peoples regarding the protection of indigenous water rights;
- All governmental decision-making processes that may limit indigenous water rights must minimize limitations on these special rights to water;
- Boundaries and criteria to guide the discretionary decisions of government officials (e.g., in regulatory licensing processes) that may limit indigenous water rights must be clearly delineated;
- An inclusive permanent national forum for discussing options for the protection of water, including a revisitation and reaffirmation of the commitments made in the *Federal Water Policy*, must be created;
- Water-Policy development must focus on defining the most effective ways to protect indigenous water rights while meeting ecosystem requirements and the needs of other water users;
- The federal government must commit to ensuring (for example, through amendment or clarification to the NAFTA, and through specific exclusions or reservations to this effect in all future trade agreements) that Aboriginal and treaty rights will not be limited by international trade agreements;
- The linkages between trade law and policy and water law and policy (at the local, regional, national, and international levels) must be explored and clarified through a process that identifies areas of ambiguity, ambivalence, overlap, or concern, and then begins to address these issues;
- A comprehensive and inclusive strategy to include the meaningful participation of indigenous peoples in both domestic and international water-related and trade-related decisions, discussions, negotiations, must be developed, maintained and documented;
- International trade agreements must be developed and negotiated only with the meaningful input and involvement of indigenous peoples, and only after a clear definition and understanding of the impacts and benefits that may accrue to indigenous peoples has been determined.

INTRODUCTION

This thesis explores the nexus between two generally unconnected areas of law: international trade law and Aboriginal rights law. It analyses this connection through narrow, focussed screens in each of these areas of law: the North American Free Trade Agreement (NAFTA) within international trade law and Aboriginal water rights within Aboriginal rights law. NAFTA and Aboriginal water rights are chosen as the two areas of focus to best demonstrate the nature and complexity of the connections that exist between them, and to reveal that, in a number of existing circumstances, Canadian governments may not be able to simultaneously uphold their responsibilities under international trade agreements and domestic Aboriginal law.

In order to explore this view, a number of questions required answers:

- Do Aboriginal peoples in Canada currently possess water rights?
- Does the NAFTA apply to water?
- If Canadian Aboriginal peoples possess water rights, and if the NAFTA applies to water, can the NAFTA put Aboriginal water rights at risk?
- If so, what can or should be done to minimise or prevent this?

These subject areas of law share the common characteristic of being highly complex and quickly evolving. Both touch upon controversial topics of national concern. The intent of this research, however, is to explore specific complex and troubling implications of the connections between these areas of law rather than to present an exhaustive review of the law within each. In certain circumstances, such as in the NAFTA analysis, a relatively detailed review was required to provide a firm foundation upon which to base conclusions that otherwise had the potential to be contentious, shallowly-based and divisive. Elsewhere, the thesis does not fully explore all aspects of an issue; for example, all possible infringements that may have

impacted Aboriginal water rights across Canada are not explored in depth, but are rather presented from an illustrative and general perspective.

For several reasons, this thesis contains areas of speculation. Although international trade law and agreements and Aboriginal rights law continue to evolve, are closely related, and each may profoundly impact the other, there has been a general lack of scholarship exploring the connections between these areas of law, in both the jurisprudence and academic writing. Further, apparently relevant public policy statements are significant more often for their absence of guidance or prescription than for the direction they provide. Existing policy, particularly in the water and international trade areas, was sometimes the only source of directly relevant information. One of the most surprising oversights in the relevant public discourse, from either government or academic sources, dealing with the application to international law of the domestic Aboriginal law requirement upon the Crown to consult with potentially affected Aboriginal peoples prior to allowing or engaging in an activity that may limit Aboriginal or treaty rights. Given the potential for numerous Crown activities occurring at the international level (such as the negotiations and implementation of trade and investment agreements) to impact domestic treaty and Aboriginal rights, this oversight is remarkable. As such, numerous areas of fruitful further work are highlighted throughout this research, but could not be fully canvassed within its scope. Hopefully, the speculative nature of some areas of this research will prompt further analysis by others.

CHAPTER 1: WATER, OWNERSHIP AND ABORIGINAL RIGHTS

This chapter begins with a discussion of the nature of water and the legal difficulty that arises in attempts to apply concepts of ownership and use rights to this unique flowing resource. The law has not yet come to terms with this challenge. Given the increasing threats to water resources in Canada, this challenge will only increase in seriousness and difficulty. While courts have not yet specifically deliberated on the existence of Aboriginal water rights in Canada, these rights exist and add substantial complexity to the challenge of protecting all water rights that may exist. This chapter provides a brief review of the foundation of Aboriginal rights law to set the context for a detailed review of Aboriginal water rights in Chapter 2.

1 INTRODUCTION

1.1 Nature of Water

Water has two characteristics that make it more valuable, unique, and inescapably precious than any other substance on earth, except air. First, almost all life is dependent upon it; without freshwater humans would perish within days. This characteristic has led numerous writers to refer to freshwater not as a resource, but rather as a fundamental human right.[1]

Second, unlike most of earth's components, water is virtually impossible to truly own, despite our legal machinations to the contrary. In its natural state, water flows and is connected above, on, and under the earth through the hydrologic cycle. There is rarely a discrete entity with clear boundaries that is "a body of water"; it is most often a system of interconnected streams, flows, and aquifers, and other bodies that comprise entire watersheds, and ultimately the global freshwater and saltwater system.[2]

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[1] Maude Barlow, *Blue Gold: The Global Water Crises and the Commodification of the World's Water Supply* (International Forum on Globalization, Sausalito, California (1999). Also, Peter Gleick, et al., *The New Economy of Water: The Risks and Benefits of Globalisation and Privatisation of Freshwater* (Oakland, California: Pacific Institute for Studies in Development, Environment, and Security, 2002) at 5.

[2] The legal structures we have created to overcome this difficulty will be discussed in subsequent chapters.

Only 2.5 percent of the water on earth is freshwater, and it is not evenly or equitably distributed:

> Canada has a relative abundance of water, possessing 9% of the world's renewable freshwater, yet only 0.5% of the global population. However, the water is not evenly distributed across the country, and water availability varies both between years and with the changing seasons. As a result, most regions of the country have experienced water-related problems, such as shortages (droughts), excesses (floods) and associated water quality issues. For example, the drought of 2001 affected Canada from coast to coast (Table 1), with significant economic and social impacts. In the 1990s, severe flooding in the Saguenay region of Quebec (1996) and Manitoba's Red River valley (1997) were two of the costliest natural disasters in Canadian history.[3]

Contrary to popular belief, the supply of freshwater is not a renewable resource in the common use of the word, that is, it is not inexhaustible:

> In most forms, water is a renewable resource, made available by the natural hydrologic cycle of the coupled atmospheric-oceanic-terrestrial system. In this sense, continued flows of water are not affected by withdrawals and use. Unlike nonrenewable resources such as coal or oil, the amount of water available for use in a basin in the future is not necessarily altered by past withdrawals of water in that basin. Not all natural waters are renewable, however, and some that are renewable can be made non-renewable through human actions. Some groundwater basins and lakes, for example, have extremely slow rates of recharge and inflow. Water extracted from these basins or bodies of water in excess of the natural recharge or inflow rate is, therefore, equivalent to pumping oil – it reduces the total stock available for later use – and hence, is non-renewable and exhaustible. Contamination of a groundwater stock, similarly, can make a renewable resource into a non-renewable resource. Finally, human actions to modify watersheds, such as cutting forests or paving land, can affect the overall hydrologic balance, reducing recharge or flow characteristics and altering timing, availability, and renewability of water. In extreme cases, this can exhaust a formerly renewable resource.[4]

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[3] Natural Resources Canada, *Climate Change Impacts and Adaptation: A Canadian Perspective*, (Ottawa: Climate Change Impacts and Adaptation Directorate, November 2002) at 1. This document is available on the Natural Resources Canada website http://www.nrcan-rncan.gc.ca:80/inter/index_e.html.

[4] Peter Gleick, et al., *The New Economy of Water: The Risks and Benefits of Globalisation and Privatisation of Freshwater*, (Oakland, California: Pacific Institute for Studies in Development, Environment, and Security, 2002) at 5.

1.2 Flow, Movement, Connections, Types

Water moves in the hydrologic cycle, through the processes of precipitation, run-off, flow, evaporation, infiltration, respiration and transpiration. See table 1. Water resides, for various periods of time in rivers, above ground and underground streams, run-off ditches, lakes, oceans, aquifers, clouds, fog, ice, snow, and organisms (such as plants and animals). At any time, water in each of these sources is moving to another location on, above or in the ground, through one or more of the processes referred to above.

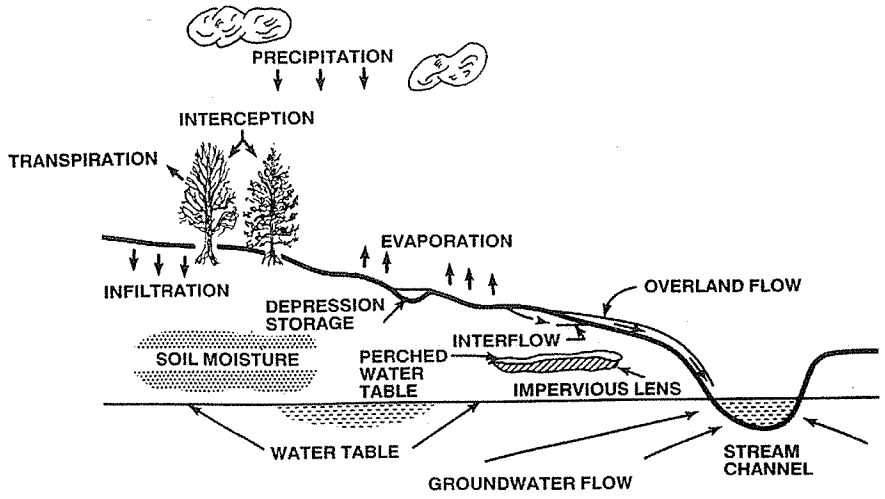

Table 1. Hydrologic Process © Robert G. Wetzel, *Limnology: Lake and River Ecosystems* (San Diego: Academic Press, 2001)

In its various places, water has different names. Subsurface freshwater is generally referred to as groundwater, and generally resides in aquifers, fissures in bedrock, the water table, and underground streams. Surface freshwater, in the form of rivers, streams, lakes, is generally permanent in nature, although there can great seasonal variability due to melting of snow and ice.[5] Water in the air, such as rain, fog, snow, and humidity is generally referred to in weather-related terms, such as precipitation, rather than hydrological terms. Water residing in living organisms

(other than trees) is not generally considered part of the world's water system, although it technically is.

1.3 Reduction, Variability, Change

Changing climatic conditions are predicted to diminish the availability of water in some areas of the world, in particular, the northern hemisphere:

> *GCMs* [global climate models] simulating a climate that is based on a doubling of CO2 suggest a global mean increase in precipitation and evaporation of between 3 and 15 percent.
>
> There are general indications that:
> - The present mid-latitude rain belt would shift northward;
> - Snowmelt and spring runoff would occur earlier than at present;
> - Evapotranspiration would be greater, as it would start earlier and continue longer;
> - The interior continental region in the Northern Hemisphere will, in general, experience drier summers.[6]

The Intergovernmental Panel on Climate Change predicts even greater threats:

> In its Third Assessment Report, the Intergovernmental Panel on Climate Change projects an increase in globally averaged surface air temperatures of 1.4 to 5.8°C by 2100. Changes of this magnitude would significantly impact water resources in Canada. Climatic variables, such as temperature and precipitation, greatly influence the hydrological cycle, and changes in these variables will affect runoff and evaporation patterns, as well as the amount of water stored in glaciers, snowpacks, lakes, wetlands, soil moisture and groundwater.[7]

Further, drastic increases in water use by humans will impact global climate:

> Manipulations of surface waters on a massive scale will inevitably lead to irreversible modifications of climate. Modifications of regional climatic condition have already occurred as a result of extensive alterations of large river systems in which surface waters and evaporation are increased greatly. These modifications are further confounded by those associated with global

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[5] As well, these "permanent" bodies are changing in their composition, flow rates, etc. likely due to climate change.

[6] Environment Canada, *The Nature of Water: Water and Climate*, available as of February 17, 2004 http: http://www.ec.gc.ca/water/en/nature/clim/e_howsup.htm.

[7] *Supra*, note 3 at 1.

climate changes induced by human-induced alterations in the gaseous composition of the atmosphere.[8]

2 OWNERSHIP AND NON-OWNERSHIP OF WATER

2.1 Water Ownership, Non-Ownership and Use

Most legal analyses start from the perspective that assumes that some form of ownership or control over water is possible. This is the fundamental belief behind all forms of environmental management, and while it is necessary to have administrative structures in place to control human behaviour regarding water, (particularly is use as a production input or pollution sink) the actual control over water can never be truly attained. While water bodies appear to be static and permanent, water exists mostly as a flow: it is rarely in one constant place or locale. Water is many movable interconnected entities that are not static.

Although for very different reasons, the differences in worldview between European and indigenous[9] societies regarding conceptions of ownership of water are

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[8] Robert G. Wetzel, *Limnology: Lake and River Ecosystems* (San Diego: Academic Press, 2001) at 46.

[9] In this paper, the term "Indigenous" is synonymous with the term "Aboriginal", and both will be used interchangeably. Aboriginal peoples of Canada are defined in s.35 (2) of the *Constitution Act, 1982*, as the Indian, Inuit and Métis peoples. In many circumstances, the Aboriginal law literature and jurisprudence appears to also use the terms "Aboriginal" and "Indian" interchangeably, particularly in much of the early case law dealing with Aboriginal rights and title. It is common for a case to deal with a scenario involving an "Indian", and to discuss the Aboriginal rights of that person, without making any reference to the general applicability of those Aboriginal rights to the other two Aboriginal groups, Inuit and Métis. Over time, the courts have begun to distinguish between the Aboriginal rights of "Indians", "Inuit" and "Métis", based upon the very different historical relationship between those groups and the Crown. (See for example *R.* v. *Van der Peet* [1996] 2 S.C.R. 507 for a discussion of the scope of Aboriginal rights as they apply to the Métis people.). Still, the majority of jurisprudence deals with the "Indian" group of Aboriginal people.

The term "Indian" has become a symbol of many negative elements of the colonisation of Canada by Europeans. Due to this, many people who would be described legally as "Indian" have chosen to use a term that they find more historically and politically accurate: "First Nation" or "First Nations". In the view of many First Nations, this term more accurately reflects the historical record, in that

generally absent; both were more concerned with access to and use of the resource. As well, both philosophies are human-centred at their core, with native philosophies tending to be more respectful of nature, at least historically.[10] In European thought, water is considered a resource. In the Shorter Oxford English dictionary, "resource" is defined as:

> A means of supplying some want or deficiency; a stock or reserve upon which one can draw when necessary.[11]

The focus in this definition is human need, rather than the interdependency of needs in nature, the reliance of other life upon water, or responsibilities that may or should be present in those inter-connected relationships. Thus, water that is unused by humans and that remains in its natural state has frequently been seen as a

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the Indigenous peoples of Canada were the first nations present, before colonisation of this country by the English and French (who are often referred to as "the two founding nations" of Canada).

While not all First Nations support its use, it has become the most accepted term used to reference individuals, communities, or groups of communities. Therefore, this thesis will use the term "Indigenous" when referring to "Aboriginal" peoples, "First Nation" in place of "Indian" when referring to singular entities (a First Nation person or community) and "First Nations" when referring to plural entities (a group of First Nation individuals or communities). "Indian" and "Aboriginal" will be used when directly quoting from sources that use that term or when appropriate, given the specifics of the discussion.

This thesis will limit its focus to one of the three Indigenous groups, the First Nation people of Canada.

[10] David Orton, one of the leading Canadian practitioners of the Deep Ecology movement, points out in "Native Americans and the Environment, The Wild Path Forward: Left Biocentrism, First Nations, Park Issues and Forestry, A Canadian View" Fall 1995, Wild Earth, Vol.5, No.3. at 3 that:

> "Unfortunately, the traditional [indigenous] world view is usually jettisoned in order to attract some recompense from the dominant society. Métis Historian Olive Dickason in her progressive book, Canada's First Nations: A History of Founding Peoples from Earliest Times, quotes Cree lawyer Delia Opikikew, saying the concept of Aboriginal rights,
>
> > ...recognises our ownership over lands we have traditionally occupied and used and our control and ownership over the resources of the land – water, minerals, timber, wildlife and fisheries."

[11] The Shorter Oxford English Dictionary, (New York: Oxford University Pres, 1973).

wasted resource. David Suzuki and Peter Knudtson, in "Wisdom of the Elders", states:

> Aboriginal peoples relationship with other life-forms comes from a deep respect that is ultimately self-interested.[12]

Despite these similarities, most elements of western and indigenous society view water, and its relationship to the earth, very differently. The view of water being one large interconnected entity forms the basis of many of the indigenous cultures. In First Nation tradition, the world of humans and the natural world are inseparable, all parts of the natural world exist in their own right, and the relationship between humans and the rest of the natural world is one of interdependence. First Nation societies traditionally held the view that water was the lifeblood of the earth, it was sacred, and that in addition to containing life, it was itself infused with spirit.[13] In this worldview, legal ownership of the natural world, or any of its parts, did not exist. Reverend Stan McKay, an Ojibway minister, states:

> It is difficult to express individual ownership within the Native Spiritual understanding. It follows that if the creatures and the creation are interdependent, then it is not faithful to think of ownership. Life is understood as a gift and it makes no sense to claim ownership of any part of the creation. Our leaders have often described how nonsensical it is to lay claim to the air, the water, or the Earth – because these are related to all life.[14]

Further, in indigenous traditional perspective, there appears to be little distinction between the concepts of "ownership" and control. Elements of the natural world could neither be owned, nor could they be subject to human control (despite appearances to the contrary).[15] In both cases, indigenous peoples were guided in

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[12] David Suzuki and Peter Knudtson, *Wisdom of the Elders* (Toronto: Stoddart Publishing Co., 1992) at xxviii.

[13] These characteristics made water of great ceremonial importance to First Nations, as evidenced by the use of water in many First Nation ceremonies.

[14] Reverend Stanley McKay, "*The Earth is Our Life: An Aboriginal North American Perspective on the Integrity of Creation*", at 88 (possession of the author).

[15] In the nature of these relationships, even in activities that externally appear to demonstrate the exercise of control, such as killing a moose for food, do not. First Nation traditional beliefs held that the moose would have allowed itself to be killed out of respect and as part of the natural interdependence of all aspects of the natural

their relationships with all aspects of the natural world by a strong awareness of their interdependence. This relationship greatly influenced and limited both the quantity and scope of uses to which First Nations might put the natural world.

These perspectives are evident in the following declaration recently signed by numerous indigenous peoples from around the world:

> ...We were placed in a sacred manner on this earth, each in our own sacred and traditional lands and territories to care for all of creation and to care for water.
> We recognize, honour and respect water as sacred and sustains all life. Our traditional knowledge, laws and ways of life teach us to be responsible in caring for this sacred gift that connects all life.
> Our relationship with our lands, territories and water is the fundamental physical cultural and spiritual basis for our existence. This relationship to our Mother Earth requires us to conserve our freshwaters and oceans for the survival of present and future generations. We assert our role as caretakers with rights and responsibilities to defend and ensure the protection, availability and purity of water. We stand united to follow and implement our knowledge and traditional laws and exercise our right of self-determination to preserve water, and to preserve life.[16]

Similarly, it is an ancient principle of the common law that water in its natural state, like air, cannot be owned.[17] Water and air are fundamental to life, which gives them special physical importance to all life. While dependence such as this should be a key consideration when allocating rights and obligations, European society has not elevated water or air to the status of the sacred, nor has it placed the needs of other life above human needs.[18] The law governing water has evolved over time in

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world. Out of respect for the moose's choice, First Nations would engage in a ceremony honouring the life and gift of the moose and the Creator's.

[16] "Indigenous Declaration on Water", Third World Water Forum, Kyoto, Japan March 2003, http://www.indigenouswater.org/IndigenousDeclarationonWater.html.

[17] This is based upon information provided in Professor Dale Gibson's paper, "The Constitutional Context of Canadian Water Planning" (1969) 7 Alta. L. Rev. 71 at 72-75.

[18] It is generally accepted that most natural resources are managed on an "emergency" basis, with true conservation measures, such as species protection legislation or harvesting bans, being adopted only as a measure of last resort. For example, endangered species legislation tends to apply to species that are already in a great degree of danger of extinction, and has only a minor impact on true prevention of species imperilment. Another example is the Atlantic cod stocks that

favour of ever-increasing access to use water, largely in response to increasing industrial demands.[19]

The common law has never recognised ownership rights to water, likely because, unlike other parts of the natural world such as land and trees, discrete portions of water are difficult to trap or sequester while they are in their natural state (i.e. part of a body of water).[20] The nature of water is that it flows, and therefore is not practically identifiable or divisible in its natural state into parcels or pieces. For example, if you own land and a lake on the land, you also own the land around and under the lake. The land and the lake are, in all scientific terms, completely and fully intertwined; they are not two distinct entities. In most circumstances, "the lake" is actually billions of water molecules that are constantly moving in, out, below, above, and through the space that would be referred to as "the land and the lake". After a number of years, the water molecules that resided in the lake at the moment you purchased the land will likely no longer reside there; they will have moved on and been replaced by different water molecules from other locations.

This may seem an obvious and trifling point, but you cannot own something you cannot contain. The best you can do is to secure use rights to use the *flow of water*, should it continue to exist. This distinction is important because it has formed the basis of most water law until very recently; it is at the basis of the distinction that states that water is not a common property resource that is "owned by all", but rather it cannot be owned, just merely used by adjacent landowners (riparian rights), by

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have been the subject of extensive federal management regimes, and yet have been legally harvested to the point of total collapse of the cod populations off the coast of eastern Canada.

[19] Kenichi Matsui, *Reclaiming Indian Waters: Dams, Irrigation, and Indian Water Rights in Western Canada, 1858-1930*, Ph.D. Thesis, (Vancouver: University of British Columbia, 2003) argues at page 7 that this has resulted in greater political and legal confusion as to the nature of Indian water rights in particular.

water licensees, or by us all (public rights). Water law (especially the definition of riparian rights) was built around this distinction: that although water cannot be owned, it can be used.[21] The best way to balance competing flow use needs and rights has been, and continues to be the critical issue.

Water is generally characterised as a "common property resource".[22] Economic theory states that human beings respond to incentives, such as financial gain, and will engage in activities that achieve those gains (such as harvesting fish or trees, or grazing their cattle in a common pasture) to the maximum extent possible, if allowed. They will do so to the point of full depletion of the resource, particularly if the resource is a common property resource, that is, fully accessible by all. The nature of these resources means they are in constant danger of over-consumption by all individuals, who are logically driven to maximize their financial gain, and to do so before others (driven by the same incentives) use up all the resource.[23] Although the long-term sustainability of the resource is dependent upon cooperation and some level of conservation by all users of the resource, this does not occur, as individuals pursue immediate gain.

At the level of the individual, this is considered rational economic behaviour despite the long-term impact of total destruction of the resource. In this situation, intervention by a regulatory body is necessary.[24] Governments in Canada thus have

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[20] As human needs for potable water and water-power generated electricity have increased, technological feats of engineering such as large-scale water diversions, have challenged this assumption.

[21] Probably due to these practical difficulties, the law has traditionally stated that water is incapable of individual or collective ownership, other than in the most philosophical and general fashion: as a collective entitlement of humankind.

[22] Steven Kennett, *Managing Interjurisdictional Waters in Canada: A Constitutional Analysis* (Calgary: Canadian Institute of Resources Law, University of Calgary, 1991) at 11.

[23] Garrett Hardin, "*The Tragedy of the Commons*" (1968) 162 Science 1243.

[24] Common law riparian water rights were a means to accomplish this goal, as they were a system of common law rules regarding allocation of the resource

jurisdictional authority that allows them, within their legitimate spheres of authority, to implement measures or controls on the use of water. This does not grant them ownership of the water.[25]

In recent years, the situation has become muddied. In response to industrial demands to use or permanently remove or alter vast quantities of water from its natural state, such extensive water use rights have been granted that the distinction between "ownership" and "use" is blurring. For example, many water uses are permanent in their impact:

- Removing water from its natural source or location;
- Permanently containing water in some fashion, such as through bottling[26];
- Diverting water outside the watershed,
- Creating a permanent or semi-permanent reservoir.

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amongst a group of users who individually, through direct access to the water adjoining the land they owned, could utilise all of a body of water to its full depletion or assimilative capacity. As Professor Bora Laskin (as he then was) points out in "*Jurisdictional Framework for Water Management*" in *Resources for Tomorrow Conference Background Papers*, vol.1 (Queen's Printer, 1961) 211 at 215: "When there is a need to husband water resources or to make them serve beneficial communal uses, it is obvious that riparian law is inadequate."

[25] See Dale Gibson, *supra* note 17 at 72-75. Despite this, in some provinces, such as British Columbia, the government asserts that it has full ownership of the waters within the province. For the statement of this legal position see http://www.lwbc.bc.ca/water/general/protect.html available as of February 17, 2004 which confirms the British Columbia government's view on this point.

[26] Property rights to engage in this type of activity exist. They are generally acquired in the first instance through purchase of a license from a regulating body, or through subsequent purchase of someone else's licence. In some jurisdictions, such as British Columbia, water license fees are structured according to the quantity of water being "used", as opposed to a reimbursement of the administrative effort of the licensor. This supports the argument that license fees represent the purchase costs of the water, rather than the license, and that the purchaser then owns the water and has the right to permanently remove it from the source. A number of these "licenses" are for the bottling or bulk removal of water. See (as of February 17, 2004) http://lwbc.bc.ca/fees/ for license application fees and http://lwbc.bc.ca/water/factsheets/fs3fees.html for information on the yearly

These uses have the impact of effectively permanently deny other users, including the ecosystem inhabitants, such as fish, which clearly depend upon the water for their existence. An individual that secures these types of extensive rights has acquired rights that are tantamount to ownership rights to water. This is particularly the case if the quantities removed or impounded are so large as to permanently deplete the water source.

2.2 Legal Jurisdiction over Water

Jurisdiction over water is not listed in the *Constitution Act*,[27] although some related activities are. In "Water Law in Canada", Gerard La Forest (as he then was) set out the federal powers that provide the basis for water management at the federal level:

- 91(1A) Public Property
- 91(7) Defence
- 91(10) Navigation and Shipping
- 91(12) Seacoast and Inland Fisheries
- 91(24) Indian Lands
- 91(27) Criminal Law
- 91(29)/92(10) Extraprovincial works, undertakings
- 91(preamble) "peace, order, and good government"
- 95 Agriculture
- 132 Empire treaties[28]

These sections are interpreted as the general basis of the federal powers regarding general environmental protection (such as toxics laws, species at risk

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payments, based upon quantity taken, and purpose of the water, due to the province for use or removal of the water.

27 *Constitution Act, 1867,* 30 & 31 Victoria, c. 3. (U.K.)

28 Gerard La Forest, *Water Law in Canada – The Atlantic Provinces* (Ottawa: Information Canada, 1973) at 6.

legislation, water strategy planning, climate change agreements, pollution prevention initiatives, among others), much of which directly impacts water resources. Finally, it has been argued that the federal government, through section 29, holds all residual powers, that is all powers not specifically enumerated and granted through section 92 (see below).

The provinces, under section 92, have jurisdiction over property and civil rights, and all matters of a merely local or private nature. These are the bases for the right of the province to manage water resources in the province.[29] This includes jurisdiction and ownership over the water within a province, although subject to federal jurisdictional aspects, such as navigation. Section 92A grants the province the right to make laws regarding non-renewable natural resources, forestry, and electrical energy production and export. All of these powers may indirectly impact water resources.

3 ABORIGINAL RIGHTS INTRODUCTION

> And the gold, she lays colds in their pockets,
> And the sun, she sets down on the trees,
> And they thank the lord for the land that they live in,
> Where the white man does as he pleases.

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[29] In *Natural Resources and Public Property Under the Canadian Constitution*, the author makes clear that when Manitoba entered into confederation in 1870, all "ungranted and waste lands" were retained as federal Crown lands. That is, most of the lands that are now Manitoba, including the ownership of base mines and minerals, and water, were federal property. In the *Constitution Act, 1930*, it was intended that water rights be transferred from jurisdiction of the federal government to that of the prairie provinces. Despite a reference to that effect in the amendment, it was not made completely certain until a further amendment in 1938. Still, this matter is not the subject of widespread agreement. Further, all transfers under these agreements are "subject to any trusts existing in respect thereof, and any interest other than that of the Crown. Any laws that have since attempted to modify this provision, for example through infringement of treaty or aboriginal rights to water, or riparian rights accompanying reserve entitlements, would be *ultra vires* the province. For more on this, see Richard Bartlett, *Aboriginal Water Rights in Canada: A Study of Aboriginal Title to Water and Indian Water Rights* (University of Calgary: Canadian Institute of Resources Law, 1986) at 200 – 202.

- Nanci Griffith

The legal history of this country is essentially a chronicle of the struggle over ownership and access to land. As with many such struggles, the relationship that has evolved over the last few hundred years between the first inhabitants, the indigenous peoples, and the settlers, has been fractured, difficult, and controversial. Further, it has been frequently punctuated by protracted litigation aimed at either legitimising or limiting indigenous peoples' access to the lands they occupied and were dependent upon for their survival.

The ancestors of the current generation of indigenous peoples extensively occupied all of North America for many thousands of years before settlement by Europeans.[30] They were organised into clans, family groupings, tribes, communities, and often cities of great complexity and diversity:

> ...They had developed every kind of society: nomadic, hunting groups, settled farming communities, and dazzling civilisations with cities as large as any then on earth. By 1492 there were approximately 100 million Native Americans - a fifth, more or less, of the human race.[31]

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[30] That they have done so for thousands of years is generally beyond dispute, although Courts have struggled to come to agreement on an actual duration of occupation. See for example, *Mikisew Cree First Nation* v. *Sheila Copps, Minister of Canadian Heritage and The Thebacha Road Society* [2001] F.C.T. 1426, where the Court accepted as part of the factual background of the case that "First Nations people have inhabited WBNP [Wood Buffalo National Park] for over 8,000 years". In *Calder* v. *British Columbia* [1973] S.C.R. 313 at p.316 the Court accepted the agreed fact that the "Nisga'a are descendants of the Indians who have inhabited since time immemorial the territory in question...". Contrast this with the approach taken by the trial court in *Delgamuukw* v. *British Columbia* [1997] 3 S.C.R. 1010. In this case, extensive evidence was presented to establish proof of Gitksan and Wet'suwet'en habitation of 22,000 square miles of territory in British Columbia. McEachern C.J.B.C. held that the plaintiffs occupied only the limited territory of certain sites in the Hagwilget Canyon and on the Skeena, Babine, and Bulkley Rivers. In his view, only "some of the ancestors of some of the plaintiffs or the peoples they represent" have been present in the territory for "an indefinite, long time", but this was not long enough or extensive enough to satisfy a claim for Aboriginal title.

[31] Ronald Wright, *Stolen Continents: The "New World" Through Indian Eyes* (Toronto: Penguin, 1993), 3-4.

At the time of colonisation, there were eleven indigenous tribal groups in Canada, which spoke many different languages.[32] They had wide-ranging cultures, economies, and systems of decision-making, governance, and law.[33]

Extensive societies and systems had been regulating the relations between indigenous peoples in North America for thousands of years before the arrival here by representatives of the English government. The inaccurate but historically repeated record chronicles the "discovery" of North America, despite its extensive prior occupation by indigenous peoples. Despite its mythical factual basis, modern courts have relied upon the "principle of discovery" to determine the extent to which Indigenous peoples would be allowed to continue to have access to the land they occupied before colonisation.[34] The leading American case to deal with the Royal Proclamation of 1763 in relation to Aboriginal rights, *Johnson* v. *M'Intosh,*[35] first discussed this meaning of principle. In this case, the court explained at pp. 573-74:

> The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it....It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.
> ...In the establishment of those relations, the rights of the original inhabitants were, in no instance entirely disregarded; but were necessarily, to a considerable extent, impaired....

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[32] In *Native Peoples and Cultures of Canada,* 2ed. (Vancouver: Douglas & McIntyre Ltd., 1995) Alan D. McMillan explained that, given the subjectivity with which languages and populations are classified and the absence of any historical records, the exact number of Aboriginal languages in existence at the time of first contact is unknown. McMillan estimated that 53 distinct languages survive in Canada today.

[33] In 1997, *Delgamuukw* v. *British Columbia* [1997] 3 S.C.R. 1010, at para. 148, the Supreme Court of Canada reaffirmed its finding in *R.* v. *Van der Peet* [1996] 2 S.C.R. 507, which held that Indigenous peoples had cultural systems that included systems of law. In *Van der Peet,* the Court stated that the existence of these Indigenous laws, particularly those that relate to land, are a valid element of proof in a claim for Aboriginal title.

[34] For an excellent and very interesting review of the "Doctrine of Discovery" and its profound limitations see Sharon Helen Venne, *Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Rights* (Penticton, British Columbia: Theytus Books Ltd., 1998) at 1 – 27.

[35] 21 U.S. (8 Wheat) 543, 5 L. Ed. 681 (1823)

> ...Their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

The indigenous peoples did not agree that the "discoverers" were entitled to the rights they asserted to these territories.[36] Indeed, they were not asked. Further, indigenous peoples had not assented to the diminishment of their rights, despite the assertion of the above passage in *Johnson* v. *M'Intosh*.[37] As discussed by the court in *Johnson,* the goal of the settler government after discovery was to assimilate and integrate the indigenous peoples of North America into the settler society. The settlers exerted force to fully colonise and assimilate local indigenous peoples.

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[36] The automatic assertion of superiority of another legal system, in this case English, was inherently repugnant to any society that operated under its own legal system. It would be no more valid for Indigenous society to have ventured out across the Pacific Ocean, "discovered" England, and asserted the supremacy of Indigenous law. In essence, moral correctness, as found in principles of natural justice, did not form the basis of legitimacy of these actions, but rather, the ability of the discoverers to enforce their discovery "by the sword".

[37] Disputes that focused upon the interpretation of treaty provisions often assert this, and this was clearly the case regarding assertions of Aboriginal title. For example, in *Calder* v. *British Columbia (Attorney General)* [1973] S.C.R. 313 at 317, Judson J. relayed the Nisga'a answer to government assertions of absolute ownership of the land within their boundaries in the following passage. This quote was of Nisga'a spokesman David Mackay, speaking in 1888, before the first Royal Commission to visit the Nass Valley:

> What we don't like about the Government is their saying this: "We will give you this much land." How can they give it when it is our own? We cannot understand it. They never bought it from us or our forefathers. They have never fought and conquered our people and taken it from us in that way, and yet they say now that they will give us so much land—our own land. These chiefs do not talk foolishly, they know the land is their own; our forefathers for generations and generations past had their land here all around us; chiefs have had their own hunting grounds, their salmon streams, and the places where they got their berries; it has always been so. It is not only for the last four or five years that we have seen the land; we have always seen and owned it; it is no new thing, it has been ours for generations. If we had only seen it for twenty years and claimed it as our own, it would have been foolish, but it has been ours for thousands of years. If any strange person came here and saw the land for twenty years and claimed the land, he would be foolish. We have always got our living from the land; we are not like the white people who live in towns and have their stores and other business, getting their living in that way, but we

Despite this, indigenous peoples were fiercely determined in their refusal to be assimilated or overpowered by the settlers. Because of the risk of permanent warfare with various indigenous groups, and recognition that the exertion of force was generally unsuccessful in achieving assimilation, the new English government adopted a policy of settling indigenous claims to land through purchase from the indigenous inhabitants, before making them available for settlement by others.[38] However, the exact nature of the land rights purchased, and therefore the extent of the indigenous land rights that continued in force to this day, has long been the subject of dispute. According to Tyler,

> Europeans were not eager to answer that question, or to discuss it with the native inhabitants of the continent. To clearly identify the rights of the aboriginal peoples would have made it more difficult to deal with them. "Indian willingness to sell was generally treated as the best, and often the only proof of Indian ownership."[3] Certainly, the Indians themselves were not encouraged to bring forward their own views as to their rights, and they were studiously ignored whenever they insisted upon doing so. Thus, even today, the question of what aboriginal resource rights might consist of is very unclear.[39]

Despite this assertion, indigenous peoples had rights they possessed and enforced amongst themselves long before the English common law tradition had yet to exist. Their indigenous laws, and the responsibilities over land given to them by the Creator[40], created and recognised an entitlement to land that the settler government did not, in the indigenous peoples view, displace. Nonetheless, in the hopes of maintaining peace, the Crown asserted the principle of discovery to

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> have always depended upon the land for our food and clothes; we get our salmon, berries, and furs from the land.

[38] Kenneth Tyler, "*Indian Resource and Water Rights*" [1982] 4 C.N.L.R. 1 at p. 4 discussed the Dutch approach to settling Aboriginal claims through purchase being adopted by the English government by the time of the *Royal Proclamation of 1763* as a means to achieve greater certainty in Aboriginal-settler relations.

[39] Kenneth Tyler, *ibid* at 4 (see footnote 3 referencing Daniel J. Boorstin, *The Americans: The National Experience* (New York, 1965) at 264).

[40] This information was provided to the author through participation in ceremonies and through discussions with numerous Aboriginal peoples.

legitimise its taking of the land, while attempting to acknowledge indigenous rights in some limited fashion.

The original and subsequent governments and courts have chosen not to completely disregard the original rights of indigenous peoples but rather to seek some sort of balance between the needs of the Indigenous peoples and the needs of the settlers. In so doing, it has been recognised and accepted, by both indigenous and western systems, that Aboriginal rights and title existed before colonisation, and are based upon the long occupation and possession of those lands by indigenous people.[41] Despite the congruence of these views, the Canadian legal system has continued to require indigenous peoples to prove the existence of these rights in order to attain any benefits from or protection for them[42], in particular rights regarding exclusive title or access to specific land, or rights to use land.[43]

It happens that balance between these rights is generally sought in the legal arena. While this attempt at reconciliation of two sets of interests has been a fundamental characteristic of the ongoing relationship between indigenous peoples and Canada[44], the outcome of this balancing frequently has not been beneficial to

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

42 This is not always the case. Recently the Supreme Court of Canada has begun making statements that encourage governments and Aboriginal peoples to negotiate solutions to Aboriginal rights claims, rather than resort to litigation for resolution. Negotiated settlements presume that there would not be a need for strict proof, which can only be secured by prior litigation in a Canadian court. In practice, this is rarely the case. In environmental assessments processes, governments routinely require there to be proof of an existing Aboriginal right in a region before it will consider its duty in those circumstances to protect the right.

43 By way of further example, access or rights to natural resources, such as forests and fisheries, has also become the subject of intense legal scrutiny in recent years. See *Marshall (#1)* [1999] 3 S.C.R. 456.

44 This element of reconciliation is, in essence, the fundamental guiding principle when balancing, for example, a claim to engage in fishing in a body of water that is situated within land owned by a third party (see *R.* v. *Badger* [1996] 1 S.C.R. 771, at 790-809). As long as the third party owner's rights to the land and water are not jeopardised, the court will tend to hold that the First Nation person has

the indigenous nations. Most significantly, it resulted in their transformation from independent and sovereign nations to protected peoples[45] when the federal government assumed responsibility in the *Constitution Act, 1867* for "Indians and lands reserved for Indians".[46] Through this provision, the First Nation peoples of Canada became legally dependent in accordance with the settler's law, and the government of the settlers became the decision-maker that was to interpret, decide, enforce and protect the rights and interests of their charges.

The legal structure assumed by the Crown, whereby it became responsible for many if not all of the aspects of the lives of First Nation peoples, created a fundamental conflict of interest for it. As the Crown attempted to meet its own needs, the needs of the settler populace that it represented, and the needs of the indigenous peoples, which it also claimed to represent, this conflict became increasingly apparent.

For example, the goals of the Crown when effecting the settlement of Canada were to gain access to land, ensure peaceful relations between the indigenous peoples and the settlers, and assimilate the indigenous peoples into European society as it developed in Canada.[47] By contrast, First Nations expressed their fundamental needs and intentions quite differently. In the late nineteenth century, when First Nations and the Crown were negotiating treaties, First Nations made clear that their goals were to provide for their families, control their own destinies, and retain their culture.[48] Further, First Nations remained explicit in their desire to

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the right to practise their traditional fishing in that spot. In essence, rights are held in co-existence, in the interests of reconciling both sets of needs.

45 This concept is discussed in Brian Slattery's article, "*Making Sense of Aboriginal and Treaty Rights*" (2000) Vol. 79 No. 2 Canadian Bar Review 198.

46 *Constitution Act, 1867*, *supra* note 27, s. 91(24).

47 *Calder* v. *British Columbia*, *supra* note 30 at 323, and *Johnson* v. *M'Intosh, supra* note 35.

48 For examples, see detailed discussion of treaties in Chapter 2.

utilise their lands, including traditional lands[49], to ensure the wellbeing of their communities. This conflict in perspective has persisted to this day. The series of decisions dealing with the application of the *Sparrow* test regarding justification for infringements to Aboriginal or treaty rights demonstrates this most clearly.[50]

This philosophical clash has been the basis for the development of Canadian Aboriginal law, which has only recently begun to demonstrate a cogent, if still self-serving, basis for much of its doctrine. This may be due in part to the simultaneous development of human rights legislation, including the *Charter of Rights and Freedoms*[51], which has influenced definitions of fairness. Gradually, the jurisprudence has begun to acknowledge that when Canada was created, a nation-to-nation relationship existed between the colonisers and the indigenous peoples. Brian Slattery recently described the body of Canadian law that flowed from this relationship, Aboriginal law, as essentially a construct of "inter-societal law", that is:

> "...a body of Canadian common law that defines the constitutional links between aboriginal peoples and the Crown and governs the interplay between Indigenous systems of law, rights, and government (based upon aboriginal customary law) and standard systems of law, rights and government (based upon English and French law). The doctrine of Aboriginal rights is a form of "inter-societal" law, in the sense that it regulates relations between aboriginal communities and the other communities that make up Canada and determines the way in which their respective legal institutions interact."[52]

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[49] In this thesis, the term "traditional" refers to the period before colonisation. That is, traditional practices are those First Nation activities that were regularly practiced before later influence and restriction by European settlers.

[50] See *R.* v. *Gladstone* [1996] 2 S.C.R. 723, *Delgamuukw* v. *British Columbia* [1997] 3 S.C.R. 1010, *Mikisew Cree First Nation* v. *Canada (Minister of Heritage)* 2001 F.C.T. 1426, *R.* v. *Marshall (#1)* [1999] 3 S.C.R. 456. These cases identify and to some extent discuss societal goals that may properly infringe Aboriginal and treaty rights, and are an indication of the elaborate rationalisation that is used to justify these activities. They further demonstrate the fundamental conflict in the goals of the two societies and the inequity in the relative power available to each society. Chapter 2 will discuss these cases in detail.

[51] Part 1 of the *Constitution Act, 1982*, being Schedule B to the Canada Act, 1982 (U.K.) 1982, C.11.

[52] Slattery, *supra* note 45, at 198.

Slattery has described two sources of Aboriginal law: ancient custom and broad principles of justice.[53] Ancient custom was generated between the British colonies and the indigenous peoples over the time-period from first contact to the point at which Canada became a sovereign nation. Broad principles of justice operated to temper the strict application of positive law and, in Slattery's view, "provide the doctrine of Aboriginal rights with its inner core of values".[54]

This framework, while positive and helpful, has not recognised that there is a fundamental conflicting goal in play: the acquisition of Aboriginal land for non-Aboriginal peoples and their governments. As well, there appears to be different moral foundations at the basis of each society's values in this "inter-societal" relationship. Indigenous peoples have long argued that fundamental differences existed in the values held by their peoples and those of other members of Canadian society, for example regarding:

- The relationship between and the type and extent of connections between humans and the natural environment;
- The appropriate treatment and use of the land and natural resources by humans;
- The definitions of "development" and "progress" in the context of human societies;
- The purpose or goal of economic systems (economic growth versus sustainable development);
- The proper approach to decision-making, including the use of democratic processes;
- The role, influence of, and respect for women, children and elders;
- The role and relative influence of political, spiritual, and community leaders; and,

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53 *Ibid.*

54 *Ibid.*, at 199.

- The influence of religion and spirituality in indigenous knowledge systems and the governance of communities, interpersonal relationships, and relationships with the earth.[55]

There has been some recognition in western institutions that a moral basis to the relationship between the Crown and indigenous peoples exists. Its application has been highly inconsistent. While, the courts refer to the "honour of the Crown" being at stake when engaged in dealings with indigenous peoples[56], this vague obligation to honourable dealings has been observed more in the breach than in practice.

The clearest example of this relates to the current test for determining the existence of an Aboriginal right. The *Van der Peet*, *Gladstone,* and *Delgamuukw* cases adopted the "Distinctive Culture" test which based the existence of an Aboriginal right on whether the claimant could show that the activity in question, the claimed Aboriginal right, was a distinctive element of the culture of the Aboriginal group. If so, it would be worthy of some level of protection, depending upon the strength of its connection to land.[57] While this might seem to be the most logical approach given multiple, often competing interests, it failed to recognise historical moral wrongs, and the broad impacts of previous contradictory federal and provincial

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[55] This is by no means an exhaustive list, and while later chapters discuss these ideas in more detail, an example may be helpful at this point. While many Indigenous peoples say that they do not "own" the land they have occupied, they are clear in their belief that they have a responsibility, a sense of stewardship over this land: "Native people did not feel ownership of land or homes, they felt the responsibility of preserving it through caring for it. They maintained the area for future use and productivity. Land was a shared, living entity." Interview with Twylah Hurd Nitsch (Seneca), from *In the Words of Elders: Aboriginal Cultures in Transition* ed. by Peter Kulchyski, Don McCaskill and David Newhouse (Toronto: University of Toronto Press, 1999) at 85. This view of ones relationship to land is in stark contrast to the Canadian legal approach to dealing with land, which is predominantly based upon ownership.

[56] While countless cases make reference to this concept, the cases dealing with the fiduciary relationship between First Nations and the Crown deal with it most directly. See for example, *Guerin* v. *The Queen* [1985] 1 C.N.L.R. 120 (S.C.C.).

policies that now served to disadvantage and undermine the ability of the indigenous claimant to prove a strong enough cultural connection. Examples of some of these Crown policies were:

- The federal government long ago implemented a policy of assimilation to "civilise" First Nations, including a forced religious boarding school policy for indigenous children and legislated prohibitions against practicing spiritual elements of indigenous cultures[58], yet confined First Nations to restricted reserve territories, segregating them from the rest of society[59];
- The Crown considered it desirous for First Nations to become productive, integrated members of society, yet decision-making over most of their affairs was the responsibility of the federal government[60] (not indigenous governments);
- Sharing of the land and resources of this country was a key element in many of the treaties, yet many treaty promises, most notably those related to land entitlement, have not yet been fulfilled.[61]

Aboriginal law, as a child born of feuding parents, both demonstrates and perpetuates these irreconcilable differences and inconsistencies. Given this, achieving a true balance between the needs of indigenous peoples and the rest of Canadian society is unattainable, without dramatic revision of the law. This has resulted, at times, in an extremely fractured and confrontational relationship between indigenous peoples and the rest of Canadian society; and the law has had to struggle to find solutions that attain some level of fairness within this atmosphere.

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57 This will be discussed in greater depth later in Chapter 2.

58 Until 1951, the Criminal Code of Canada had a prohibition on Aboriginal feast ceremonies.

59 *St. Catherine's Milling & Lbr. Co.* v. *R.* (1888), 14 App. Cas. 46, 4 Cart. 107 (P.C.).

60 See *Constitution Act, 1982*, *supra* note 27, s. 91(24), and the *Indian Act*, R.S.C 1985, c.I-5.

61 For example, the Treaty Land Entitlement Committee in Manitoba informed the author that only approximately 1500 acres of over 1.5 million entitlement acres have been resolved since formation of the Committee in 1977.

Based upon the evolution of these principles and their application in jurisprudence, the intent of our legal and political institutions has seemed not to achieve an actual balance between First Nation and non-First Nation societies based upon concepts of equitable sharing and reconciliation, but to create a logical framework that attempts to do so only on its surface, through an accommodation-based approach.[62] The goals and legal systems of First Nations and non-First Nations have been different in at least one fundamental way: First Nations desire full and absolute rights to what they consider to be their land, and non-First Nation governments do not consider this a workable solution, given its potential economic and political impacts on the remainder of Canadian society.

Recent cases have begun to openly adopt an accommodation-based approach that evaluates, weighs, and ultimately narrows Aboriginal rights claims to accommodate the needs of society. This is particularly the case in circumstances involving resources development.[63] As competition for natural resources increases, the courts, which once may have focussed upon maintaining the honour of the Crown in dealings regarding the Aboriginal interest in land, now openly state that the economic interests of the rest of society are at least as important. In practical terms, courts must resolve the competing claims to resources that are before them; given this, it may be argued that any decision that has the impact of limiting Aboriginal rights, is actually a decision that places the economic wishes of non-Aboriginal society in greater priority than the protection of Aboriginal rights, despite the rhetoric of "sharing" and "balancing" interests.

The economic interests of society are largely implemented through private companies engaged in implementing their particular business plans. This pursuit of economic development can create or exacerbate conflict if the rights of the

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[62] This approach, increasingly evident in the decisions of the courts, will be discussed in greater detail later in this chapter.

corporation are pitted against the rights of indigenous peoples. This is particularly challenging given the potential for conflict between the constitutional protection afforded Aboriginal rights, the federal responsibilities created by this protection, and federal participation in trade agreements and other instruments directed at ever-increasing expansion of Canadian economic development (particularly when these federal decisions create expansive corporate rights). When these rights are traded-off against one another, the solution is not usually integrated (in the sense that all needs are met to the greatest extent possible), but rather one need or right is sacrificed in some way to make way for another (usually the more valuable of the two in the mind of the decision-maker). In most circumstances this has meant the rights of economic development held by the corporate entity have taken priority over the rights of indigenous peoples.

4 CONCLUSION

The treatment of water in Canadian law is complicated and unresolved. Because our structures of society assume that water is a "resource", our legal and economic systems are perpetually in conflict with scientific and ethical realities of sharing and distributing water among all ecosystem users (of which humans are just one). These conflicts are woven into our evolving conceptions of water "ownership" and "use". Ultimately, a more holistic and ecological characterisation of water is necessary for our legal and economic systems to be able to "manage water resources" in a truly sustainable fashion.

Given the increasing demand and the diminishing availability of freshwater, particularly in the northern hemispheres, it is likely that Canada will face increasing pressures to both satisfy its own freshwater needs while accommodating those of drier parts of North American. Further, given that freshwater defies the categories

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63 *Gladstone*, *supra* note 50 and *Mikisew*, *supra* note 50.

that our scientific, economic and legal systems attempt to place in into, and therefore our attempts to "manage" it, it is likely that our systems will experience increasing stress as water utilisation, and the forms that this utilisation takes, diversifies and increases. As demand for water increases to meet manufacturing, domestic, agricultural and power production requirements, the inconsistencies in the treatment of water in law will become more apparent. Rights-holders, in particular, will engage in greater struggles as they attempt to protect access to this precious resource. Whether Indigenous peoples in Canada possess constitutionally-protected water rights becomes an important question. Given that access to water resources, primarily to ensure the sustainability of economic interests, is one of the most sacredly-held rights in the majority of Canadian society, ensuring that indigenous peoples retain their water rights in priority over other users may be critical to their long-term community sustainability. As economic growth and trade dominate that agenda, and as the protection of open and unrestricted trade increases as a political priority, the impact of these broad societal goals on Aboriginal rights will be even more profound.

Despite these fundamental constraints on jurisprudential analysis, a series of important decisions have clarified some of the most neglected areas of Aboriginal law, including the source and scope of Aboriginal rights and title. From the direction given in these cases, the existence of Aboriginal water rights can be asserted. Given the increasing demand for water use, indigenous peoples and the Crown will be faced with ever greater challenges in ensuring the protection of these rights. This is the focus of the next chapter.

CHAPTER 2 - ABORIGINAL WATER RIGHTS

This chapter explores the context in which the body of law known as Aboriginal law developed, the legal source of Aboriginal rights, and demonstrates that extensive and varied Aboriginal and treaty water rights currently exist in Manitoba, and likely many other parts of Canada. In particular, it will be argued that according to the traditional test for determining the existence of an Aboriginal right, water rights exist and include the right to extensive forms of water use, and right to the water resource itself. Further, according to the legal tests to determine whether Aboriginal or treaty rights have been extinguished, Aboriginal water rights existed when federal land was transferred to Manitoba provincial ownership in 1930. As that transfer was subject to the Aboriginal interests in land and waters, Aboriginal water rights continue to exist. The scope of Aboriginal and treaty rights to water is explored.

Given the existence of these rights, the protections or limitations Aboriginal rights are afforded are reviewed, although a detailed analysis of all possible infringements of Aboriginal water rights is not presented. Instead, a general indication of the wide scope of possible infringements is provided in support of the argument that Aboriginal water rights are currently not receiving the attention and protection the law mandates, and that Aboriginal peoples have a strong case upon which to assert the acknowledgment and protection of these rights.

This leads into a discussion in Chapter 3 of the currently overlooked linkage between the exploitation of vast water resources for economic development in Canada, and how the regimes that govern the international trade of products, services, and investment may be infringing upon Aboriginal water rights.

1 ABORIGINAL RIGHTS TO WATER: DEFINITION

Aboriginal rights as defined under the Canadian legal system are the broad category of legal rights possessed by Aboriginal people in Canada. While there is no comprehensive definition or listing of these rights, their existence has been recognised and affirmed in the Canadian constitution since 1982, and they have been defined to the current level of understanding generally through litigation.

The common law dealing with Aboriginal rights claims has evolved predominantly in response to claims to land; that is, cases have usually focussed upon the question of whether or not a First Nation possesses Aboriginal title to lands they have traditionally inhabited. In many cases, Aboriginal rights other than rights to an area of land have been in question, for example rights to hunt or fish in an area where the First Nation is not asserting a claim of Aboriginal title. The scope of treaty

rights has also been the frequent subject of litigation. The evolution of Aboriginal law has resulted in some confusion over the exact nature of these various rights, the relationship and distinction between them, and in particular, the applicability or suitability of the tests set out under cases dealing with either the other forms of Aboriginal rights including Aboriginal title. [1] It is settled that Aboriginal title is a sub-category of Aboriginal rights that deals solely with claims of rights to land.[2] All Aboriginal title cases are inherently Aboriginal rights cases and the law dealing with these rights applies to both.[3] As well, Aboriginal rights decisions, particularly those provisions on the protection or infringement of rights, apply fully to all Aboriginal rights including treaty rights.[4]

In *R.* v *Adams*[5], the Supreme Court of Canada held that Aboriginal rights exist independently of Aboriginal title. This has proven to be a critical clarification. Before this, many First Nations were unable to exercise Aboriginal rights, for example, the right to hunt, without possessing Aboriginal title to an area. Having to prove the validity of an Aboriginal right through a corresponding direct connection to land sufficient to support a claim for Aboriginal title was a great burden on an Aboriginal rights claimant. For example, many Indigenous peoples had nomadic lifestyles in pre-contact times. They did not have permanent occupation of a specific tract of land, but nonetheless relied heavily upon land for their survival, and had formed many practices, customs, and traditions that were integral to their distinctive

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1 In *Delgamuukw* v. *British Columbia* [1997] 3 S.C.R. 1010, the Supreme Court of Canada restated the relationship between Aboriginal rights and Aboriginal title: Aboriginal title is one type of right that Indigenous peoples may possess, from among a broad array of over-arching rights called "Aboriginal rights".

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

3 Note that the tests of proof of existence of Aboriginal rights and title are different, but the infringement tests are the same, with variations in scope, depending on the seriousness of the infringement and the nature of the right infringed.

4 *R.* v. *Marshall (#1)* [1999] 3 S.C.R. 456.

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

cultures. But without Aboriginal title to a specific area, it could be argued that the First Nation was not entitled to the exercise of any rights on the land, even if limited to the gathering of food or other subsistence needs. With the recognition that Aboriginal rights could exist without corresponding Aboriginal title to the land, First Nations may now demonstrate that they have a connection to land that gave rise to practices, customs, and traditions that were central to their distinctive culture at pre-contact times, and which have continuity with its distinctive culture today.[6]

Aboriginal rights are 'use' rights, not 'ownership' rights. This is because Aboriginal title, as the strongest form of Aboriginal right, has been held in all cases to be subject to Crown title.

The existence of Aboriginal rights has been acknowledged by s. 35 of the Constitution Act but they obviously are protected by the courts on a situation-by-situation basis. That is, cases arise when an Aboriginal person asserts their treaty and Aboriginal rights as a defence to a charge in a specific circumstance. As courts determined the facts of the case at hand, they necessarily must characterize the Aboriginal right being relied upon. Clearly, s.35 guarantees the recognition of Aboriginal rights in general, while protection of the right, when held up against a competing right, requires specific proof in relation to the circumstances of the case. This does not mean that Aboriginal rights do not exist until proven on a case-by-case basis. Some authors have mistakenly argued this process of characterisation the courts engage in means that Aboriginal rights must be proven on a case-by-case basis by the courts.[7] Indeed, federal and provincial governments routinely make this assertion in ascertaining their obligation in any given circumstance to protect

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6 *Van der Peet, supra,* note 2 at 512.

7 Thomas Isaac, "Aboriginal Right to Fish and Otherwise Exploit Water Resources: Achieving Certainty" (Unpublished paper presented at Aboriginal Water Rights conference, Pacific business and Law Institute, June 5-6, 2003, Ottawa, Ontario) at 2.8.

Aboriginal or treaty rights. In fact, the Supreme Court of Canada has upheld the general existence of treaty and Aboriginal rights, without the need for a case-by-case approach to proving their existence, when it urged all parties to negotiate resolutions to Aboriginal rights issues, rather than rely upon the interpretations of specific cases by the courts.[8] This would not be possible [indeed there would be no basis upon which to urge the negotiation], if the Supreme Court of Canada did not accept the existence of Aboriginal rights.[9]

1.1 General Principles

All analyses of s. 35(1) must take place in light of the general principles that apply to the legal relationship between the Crown and Aboriginal peoples. *Van der Peet* held, at paragraph 24:

> The Crown has a fiduciary obligation to Aboriginal peoples with the result that in dealings between the government and Aboriginals the honour of the Crown is at stake. Because of this fiduciary relationship, and its implication of the honour of the Crown, treaties, s. 35(1), and other statutory and constitutional provisions protecting the interests of Aboriginal peoples, must be given a generous and liberal interpretation: R. v. George, [1966] S.C.R. 267, at p. 279.

Also, at paragraph 25:

> The fiduciary relationship of the Crown and Aboriginal peoples also means that where there is any doubt or ambiguity with regards to what falls within the scope and definition of s. 35(1), such doubt or ambiguity must be resolved in favour of Aboriginal peoples.

No cases in Canada have specifically considered Aboriginal water rights yet, although there have been general statements within the discussions of the test for Aboriginal rights, that make clear that the test applies to determining Aboriginal rights to both lands and waters. This will be discussed below. In the absence of water rights specific decisions, the American law should be reviewed and the

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8 *Delgamuukw* v. *British Columbia*, *supra,* note 1 at para. 186.

9 While a negotiated approach to resolving treaty and Aboriginal rights may be preferable, it is predicted an assumption of equal access to resources [both technical

principles enunciated applied. The Chief Justice of the Supreme Court of Canada in *Van der Peet* held regarding the application of American law to Canadian Aboriginal rights decisions:

> I agree with Professor Slattery both when he describes the Marshall decisions as providing "structure and coherence to an untidy and diffuse body of customary law based on official practice" and when he asserts that these decisions are "as relevant to Canada as they are to the United States" -- "Understanding Aboriginal Rights", *supra*, at p. 739. I would add to Professor Slattery's comments only the observation that the fact that Aboriginal law in the United States is significantly different from Canadian Aboriginal law means that the relevance of these cases arises from their articulation of general principles, rather than their specific legal holdings.[10] [emphasis added]

The relevant Aboriginal water rights principles stated in American case law will be reviewed in the next section.

1.1.1 "Existing Rights"

Sparrow and *Van der Peet* held that rights asserted must exist as of the date the Constitution Act, 1982 came into effect, that is April 12,1982. This is because prior to this constitutional amendment, these rights were protected only at common law, which is always subject to valid over-riding legislation. The constitution protects those rights that were not previously extinguished, for example, through treaty or legislation. The test for determining whether the Crown has correctly extinguished an Aboriginal right is the "clear and plain intention test", set out in *Sparrow* and *Van der Peet.*[11] As discussed earlier, *Marshall* affirmed that this test applies to both treaty and Aboriginal rights.

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and financial] of the parties, which is frequently not the case particularly with the poorer First Nations communities.

10 *Van der Peet*, *supra,* note 2 at para. 35.

11 *R.* v. *Sparrow* [1990] 1 S.C.R. 1075 at 1099, held regarding a *Fisheries Act* regime:

> There is nothing in the Fisheries Act or its detailed regulations that demonstrates a clear and plain intention to extinguish the Indian Aboriginal right to fish. The fact that express provision permitting the Indians to fish for food may have applied to all Indians and that for an

1.2 Test: Proof of Aboriginal Rights

The presence of Indigenous peoples in North America for many thousands of years before European settlement, and the existence of their distinctive cultures, traditions and social systems, forms the legal basis for recognition of all Aboriginal rights cases today. This is the basic premise underlying the title possessed by Indigenous peoples to all of the lands that now comprise Canada.[12] In *Van der Peet*, the Supreme Court of Canada confirmed:

> ...the doctrine of Aboriginal rights exists, and is recognised and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, Aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures as they had done for centuries.[13]

The court articulated this thinking as the "Distinctive Culture" test, used for identifying Aboriginal rights that are protected by s. 35(1). This analysis stated that the general approach to determining the existence of an Aboriginal right was to demonstrate that the practice, custom, or tradition was a central and significant part of the society's distinctive culture. The court presented the following factors to be used to determine the existence of an Aboriginal right.

1.2.1 Integral Part of Distinctive Culture

The practice being claimed as an Aboriginal right must be central to the culture of the Aboriginal society of the claimant. So in *Van der Peet*, for example, Aboriginal fishing was held as being central to the culture of the people of Artic, Van

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> extended period permits were discretionary and issued on an individual rather than a communal basis in no way shows a clear intention to extinguish. These permits were simply a manner of controlling the fisheries, not defining underlying rights."

[12] In some parts of Canada this unique form of title to land remains. For example, no treaties for the surrender of land to which Aboriginal title existed were entered into in the Maritimes, Newfoundland, and southern Quebec, parts of the Northwest Territories, a small portion of southwestern Manitoba, and a large portion of British Columbia. In these areas, the assertion by Indigenous peoples is that Aboriginal title still exists.

[13] *R.* v. *Van der Peet*, *supra,* note 2 at para. 30.

der Peet was a member, and therefore, protected as an Aboriginal right. The court, at paragraph 45, relied on a passage in *Sparrow*[14] to explain:

> The anthropological evidence relied on to establish the existence of the right suggests that, for the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture. Its significant role involved not only consumption for subsistence purposes, but also consumption of salmon on ceremonial and social occasions. The Musqueam have always fished for reasons connected to their cultural and physical survival. [emphasis added]

As well the court held that the Sto:Lo practice of trading fish after it was caught, was not an activity protected by s.35:

> The court cannot look at those aspects of Aboriginal society that are true of every human society (e.g., eating to survive), nor can it look at those aspects of the Aboriginal society that are only incidental or occasional to that society; the court must look instead to the defining or central attributes of the Aboriginal society in question.[15]

In some circumstances the practice of trading fish may be considered to be an Aboriginal right. The possible existence of an Aboriginal right to trade was recently considered in the *Mitchell* case[16], where the claimed right was characterized as the right to bring goods across the Canada-United States boundary at the St. Lawrence River for purposes of trade. The trial and appeal courts held that the 'distinctive culture' test had been regarding the existence of an Aboriginal right to trade, but the Supreme Court disagreed, stating:

> ...even if deference were granted to the trial judge's finding of pre-contact trade relations between the Mohawks and First Nations north of the St. Lawrence River, the evidence does not establish this northerly trade as a defining feature of the Mohawk culture. The claimed right implicates an international boundary and, consequently, geographical considerations are clearly relevant to the determination of whether the trading in this case is integral to the Mohawks' culture. Even if the trial judge's generous interpretation of the evidence were accepted, it discloses negligible transportation and trade of goods by the Mohawks north of the St. Lawrence River prior to contact. This trade was not vital to the Mohawks' collective identity. Therefore, the defendant could not rely upon this right as a defense to the certain charges he faced.

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14 *Ibid.,* note 11.

15 *Ibid.*, at para. 56.

16 *Mitchell* v. *M.N.R.* [2001] 1 S.C.R 911.

1.2.2 Aboriginal Perspective

In assessing a claim for the existence of an Aboriginal right, a court must take into account the perspective of the Aboriginal people claiming the right... but they must also be aware that Aboriginal rights exist within the general legal system of Canada. The dissenting court in *Van der Peet* stated:

> To quote again Walters, at p. 413: "a morally and politically defensible conception of Aboriginal rights will incorporate both [Aboriginal and non-Aboriginal] legal perspectives".[17]

John Borrows has written extensively on this matter, in particular the interplay between First Nations law and the western legal system, and how the western system could and should draw upon Aboriginal legal sources and perspectives more frequently than it currently does. Others argue that the Aboriginal perspective extends beyond just legal perspectives to encompass and spiritual perspectives. For example, McClenaghan argues that s.35 includes an Aboriginal right of First Nations to engage in environmental protection of their lands.[18] The process of substantiating the application of this right in a given situation would likely include evidence that in many ways was very different than that regularly presented in court in Aboriginal rights cases. For example, the indigenous approach to environmental protection, indeed their relation to the entire environment, has been described by numerous Aboriginal writers as being distinctly at odds with the western conceptions of the world, and the structure of the environment. In particular, the relationship between humans and the environment is seen as fundamentally different from the perspectives of the two worldviews. Evidence about the Aboriginal stewardship relationship with the world, and the responsibilities entrusted from the Creator to Aboriginal peoples in this regard would certainly challenge the thinking of the courts, but despite this, would presumably be valid according to *Van der Peet.*

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17 *Van der Peet*, *supra,* note 2 at para. 49.

1.2.3 Description of Claim

To properly characterize an applicant's claim, a court should consider such factors as the nature of the action which the applicant is claiming was done pursuant to an Aboriginal right, the nature of the governmental regulation, statute or action being impugned, and the practice, custom or tradition being relied upon to establish the right.[19]

1.2.4 Specific Characterization of the Right

Courts considering a claim that relaying upon is to an Aboriginal right must focus specifically on the practices, customs and traditions of the particular Aboriginal claimant and Aboriginal group claiming the right, in particular their relationship to the land:[20]

> In considering whether a claim to an Aboriginal right has been made out, courts must look at both the relationship of an Aboriginal claimant to the land and at the practices, customs and traditions arising from the claimant's distinctive culture and society.[21] [emphasis added]

General instances of practices will not suffice, they must be related specifically to the Aboriginal claimant and group in question.

1.2.5 Significance

The significance of the practice, custom or tradition to the Aboriginal community is a factor to be considered in determining whether the practice, custom or tradition is integral to the distinctive culture. The significance of a practice, custom or tradition cannot, itself, constitute an Aboriginal right, it is just one factor in the test. *Van der Peet.*[22] However, if an activity is highly significant it will likely be

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18 Theresa McClenaghan, "Molested and Disturbed: Environmental Protection by Aboriginal Peoples through Section 35 of the Constitution Act, 1982" LL.M. thesis, (Toronto: Osgoode Hall School of York University, September 1999) at 5 – 9.

19 *Van der Peet*, *supra,* note 2 at para. 43.

20 *Van der Peet*, *supra,* note 2 at para. 69.

21 *Ibid.,* at para. 74.

22 *Ibid.,* at para. 52.

seen to meet the "integral part of the distinctive culture" test element of the Aboriginal community.[23]

1.2.6 Distinct vs. Distinctive

To satisfy the distinctive culture test the Aboriginal claimant must do more than demonstrate that a practice, custom or tradition was an aspect of, or took place in, the Aboriginal society of which he or she is a part. The claimant must demonstrate that the practice, custom or tradition was a central and significant part of the society's distinctive culture. He or she must demonstrate, in other words, that the practice, custom or tradition was one of the things that made the culture of the society distinctive -- that it was one of the things that truly made the society what it was.[24] It does not mean that the culture has to be distinct, that is, unique or different from the practices, customs or traditions of another culture.[25]

The question to be asked is whether or not a practice, custom or tradition is a defining feature of the culture in question.[26]

1.2.7 Continuity

The practices being claimed as an Aboriginal right must have their origins prior to contact with Europeans; presumably in order to assure that the activities were distinctive to the Aboriginal culture, not created by a subsequent culture. The practises can, however, have adapted to or be influenced by European cultures:

> If the practice, custom or tradition was an integral part of the Aboriginal community's culture prior to contact with Europeans, the fact that that practice, custom or tradition continued after the arrival of Europeans, and adapted in response to their arrival, is not relevant to determination of the claim; European arrival and influence cannot be used to deprive an Aboriginal group of an otherwise valid claim to an Aboriginal right.[27]

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23 *Ibid.,* at para. 58.
24 *Ibid.,* at para. 55.
25 *Ibid.,* at para. 71.
26 *Ibid.,* at para. 59.
27 *Ibid.,* at para. 73.

The customs, practices and traditions of the Aboriginal claimant could evolve into modern forms, as long as there was the maintenance of some continuity with pre-contact practices.[28] This cultural evolution or adaptation may continue to occur through time.

1.2.8 Evidence

Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating Aboriginal claims.[29] The court *in Van der Peet* recognized that, due to historical realities whereby the federal and provincial governments attempted to eliminate the culture and ways of life of indigenous peoples, there is a dearth of evidence from the late 1800's to the mid-20th century. Aboriginal peoples must not be penalized because of this in their attempts to assert their rights.

As well, although not specifically articulated in *Van der Peet* other ordinary burdens (relating to verification for example) regarding the use of traditional knowledge that should not disadvantage Aboriginal peoples.

1.2.9 Not an Incidental Practice

The practice, custom or tradition cannot exist simply as an incident to another practice, custom or tradition but must rather be itself of integral significance to the Aboriginal society. Where two customs exist, but one is merely incidental to the other, the custom which is integral to the Aboriginal community in question will qualify as an Aboriginal right, but the custom that is merely incidental will not.[30]

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28 *Ibid.,* at para. 62.
29 *Ibid.,* at para. 68.
30 *Ibid.,* at para. 70.

1.3 Scope of Aboriginal Rights

Aboriginal law doctrine has evolved through a general acknowledgment of the existence of treaty and Aboriginal rights in section 35[31], and has focused upon defining Aboriginal rights in specific situations.[32]

While the rights defined to date are not exhaustive, courts have recognised the right to occupy the land, to fish, hunt, trap, and generally use the "products" of the rivers, forests and streams. They have upheld these rights through general dicta, and through their case-specific holdings. So far, there has not been a case that has successfully argued the existence of Aboriginal title to a territory, although

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[31] Originally, key to this debate was determining whether Aboriginal title came into existence when recognised by the Royal Proclamation of 1763, or whether that instrument merely acknowledged a valid, pre-existing Aboriginal title. In the *St. Catherine's Milling & Lbr. Co.* v. *R.* (1888), 14 App. Cas. 46, 4 Cart. 107 (P.C.) the Privy Council had acknowledged that Aboriginal title existed but held that it originated in the *Royal Proclamation of 1763*, R.S.C. 1985, App.II, No.1. First Nations have argued that they possess a broader scope of Aboriginal rights than those recognised by the *Royal Proclamation*, and courts have agreed. (Many cases deal with the issue of the scope of Aboriginal rights. *R.* v. *Sparrow* [1990] 1 S.C.R. 1075 was the pre-eminent case that interpreted the *Royal Proclamation vis-à-vis* the basis and scope of Aboriginal title). *Calder* v. *British Columbia (Attorney General)* [1973] S.C.R. 313 at 313, held on this point that the Royal Proclamation, while recognising the existence of Aboriginal title, was not the source of the title. It held that Aboriginal title pre-dated the Royal Proclamation. The implications of this recognition were profound. Fundamentally, this meant that the *Royal Proclamation* was not the source of legitimacy of Aboriginal title, nor was any other instrument that post-dated the *Proclamation*, such as Canadian legislation, pronouncements, treaties, or the common law. This afforded Indigenous peoples some protection in that the scope of their Aboriginal rights could not be limited to those rights specifically referred to in the *Royal Proclamation* or any other document, such as a treaty (for example, the *Royal Proclamation* reserved lands for First Nations "as their hunting grounds" but did not reference other activities or rights.)

[32] As discussed earlier in *Van der Peet*, *supra,* note 2, the requirement to characterize the Aboriginal rights claim precisely was set out at paragraph 53 of that case. Specific evidence must be tendered in support of the activity for which protection is sought.

negotiated settlements have been based upon the assertion of title by an Aboriginal group.[33]

Some authors have argued that courts will tend not to recognize a commercial Aboriginal right.[34] *Marshall #1* expanded upon the thinking [originally set forth in *Van der Peet*] that the exercise of Aboriginal rights at the commercial scale could be justified if the activity was not directed predominantly at the generation of profit, but rather merely providing a subsistence living. *Marshall* #1 held that commercial activities aimed at providing a moderate living, that is more than mere subsistence, were protected.[35]

Thecourts have resolved two other issues relating to the commercial exercise of an Aboriginal right. First, in *Van der Peet* the court made clear that the analysis involves characterizing the right claimed appropriately. In this analysis the "commercialness" of the right was not the appropriate characterization in applying the test for Aboriginal rights:

> With respect, this characterization of the appellant's claim is in error; the appellant's claim was that the practice of selling fish was an Aboriginal right, not that selling fish "on a commercial basis" was.[36] [emphasis added)

From this passage it would appear that the proper analysis would determine the right claimed (i.e. an Aboriginal right to fish), and then determine the scope of the right (i.e. fishing at commercial level rather than subsistence level) during the infringement test[37] analysis.

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33 *Nisga'a Final Agreement*, available as of January 30, 2004 at http://www.ainc-inac.gc.ca/pr/agr/nsga/nisdex_e.html.

34 Stuart Rush, Q.C., "Aboriginal Water Rights in Canada", (unpublished paper presented at "Just Add Water" 2202 conference), available as of January 31, 2004 at http://www.sakriverbasin.ca/Resources/2002resources.html.

36 *Van der Peet, supra,* note 2 at paras. 52 and 54.

37 This test is discussed in a later section of this chapter.

The second issue involves whether an Aboriginal right may even be exercised at a broad commercial scale (i.e. so extensive that it results in a generating a quantity of revenue that goes beyond providing a moderate livelihood for the claimant). In the following passage from the dissenting judgment of *Van der Peet*, the court states that commercial activities may still qualify as an Aboriginal right:

> An Aboriginal activity does not need to be undertaken for livelihood, support and sustenance purposes to benefit from s. 35(1) protection. ...It may be that, for a particular group of Aboriginal people, the practices, traditions and customs relating to some commercial activities meet the test for the recognition of an Aboriginal right, i.e., to be sufficiently significant and fundamental to the culture and social organization for a substantial continuing period of time.[38]

The courts also added that the profit element may impact the scope of the right protected. *Marshall* #1 later adopted the sentiment expressed in the following passage, when the court confirmed an Aboriginal right to fish at a commercial-scale to provide for a moderate livelihood:

> However, as in *Horseman*, *supra*, to respect Aboriginal perspective on the matter, the purposes for which Aboriginal activities are undertaken cannot and should not be strictly compartmentalized. Rather, in my view, such purposes should be viewed on a spectrum, with Aboriginal activities undertaken solely for food, at one extreme, those directed to obtaining purely commercial profit, at the other extreme, and activities relating to livelihood, support and sustenance, at the centre.[39]

In some discussions, exercising an Aboriginal right at a commercial level has been confused with the act of trade. For example, trading fish has been seen as a commercial activity, and thus disallowed, based upon somewhat confused reasoning. It is clear now that Aboriginal rights can be exercised at a commercial scale, but only up to the point of earning a moderate income. This could involve trade of the product (i.e. the fish caught in exercise of the right) if that was what was

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38 *Van der Peet*, *supra,* note 2 at para. 197.

39 *Ibid,* at para. 192.

necessary to receive payment. In this sense, trade is analogous to sale, as indicated in the following passage:

> With the white man came new customs, new ways and new incentives to colour and change his old life, including his trading and bartering ways. The old customs, rightly or wrongly, for good or for bad, changed and he must change with them -- and he did. A money economy eventually developed and he adjusted to that also -- he traded his fish for money. This was a long way from his ancient sharing, bartering and trading practices but it was the logical progression of such. It has been held that the Aboriginal right to hunt is not frozen in time so that only the bow and arrow can be used in exercising it -- the right evolves with the times: see Simon v. R., [1985] 2 S.C.R. 387. ... So, in my view, with the right to fish and dispose of them, which I find on the evidence includes the right to trade and barter them. The Indian right to trade his fish is not frozen in time to doing so only by the medium of the potlatch and the like; he is entitled, subject to extinguishment or justifiable restrictions, to evolve with the times and dispose of them by modern means, if he so chooses, such as the sale of them for money. It is thus my view that the Aboriginal right of the Sto:lo peoples to fish includes the right to sell, trade or barter them after they have been caught. [Emphasis added.][40]

This is to be contrasted with an Aboriginal right to trade, which implies no real limitation or focus regarding the nature or quality of items traded, and further if engaged in across international borders, would seem to include an exemption from duties or taxes.[41]

1.4 Are there Aboriginal Water Rights according to the *Van der Peet* Test?

As discussed earlier, no cases have specifically considered the existence of any Aboriginal water rights, although it is clear from *Van der Peet* that the present Chief Justice, although in dissent in that case, is of the opinion that section 35(1) protects Aboriginal rights that extend to both land and water:

> 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.*[42]

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40 *Van der Peet*, *supra,* note 2 at para. 202.

41 *Mitchell* v. *MNR* [2001] 1 S.C.R 911.

42 *Van der Peet*, *supra,* note 2 at para. 275.

Her reasoning is based upon the historic existence of Aboriginal water rights prior to colonization, and she assumes that unless they have been properly extinguished or there is a treaty limiting their implementation, that they still exist:

> It may now be affirmed with confidence that the common law accepts all types of Aboriginal interests, "even though those interests are of a kind unknown to English law": *per* Lord Denning in *Oyekan*, *supra*, at p. 788. What the laws, customs and resultant rights are "must be ascertained as a matter of fact" in each case, *per* Brennan J. in *Mabo*, at p. 58. It follows that the Crown in Canada must be taken as having accepted existing native laws and customs and the interests in the land and waters they gave rise to, even though they found no counterpart in the law of England. In so far as an Aboriginal people under internal law or custom had used the land and its waters in the past, so it must be regarded as having the continuing right to use them, absent extinguishment or treaty. [emphasis added][43]

Later sections of this chapter discuss that In Manitoba, no legislation has ever been enacted purporting to extinguish Aboriginal rights, nor have treaties ever done so.

1.5 Possible Aboriginal Water Rights

As discussed earlier, while the court recognises that section 35(1) protects the general category of collective rights called treaty and Aboriginal rights, and water rights are within this category, an Aboriginal claimant would still have to meet the distinctive culture test in the specific circumstances of their case. There are numerous water-related activities that could meet this test.

1.5.1 Irrigation

These rights would likely be considered a special category of water use rights that are necessarily incidental to the creation of treaty or reserve lands (and therefore a protected activity). Further, they have been seen as necessary in order to be able to accomplish the main purposes of the reserve, which were to provide for the viability of the community, and to promote a shift from a generally nomadic hunting society to a permanent agricultural society.

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[43] *Van der Peet*, *supra,* note 2 at para. 269.

1.5.2 *Transportation rights*

These are rights to navigation or travel in water, in particular as a means to get to and from the location of food, but also includes travel to ceremonies, meetings and exchanges with other indigenous groups.

1.5.3 *Environmental Protection Rights*

These are rights to protect both water quality and quantity, on behalf of both humans and the ecosystem.

1.5.4 *Right to Water Use*

These are rights to engage in water use to provide a moderate living to community members. The scale of water use may be limited (such as for domestic purposes), or grand (such as for irrigation, manufacturing or industrial) in scope. If water was traditionally used to sustain the community (i.e. for domestic purposes), it could now be used in the modern evolution of the practice, such as selling or leasing the water to provide much needed water supply infrastructure and services to community members. In this circumstance, the use of the water would be providing the same service as it did traditionally, with the introduction of the cash economy as an intermediate step.

1.5.5 *Right to Trade Water*

The following passage may be helpful in understanding the approach of the court regarding the potential to have an Aboriginal right to use or engage in the trade of water. The judgement in *Van der Peet* refers to "the river or sea" when explaining the modern evolution of rights.[44] It held that:

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[44] Note that this passage is from the dissenting judgement, which was not dissenting on this issue. In fact, it is difficult to determine whether or not apparently casual references to "land", and later references to land apparently including both land and water, are in fact *obiter* as there has been no Aboriginal or treaty rights judgement that has ever addressed this question. Other decisions have addressed

> The Aboriginal right to fish may be defined as the right to continue to obtain from the river or the sea in question that which the particular Aboriginal people have traditionally obtained from the portion of the river or sea. If the Aboriginal people show that they traditionally sustained themselves from the river or sea, then they have a *prima facie* right to continue to do so, absent a treaty exchanging that right for other consideration. At its base, the right is not the right to trade, but the right to continue to use the resource in the traditional way to provide for the traditional needs, albeit in their modern form. However, if the people demonstrate that trade is the only way of using the resource to provide the modern equivalent of what they traditionally took, it follows that the people should be permitted to trade in the resource to the extent necessary to provide the replacement goods and amenities. In this context, trade is but the mode or practice by which the more fundamental right of drawing sustenance from the resource is exercised. [emphasis added][45]

This passage is significant in that it clearly refers to a right to right to obtain something needed from the river or sea. It is limited to a thing or product the Aboriginal group *traditionally* obtained from the river or sea, in this case fish for food, but allows for the extension to modern forms by which to achieve basic sustenance (which since then has been extended to a "moderate livelihood") from the river or sea. Could this extension include other activities utilising the river or sea, the ultimate purpose being the provision of a moderate livelihood?

To answer this question a number of considerations must be addressed. First, engaging in a cash economy through the sale of fish is acceptable as the modern form of trading fish. Further, the courts have clearly stated Aboriginal rights are collective rights. Therefore, engaging in one large-scale fish operation on behalf of the collective community, whereby the profit is shared and all community members are provided with a moderate income, would be acceptable.[46]

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this issue though. In *Burrard Power Co,* v. *The King* [1911] A.C. 87 (P.C.), the court refused to separate the water from the land when considering the scope of a transfer of land from the province to the federal government.

45 *Van der Peet*, *supra,* note 2 at paras. 278-279.

46 The passages above that discuss the unacceptability of profit demonstrate a logic that can only be described as racist. This limitation in essence states that profit earned, presumably through one's own effort, is not allowable when that effort is pursuant to the exercise of an Aboriginal right. This forever relegates Aboriginal

Second, the courts have held that method of exercising the Aboriginal right is not limited to historical methods; it may change over time, even evolving into a commercial form of the right. As stated in *Van der Peet*, at paragraph 189:

> The whole emphasis of Treaty No. 8 was on the preservation of the Indian's traditional way of life. But this surely did not mean that the Indians were to be forever consigned to a diet of meat and fish and were to have no opportunity to share in the advances of modern civilization over the next one hundred years.
> I am in complete agreement with the finding of the trial judge that the original Treaty right clearly included hunting for purposes of commerce. The next question that must be resolved is whether or not that right was in any way limited or affected by the Transfer Agreement of 1930. [Emphasis added.]... This passage recognizes that the practices, traditions and customs of the Horse Lakes people were not frozen at the time of British sovereignty and that when *Treaty No. 8* was concluded in 1899, their activities had evolved so that commercial hunting and fishing formed an "integral part" of their culture and society.[47]

Therefore, regarding obtaining fish, catching them by fishing rod, small nets, very large nets, or even by impounding water in a permanent reservoir[48] to trap the fish,[49] would all be acceptable techniques.[50]

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peoples, should they wish to live off of the products of the exercise of their Aboriginal rights, to a basic standard of living, despite the fact that non-Aboriginal peoples have been the beneficiaries of profit exploiting the same resource. Most people in Canadian society see the production of profit as a necessary and laudable pursuit; it is ingrained in our society. Yet Aboriginal peoples must operate outside their unique rights should they wish to attain the level of financial success as the rest of Canadian society. This is another form of assimilation policy, and is another method by which the exemption from taxation provided by the Indian Act is yet again circumvented.

[47] *Van der Peet*, *supra,* note 2 at para. 185.

[48] There are limitations on the exercise of Aboriginal rights which be discussed in a later section of this chapter. One such limitation states that the Aboriginal right cannot be exercised in a fashion that is ultimately incompatible with the original basis upon which the right was claimed, which is ultimately a historic connection to the land. For example, an Aboriginal right to fish could not exercised to the point of depletion of the resource. In the case of a technique involving permanent containment through the construction of a reservoir, it could be argued that this technique could permanently destroy the fish populations. This argument would be difficult to support however given the general acceptance of the practice of constructing hydro-electric dams, which create reservoirs which are described minimally environmentally damaging (particularly if certain precautions, such as the creation of fish ladders, are taken). There are 14 dams of this nature in Manitoba.

Third, the main reason behind the protection of Aboriginal rights is so that Aboriginal people can make a moderate living, presumably for the purpose of being able to remain in their traditional communities (a requirement that could be argued is closely tied to the preservation of indigenous cultures). An Aboriginal group may have traditionally used the river for food (fish and water plants), to travel to find food in the river (and on land), conducted ceremonies both in the water and using the water, used the water for recreational activities, and had practices that were dictated by the significance of water to their culture.[51] If so, they may be able to demonstrate that their use of a particular water body, such as river, was central to their distinctive culture, and therefore is a protected Aboriginal right. If a moderate living was historically achieved by using the river resources (both its products and the water itself), the activities that this includes could evolve and change over time. A modern practice of the right to use the river could involve the creation of a reservoir (through damming) to provide access to fish, the damming of a river to create hydro-electricity and revenue from the sale of hydro-electricity, the removal or diversion of water for agricultural purposes, and the removal of water for sale (on a small or large scale). All of these activities would be legitimate modern means by which to use a river to provide for a moderate living for the collective rights holders.

Of course all of these activities would be subject to the limitations that are routinely imposed upon the exercise of Aboriginal rights. In the case of damming or the creation of a reservoir, it is difficult to imagine how these activities could be

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[49] In *Van der Peet, supra,* note 2 at para. 210, the court accepted that the Sto:lo used many methods and devices to fish salmon, such as dip-nets, harpoons, weirs, traps and hooks.

[50] Note that this latter technique has been shown to be a historical practice of indigenous peoples in various parts of the country.

[51] For example, water, as a sacred substance, should not be used to transport human waste. This rule is held by a number of indigenous peoples including the Ojibway. This rule would dictate both the use of the water and land use planning (where on land to dispose of human waste).

curtailed on the conservation limitation, given that non-Aboriginal society routinely approves projects such as these when they are the proponents. In the event that these activities were held to be subject to conservation limitations, this conservation approach should apply to all proponents of dams (regardless of the purpose).

The court in *Van der Peet* stated that the types of Aboriginal rights that exist would continue to expand over time as circumstances were presented that could meet the Aboriginal rights test. The question that is the subject of this chapter is whether the "products" of the water, as mentioned in *Van der Peet,* include the right to the water resource itself. There has never been an Aboriginal water rights case (based upon Aboriginal rights, treaty rights,[52] or riparian rights) that has answered this question. Aboriginal rights to environmental protection, which would include expansive water-related rights, have never been asserted in litigation although, as mentioned above, McClenaghan makes a compelling argument for their existence. As one author has stated, "it is only a matter of time before a water rights case...is litigated in Canada".[53]

1.6 Water rights as Reasonably Incidental to Existing Aboriginal Rights

The Supreme Court of Canada held in *R.* v. *Simon*[54], *R.* v. *Cote*[55], *R.* v. *Sundown*[56] that certain activities may be included within the activities encompassing a protected treaty right.[57] In the *Sundown* case, the court held that a hunting cabin constructed within a provincial park (in violation of provincial park regulations) by an Aboriginal person as part of their process of hunting and fishing was acceptable as

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52 The Piikani settlement, which dealt with the assertion of a treaty right to water, will be discussed in the section below dealing with treaty rights to water. Note that this case was settled out of court.

53 Stuart Rush, *supra,* note 34, page 14.

54 *R.* v. *Simon* [1985] 2 S.C.R.387.

55 *R.* v. *Cote* [1996] 3 S.C.R. 139.

56 *R.* v. *Sundown* [1999] 1 S.C.R.393.

an activity that is necessary to be able to exercise the treaty rights to hunt and fish. The court held that the only way that the right to hunt could be effective was to embody those activities reasonably incidental to the right itself. Further:

> Incidental activities are not only those which are essential, or integral, but include, more broadly, activities which are meaningfully related or linked.[58]

Claxton v. *Saanichton Marina Ltd*[59] held that not only the fishing right, but also the fishery itself (meaning the fish and habitat), the surrounding area, and travel to and from the fishery are within the category of rights that are protected as "incidental" to the treaty right to fish. The court listed numerous potential infringements on fishing rights:

- Limitations and impediments to their right of access to an important fishing area;
- Not be able to carry on the stationary crab fishery "as formerly";
- Loss of an important ecosystem component (eel grass) due to dredging;
- General fishery disruption due to construction;
- The existence (or lack of) of previous development that had already occurred around the bay.[60]

This decision is important because it focussed upon the geographical, ecosystemic, and economic context within which the fisheries were located, and held that there were protectable components, beyond just activities, that were linked to the fishing right. Applying this reasoning to water, it is clear that Aboriginal fishing and harvesting right holders could engage in numerous protected, water-related

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57 While these cases all dealt with treaties, the courts have held that all tests relating to Aboriginal rights are also applicable to treaty rights, and vice versa.

58 Stuart Rush, *supra,* note 34 at page 11.

59 *Claxton* v. *Saanichton Marina Ltd* [1989] 57 D.L.R. 4TH 161 (B.C.C.A.)

60 The court was reluctant to allow any disruption to an area that was relatively development free. The converse thinking could have also applied if there was a high level of development already in existence, creating a fragile ecosystem that could have collapsed with the introduction of more impacts.

activities that are "reasonably incidental" to existing treaty and Aboriginal rights, including:

- Protection of water quality and quantity;
- Habitat protection;
- Watershed management for the protection of fishing, hunting, trapping grounds;
- Watershed management for the protection of harvesting/gathering grounds (such as wild rice harvesting);
- Transportation over waterways (the right to unrestricted waterways to travel to hunting, fishing, and trapping sites);
- Use of water reasonably incidental to the general fulfillment of the purposes of the treaty (that being primarily the economic stability of the indigenous group of peoples) including water use for manufacturing, irrigation, the production of electricity, and for sale.

2 ABORIGINAL TITLE TO WATER

Aboriginal title, as a category of Aboriginal right, has frequently been poorly described as a "personal and usufructory right"[61], that is, attached to Aboriginal people and based upon their right of possession, use or enjoyment.[62]

This definition has been found wanting by more than one court, but was clarified somewhat in *Guerin* through being described as *sui generis*, that is, "of a unique nature".[63] The court explained as follows:

> Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the *sui generis* interest in which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee,... [this] gives rise upon surrender to a distinctive

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61 *St. Catherine's Milling & Lbr. Co.* v. *R., supra,* note 31 at 54.

62 This is the definition of "usufruct" in *The Shorter Oxford English Dictionary* (New York, Oxford University Press, 1973).

63 *Geurin* v. *The Queen* [1985] 1 C.N.L.R. 120 (S.C.C.) at 499.

> fiduciary duty on the part of the Crown to deal with the land for the benefit of the surrendering Indians.
> ...The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians behalf when the interest is surrendered. Any description which goes beyond these two features is both unnecessary and potentially misleading.[64]

The court here was attempting to redirect the thinking on this topic away from any further consideration of the strained analysis found in cases such as *St. Catherine's Milling*. These cases had struggled [with limited success] to frame Aboriginal title within a property rights regime, for example by exploring its similarity to or difference from fee simple title. *Guerin* held that Aboriginal title was unique, and that it would be most effective if further analysis focussed upon defining its unique characteristics rather than comparing it to other existing rights regimes.[65]

Aboriginal title, like all Aboriginal rights, is a collective right, held by all the members of an Aboriginal group in common, who are the collective decision-makers regarding the uses to which the land can be put:

> Aboriginal title cannot be held by individual Aboriginal persons; it is a collective right to land held by all members of an Aboriginal nation. Decisions with respect to that land are also made by that community. This is another feature of Aboriginal title which is *sui generis* and distinguishes it from normal property interests.[66]

2.1 Scope of Title

Thirteen years after the *Guerin* decision, *Delgamuukw* discussed the scope of Aboriginal title and held that Aboriginal title to land allowed an Aboriginal group to engage in almost any activity they wished regarding that land. The court in

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64 *Ibid.*

65 This is a prejudicial approach that serves merely to deepen the discrimination faced by Aboriginal peoples when trying to assert their rights. By adopting a *sui generis* regime, the traditional protections of property law are generally unavailable to Aboriginal title and rights claimants. For more on this, see William F. Flanagan, "Piercing the Veil of Real Property Law: Delgamuukw v. British Columbia" (1998), 24 Queen's L.J 279, and John Borrows and L.I. Rotman, "The Sui Generis Nature of Aboriginal Rights: Does it Make a Difference?" (1997) 36 Alta.L.Rev.9.

66 *Delgamuukw, supra,* note 1 at para. 115.

Delgamuukw described Aboriginal title in terms of "uses" to which the land could be put:

> ...first, that Aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those Aboriginal practices which are integral to distinctive Aboriginal cultures; and second, that those protected uses must not be irreconcilable with the nature of that group's attachment to that land. [emphasis added]

Despite this, there remained certain limitations on the uses of lands subject to Aboriginal title, namely Aboriginal rights do not include such extensive use as could deplete a resource,[67] that is, those uses that might be:

> "...irreconcilable with the nature of the occupation of the land and the relationship that the particular group has had with the land which together have given rise to Aboriginal title in the first place."[68]

The court attempted to, but did not fully succeed in clarifying the basis for and scope of the concept of "irreconcilable uses". At paragraph 128, Lamer C.J. explained that prior occupation of land created a "special bond" with it, which formed a key part of the group's distinctive culture. This was the basis of Aboriginal title. In his view, it would be a conflict with this "special bond" to put the land to uses that might destroy that bond. For example, if a group had successfully claimed Aboriginal title referencing use of the land for hunting, they could not then later use the land for strip-mining, which could in essence destroy the original use, and by implication the "special bond" which formed the basis of their Aboriginal title.

Later though, the court referenced the requirement for a group to demonstrate that they held practices distinctive to their culture *vis-à-vis* the land being claimed, but clarified that this did not strictly apply to claims for Aboriginal title, only to those other Aboriginal rights that fell short of Aboriginal title. The court states

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[67] Rights to use the resource to complete depletion have been argued earlier in this chapter as being in most practical respects tantamount to ownership.

[68] *Ibid.*, at para. 128.

that occupation itself, even without reference to specific significant practices, customs, and traditions, was sufficient to demonstrate Aboriginal title.[69]

In other words, a claim of Aboriginal title requires only evidence of a connection to the land in question, which the Aboriginal group could demonstrate through referencing pre-contact activities undertaken in the territory continuing to the current day. These activities did not have be customs, practices, or traditions that were "a central and significant part of the society's distinctive culture", which was the *Van der Peet* test for Aboriginal rights.

Yet, the court when determining the scope of appropriate uses of the land referenced certain activities to determine if they could break the "special bond" with the land that was the foundation of the use and occupation as a basis for Aboriginal title. In essence, this elevated the Aboriginal title requirement of mere occupation to the requirement to demonstrate that the pre-contact First Nation uses and activities were broad enough to include modern uses, which do not have the potential to conflict at a later time with the First Nation's "special bond" with the land.

To exist, Aboriginal rights must be shown to be a central and significant part of the society's distinctive culture. To prove Aboriginal title, the test is different: claimants must show long-term use and occupation, and to be able to use the land in all ways, they must be able to show that their uses will not break their "special bond" with the land. One way to do this is to demonstrate that modern activities were also conducted in some historical form. For example, historical uses of water as irrigation, recreation, transportation, spiritual uses could all be shown as historical activities.

Further, the court discussed the Australian case of *Ward* v. *Western Australia*, (1998) 159 ALR 483, agreed that the scope of rights flowing from Aboriginal title to land include the rights to:

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69 *Ibid.,* at para. 151.

- Possess, occupy, use and enjoy the area;
- Make decisions about the use of the area;
- Access to the area;
- Control access by others;
- Use and enjoy the resources of the area;
- Control the use of resources by others;
- Trade in those resources;
- Receive a portion of resources taken by others;
- Maintain and protect important cultural sites; and
- Maintain, protect, and prevent the misuse of cultural knowledge.[70]

More specifically, Aboriginal title would include the following water-related rights:

- To use or not use water;
- To divert or impound water for agricultural and other purposes;
- To pollute or prevent the pollution of a water body;
- To remove or take fish and other resources;
- To travel in or on the water or prohibit the travel of others;
- To regulate all uses of the water, including denying use by others;
- To consume, for domestic, manufacturing, industrial, and other purposes;
- To protect the quality and quantity of water;
- To generate revenue, for example through hydro-electric power[71]; and,
- To sell or trade water, or limit or prevent the sale of water by others.

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[70] Stuart Rush, *supra,* note 34 at pages 9 – 10.

[71] Provincial legislation that purports to grant exclusive rights to the generation of hydroelectric power to provincial utilities, such as the *Manitoba Hydro Act*, C.C.S.M c. H190 could not prohibit First Nation hydroelectric development based upon Aboriginal title, for reasons elaborated in other parts of this chapter; this Act does not express a clear and plain intention to extinguish Aboriginal title.

Once again, the Crown is entitled to interfere with Aboriginal title, as long as it is done in a fashion that meets the test for infringement (i.e. it is justified).[72] Regarding Aboriginal title, the test involves a much higher standard (on all elements) than the test for infringement of an Aboriginal right. For example, regarding the involvement of Aboriginal peoples in the Crown decision to infringe title, the court in *Delgamuukw* held that:

> This aspect of Aboriginal title suggests that the fiduciary relationship between the Crown and Aboriginal peoples may be satisfied by the involvement of Aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation. (italics added)
>
> In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to Aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an Aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to Aboriginal lands.[73]

The purpose for this higher standard is the recognition that certain actions may impact a right so significantly that full consent is required. It is logical to extend this requirement to legislation and regulations that may indirectly impact hunting and fishing (which are substance–related activities) such as non–Aboriginal water use and hydropower legislation and associated regulations.

Aboriginal title has an "inescapable economic component", which means that the land may be put to economic use, particularly given that Aboriginal title uses encompass modern uses not related to historical uses. This also means that taking away any of these uses is compensable:

> ...Aboriginal title...has an inescapably economic aspect, particularly when one takes into account the modern uses to which lands held pursuant to

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72 *Delgamuukw*, *supra,* note 1 at para. 165.

73 *Ibid.,* para. 168.

> Aboriginal title can be put. The economic aspect of Aboriginal title suggests that compensation is relevant to the question of justification as well...[74]

The existence of Aboriginal water rights, including Aboriginal title to water (such as a lake), has not been litigated. Further there has been no intent expressed in the jurisprudence to exclude water as a component of Aboriginal title[75]; rather, it seems to be a matter that has been overlooked by the judiciary in their reviews of Aboriginal rights, as their language has not been consistent or careful on this point.

It is reasonable to assume that an Aboriginal claimant could demonstrate long-term use and occupation of a water body to support a claim of Aboriginal title, or that use of the water itself is and was a central and significant part of that society's distinctive culture (in support of a claim of Aboriginal water rights). Even in the case of treatied land, an argument could be made that water rights, include title to water, were not given up by the indigenous signatories to the treaties, they were reserved, and remain so to this day.

3 TREATY RIGHTS TO WATER

3.1 The Concept of Treaties

3.1.1 General Purposes of Treaties

The purposes of treaties signed in Canada between indigenous nations and either the British or the French vary, but generally includes at least one of the following:

- Obtaining peace and friendship between the signatories and their respective peoples;

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74 *Ibid.*, para. 169.

75 This point was made by Terence P. Douglas, in "Sources of Aboriginal Water Rights in Canada", www.firstpeoples.org/land.rights/canada/summary_of_land_rights/water_rights.htm, available as of September 24, 2001, at page 8.

- Acknowledgement of British or French sovereignty over the area ceded in the treaty;
- Acknowledgement of the applicability of British or French law to the indigenous peoples;
- Acknowledging that certain rights to land were given up or retained by the indigenous signatory to the treaty;
- Protection of a way of life by Indigenous peoples for their future generations;
- Adoption of a new way of life by the indigenous signatory;
- Acknowledgement of the nationhood of the indigenous signatory; and
- A settlement of the terms of occupancy of the settler people.[76]

These purposes are instrumental to ascertaining the nature of the rights that have been given up or retained after the treaty has been signed. Further, the treaty goals give guidance regarding the interpretation of indigenous rights, activities and entitlements that appear to have been overlooked at the time of treaty-making, as with water rights. There has never been a statement in a treaty that has held that the intent of the treaty was to fully extinguish all rights of the indigenous signatory. The judgement of *Van der Peet*, dissenting on another point, held:

> A treaty, however, does not exhaust Aboriginal rights; such rights continue to exist apart from the treaty, provided that they are not substantially connected to the rights crystallized in the treaty or extinguished by its terms.[77]

The court here upholds the potential existence of rights that were not contemplated, and therefore not extinguished, at the time of signing the treaty. These Aboriginal rights would therefore continue to exist.

The general purpose of a treaty is to document a mutual understanding; the principles of treaty interpretation are relied upon to ascertain this understanding. In

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[76] This is a general summary of the discussion in Thomas Issac, "Aboriginal and Treaty rights in the Maritimes: The *Marshall* decision and Beyond"(Saskatoon, Purich Publishing Ltd, 1999) at 22 – 29.

many circumstances this understanding may not cover all issues of relevance today, such as water rights. Given the *Van der Peet* "clear and plain intention" test required for extinguishment of Aboriginal rights, it must be assumed that, as a general statement, the Aboriginal water rights continue to exist.

3.1.2 Relinquishing or Reserving Rights

In the *Marshall #1* decision, it was held that what appeared to be a negative covenant in a treaty limiting the trade of the Mi'kmaq, was in fact, a positive covenant of the Crown to engage in trade with them.[78] This interpretation was achieved by ascertaining the real intent of the treaty, in particular the surviving substance[79], rather than the literal interpretation. In this sense, treaties, particularly if their terms do not make sense or accord with the honour of the Crown, should be interpreted in accordance with a larger, logical purpose. So, for example, if certain rights are not referenced in a treaty, it would be in accordance with the *Marshall* approach to assume that certain rights (such as water rights) which reflect some need for obtaining a moderate livelihood, will be protected either within (as a treaty right) or outside (as an Aboriginal right) the terms of the treaty.

It would be highly dishonourable, for the Crown to have been able to remove all indigenous rights whatsoever, without ever having given any notice of such intention. Further, a right cannot be extinguished by being ignored by the Crown. This would be a violation of all case law and s.35 of the constitution.

3.2 Treaty Interpretation: *R. v. Badger*[80]

This case explained the interpretive approach to be used when analyzing treaty rights. The fundamental principles are:

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77 *Van der Peet, supra,* note 2 at para. 120 (dissenting judgement).
78 *R.* v. *Marshall (#1)* [1999] 3 S.C.R. 456, paras. 53 - 59.
79 *Ibid.*, para. 56.
80 *R. v. Badger* [1996] 1 S.C.R. 771

- A treaty represents an exchange of solemn promises between the Crown and the indigenous nation signatory. It is a sacred agreement.
- The honour of the Crown is always at stake in its dealing with Aboriginal people. The integrity of the Crown must be maintained when interpreting treaties and statutory provisions, which may have an impact upon treaty, or Aboriginal rights. It is always assumed that the Crown intends to fulfill its promises. No appearance of "sharp dealing" will be sanctioned by the courts.
- Any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Aboriginal peoples. A corollary to this principle is that limitations, which restrict the rights of Indians under treaties, must be narrowly construed.
- The Crown has the onus of proving that a treaty or Aboriginal right has been extinguished. There must be "strict proof of the fact of extinguishment" and evidence of a clear and plain intention to extinguish treaty rights.[81]

3.2.1 Parties Intention Regarding Inclusion/Exclusion of Water in Treaties

3.2.1.1 Legal treatment of Water at Time of Signing of Treaty

In order to understand the rights that the federal or provincial governments believed were being negotiated in the treaty negotiation process, [82] it is important to understand the English law[83] at the point of reception into Manitoba.[84] Under English

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81 *Ibid.*, at para.41.

82 This analysis also assists with understanding the intention of the Crown subsequently in legislative process intended to define water rights: for example, the *Constitution Act, 1867,* 30 & 31 Victoria, c.3. (U.K.), the *Manitoba Act*, *1870,* 33 Victoria c.3, the later *Natural Resources Transfer Agreements*, *1930*, Statutes of Great Britain (1930), 20-21 George V, c.26, and their subsequent amendment through the *Constitution Act*, 1938.

83 To define the law of Canada at the time of colonisation by England, it must be decided whether Canada was conquered or settled, and additionally, if laws were adopted or imposed. This is required because conquered nations acquired the statutory and common laws of their conquerors only to the extent necessary for the conquerors to establish themselves as the new government. All unconflicting laws of

common law, no one could possess proprietary rights to surface water in its natural state.[85] Water itself could not be owned. Water was a public resource; therefore all people had rights to certain uses of the water; in particular, the right to navigate on the water body, and the right to take fish.[86]

The Crown owned title to the riverbeds of all tidal waters, unless they had specifically granted them away.[87] In Canada, the beds of non-tidal, non-navigable[88]

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the conquered land in place before conquest remained in force. In contrast, settled nations acquired the laws brought with them by their settlers. As discussed in Chapter 1, this issue remains controversial and debated. Courts tend to treat Canada as if were settled, although this is not always the case, particularly in parts of Canada that were originally under French control.

[84] The date of reception has generally been held to be the end date of the settlement or conquest process, marked as the date of the colony's first legislative assembly. The reception date of English law into Manitoba is fixed as July 15, 1870 by the *Queen's Bench Act*, S.M. 1874, c. 12, s. 5.

[85] Professor Bora Laskin (as he then was) points out in "Jurisdictional Framework for Water Management" in *Resources for Tomorrow Conference Background Papers*, vol.1 (Queen's Printer, 1961) 211 at 212. See also, Dale Gibson's paper, "The Constitutional Context of Canadian Water Planning" (1969) 7 Alta. L. Rev. 71 at page 73 where he quotes American case law referencing the origins of this doctrine to Justinian times, and later embodied in the Napoleonic code.

[86] This was the case regarding both ocean tidal waters and inland tidal waters (the latter being considered extensions or branches of the sea).

[87] England's common law was created in response to their circumstances, which did not include vast bodies of inland fresh water (i.e. non-tidal) such as we have in Canada. As such, Canadian courts have modified all rules regarding non-tidal waters over time to fit Canada's circumstances.

[88] The test to determine navigability is uncertain although some case law has indicated that the test is "navigable in fact", while other cases have held that the test is "capable of navigation". There is also the "commercial viability purposes" test states that in order to be navigable, the water must be generally useful in pursuit of agriculture or commerce (see Gibson, *supra,* note 85). Under the "commercial viability test" water that is generally inaccessible, but that is navigated by Aboriginal peoples for the attainment of subsistence lifestyles, or a moderate living, would not meet the test of navigability. As such, both First Nation and non-First Nation proprietors could privately own the bed of that water body.

waters can be owned privately, and this may also apply to non – tidal navigable waters.[89]

Authorities in Canada are clear that ownership of the bed allowed the proprietor extensive freedom regarding use of the water and all it contained, subject to the public rights of fishing and navigation (if it was navigable).[90] Laskin relies upon the "reasonable use" doctrine to determine the scope of rights available to the owner of the bed, and cites examples of domestic uses, irrigation and manufacturing. Other cases have extended the owners rights to building a dam on a navigable river[91], building bridges over both navigable and non-navigable rivers, and building and using riverside mills drawing on extensive water flow.

At the approximate time of making of the numbered treaties, there was no definitive statement regarding the status of water rights in Canada law. The law regarding ownership of land under water was similarly evolving. The general prescription seems to have been in favour of Crown control over water, likely through ownership of the underlying or adjacent public lands. Beyond this, the law was, and remains, unsettled. As such, evidence of the general intentions of the parties becomes more important.

3.2.1.2 General Intention of the Signatories

There is no reference to water within the numbered treaties, except regarding the boundaries of the geographical area being treated, or indirectly through the guarantee of fishing, transportation and other rights related to water. Some indication

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89 There is some dispute on this matter. Both Peter W. Hogg, *Constitutional Law of Canada*, (Carswell, Thompson Canada Ltd: Scarborough Ontario, 1997) and Gibson, *supra,* note 85 at page 74, indicate that private owners cannot own the beds of navigable waters unless specifically granted to them by the Crown, but both footnote the disagreement on this issue between Laskin, *supra,* note 85 and Gerard La Forest, *Water Law in Canada – The Atlantic Provinces* (Ottawa: Information Canada, 1973). The issue remains unsettled.

90 Gibson, *supra,,* note 85 at 74 and footnotes 16 and 20.

of general intention regarding transfer of water rights can be inferred from circumstances existing at the time (some of which contradict others), including:

- The *Constitution Act, 1867* divided up powers between the federal and provincial government but did not reference water directly;
- Heads of power tended to deal with water-related uses (such as navigation), rather than ownership of water or property rights to water. This is consistent with the generally held view that water could not be owned by anyone, including governments;
- Legislation that dealt with water as an entity distinct and separate from land had been enacted. As a result, it is difficult to argue that the lack of reference to water in treaties and agreements was either a matter of the way water was viewed at the time, or historical oversight;[92]
- Modern legislation continues to focus upon land and water issues separately, even at the provincial level;
- Extensive documentation, mostly in the form of correspondence between the federal and provincial governments, indicated that the federal government was of the belief that First Nations had first-in-line water rights. The provinces tended to vigorously disagree. Matsui presented a comprehensive discussion and documentation supporting the assertion that the federal government, through the Department of Indian Affairs, was ineffective, unassertive, and virtually negligent in protecting these water rights, despite their fiduciary duties to First Nations in this regard.[93]
- There is extensive evidence that indigenous nations intended to maintain full access to the fisheries, which included all logical

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91 *Roy* v. *Fraser* (1903) 36 N.B.R. 113 (C.A.).

92 See *The North-West Irrigation Act*, S.C. 1894, c.30, and the *Dominion Water Power Act*. R.S., c. W-6, including numerous provincial water laws. In particular, the province of British Columbia had asserted since before its admission into confederation that it owned all the water in the province.

93 Kenichi Matsui, "Reclaiming Indian Waters: Dams, Irrigation, and Indian Water Rights in Western Canada, 1858-1930" Ph.D. Thesis, University of British Columbia, 2003.

incidental aspects (including transportation, clean free-flowing water, etc.).[94]

- It is generally assumed that the Crown must have control of water resources in order to protect them. Thus, the Crown began to regulate the riparian rights established and protected by the common law. Protection of water resources may be a valid purpose for infringement of common law rights, but the reason for doing so through regulation must be to counter the inadequacy of riparian law[95], not exacerbate it. If the Crown, now as regulator, allows substantial amounts of water to be taken[96] from the ecosystem[97] then the regulator is not protecting the public interest in the resource, and the system is functioning no better than the riparian system it was meant to improve upon. It is doubtful that was this intention of the Crown.

Given that there is no evident general intention of the signatories, their specific intentions, and the general principles of treaty interpretation are critical to determine the existence of Aboriginal water rights.

3.2.1.3 Intention Regarding Infringement or Extinguishment of Water Rights through Treaties

There has been no "clear and plain" intention expressed in any of the Manitoba-area treaty documents regarding the extinguishment of any Aboriginal rights to water. In the absence of such direct intention, ascertaining an intention

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94 *Ibid.*

95 This concept is taken from Laskin, *supra,* note 85 at 215:

> When there is a need to husband water resources or to make them serve beneficial communal uses, it is obvious that riparian law is inadequate.

96 This paper discusses bulk water removal for international export, which has an additional constitutional division of powers problem because provinces cannot regulate products that are intended for export. This is a matter of inter-provincial or international trade, which falls within the federal "trade and commerce power". But note that this argument would also apply to any large-scale diversion of water out of a watershed, which could be very damaging to the ecosystem as a permanent removal.

regarding the inclusion or exclusion of water rights in a treaty creates a direct conflict between the two main principles of law that could give some, however tenuous direction regarding this particular analysis. Given this factual and legal situation, it is highly unlikely that a court would be able to determine that water rights were intended to be extinguished by any of the parties to the treaties.

The first principle is based upon the law, which was imported to Canada at the point of assertion of sovereignty, relating to rights water possessed by purchasers of adjoining land. Riparian law, that is the rights to use of the water adjoining owned land, was based upon the English rule *ad medium filum*. This rule stated that, regarding non-navigable waters[98], any sale of land included the land underneath the body of water, to the halfway point of the water. This is so, unless the terms of the sale clearly denote an intention to stop at the edge of the water.[99] The doctrine of riparian rights is based upon this assumption, without which there would be no basis for entitlement to use the water other than for purposes guaranteed to all public (such as navigation and fishing).[100]

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97 For example, *The Water Resources Conservation and Protection and Consequential Amendments Act*, S.M. 2000, c. 11, has adopted an approach to dealing with water at the ecosystem, basin, and sub-basin levels.

98 This was generally not the case regarding navigable waters because the right to navigation needed to be ensured through government control.

99 *Williams* v. *Salter* (1912), 23 O.W.R. 34 (C.A.) which dealt with ownership of the land under a non-navigable lake; *McLaren* v. *Caldwell* (1882), 8 S.C.R. 435 (non-navigable stream in Ontario); *R.* V. *Robertson* (1882), 6 S.C.R. 52 (non-navigable stream).

100 Many decisions, although not all, have held in support of this general proposition, in particular, those cases related to non-navigable rivers and streams. Regarding lakes however, some courts have held that the rule is inapplicable to the lakes within a province, given that their size and configuration generally prohibits an easy determination of the *medium filum*. *McDonald* v. *Linton* (1926) 53 N.B.R. 107 (C.A.). Contrast this though with *Ledyard* v. *Young* (1914) 7 O.W.N. 146 (H.C.) which held that the *ad medium filum* line of a marsh should be determined by following all the sinuosities of the marsh. A number of cases have commented that the rule applies whether the waterway is navigable or not, but in Manitoba it was later established that there was no presumption of ownership of the bed of navigable riparian waters.

Therefore, if this was the law at the time of assertion of English sovereignty and was imported into Canada at that time, then it could be used as an indirect indication of the intention of government signatories regarding the inclusion of water in the treaty-making negotiations. For example, in treaties that specifically refer to boundaries of the intended grant of Aboriginal title land from the indigenous peoples to the Dominion as extending to the edge of a specific non-navigable[101] lake or river, it could be argued, based upon the riparian principle existing at the time, that the Crown intention was to extinguish Aboriginal water rights to the river bed (to the halfway point of the river). Based upon this same principle, it is logical to assume that the Aboriginal intention was to the contrary, that is, to grant to the Crown rights only to the halfway point of the water body.

This conflicting result directly conflicts with a presumption used in treaty interpretation, which states that when indigenous rights are to be infringed (whether unilaterally taken away by the Crown or voluntarily given up by indigenous peoples), the rights being infringed or extinguished must be set out clearly prior to the infringement. In the absence of a clear intention in the treaty to infringe a specific right, it will be assumed that neither party intended that the indigenous right be infringed or extinguished through the treaty process.[102] Since no treaties expressed any intention of any kind regarding extinguishment of water rights, and given this "clear and plain intention" doctrine, it is highly unlikely that this analysis could shed light on the nature of intentions existing at the time.

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[101] Regarding reference in a treaty to a navigable river or lake this would similarly include the water rights described in this section if *ad medium filum* applies to navigable waters, which it likely does. These rights would be protected as any treaty right.

[102] In ascertaining the intention to relinquish water rights, this conflict can only be resolved by resort to the additional principles of treaty interpretation, as set out in *Badger*, which will be discussed in the next section.

Bartlett explored an illuminating example of the changeability of government intention over time and the dangers of this kind of hindsight analysis in his review of the "Headland-to-Headland" dispute involving the federal government, Province of Ontario and Treaty #3 First Nations.[103] This situation dealt with a conflict over whether Treaty #3 lands that were required to be set aside under a federal-provincial agreement to satisfy the terms of the original treaty.[104] The dispute centred upon whether the lands required to be set aside included the headlands of the water bodies that formed the boundaries of the reserves within the treaty area. Under an interpretation that they did[105] the size of the reserves would have been greatly increased, and more importantly, resulted in First Nations control over extensive water bodies and lands included therein. Over a period of almost 50 years both the federal and provincial governments agreed with this interpretation, and evidenced their interpretation in a signed agreement to this effect. The province later reneged upon this agreement enacting by unilateral legislation expressly contradicting the application of the "Headland-to–Headland" principle regarding the reserve lands under the Agreement of 1894. According to Bartlett this unilateral action is a violation of both the earlier agreement and Treaty #3.[106]

Note that this issue of whether or not water was included in transfers of land existed even in situations that did not involve indigenous lands and rights. Dominion land was transferred to the provincial governments of Manitoba, Saskatchewan, and Alberta in the *Natural Resources Transfer Agreements* of 1930. Despite the existing

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103 Richard Bartlett, *Aboriginal Water Rights in Canada: A Study of Aboriginal Title to Water and Indian Water Rights* (University of Calgary: Canadian Institute of Resources Law, 1986) at pages 101 – 110.

104 *An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Lands, S.O. 1891, c.3, and An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Lands, S.C. 1891, c.5.*

105 This is known as the "Headland–to-Headland" principle.

106 Bartlett, *supra,* note 103, at page 109.

principle in law that water could not be owned, the provinces sought an agreement to clarify that their ownership over water was included in the transfer. A subsequent constitutional amendment clarified that water was included in the property transferred to the provinces.[107]

This example indicates that regardless of the nature of the rights (proprietary or something less than that) being negotiated, it is reasonable to assume that if a government intends to assume jurisdiction over a geographic or legal area, it will specifically reference the intention and the area particularly in the case where rights to land are remaining with a non-government party (in this case, the Aboriginal peoples).

Finally, as mentioned above, lands of western Canada were transferred to the ownership of the Dominion government from the Hudson's Bay Company at confederation. The provinces of Manitoba, Saskatchewan and Alberta received their provincial lands from the Dominion in 1930[108], "subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same". The language of the subsequent 1938 agreement describes it as a clarification of the previous agreement, and as such the water rights discussed in the 1938 agreement are also subject to the limitations set out in the 1930 agreement.

Gibson points out that this means that the province has no power to affect the title to Indian reserve lands existing at the time of Confederation[109], which would also apply to lands encumbered by treaty obligations and unextinguished Aboriginal title. This means that even if the ownership of water was transferred to the Province, it was subject to all Aboriginal water rights that then existed. Aboriginal water rights that existed at this time are discussed in the next section of this chapter.

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107 *Constitution Act, 1938.*

108 The *Manitoba Natural Resources Transfer Agreement (1930) supra,* note 82.

109 Gibson, *supra,* note 85 at 75.

3.3 Implied Rights to Water

This approach to treaty interpretation was developed in the American jurisprudence, and is known as the *Winter's Doctrine.* It was first articulated in *Winters* v. *United States*[110], affirmed in *Arizona* v. *California*[111], and again in *United States* v. *Adair.*[112] These cases held that there was an implied reservation of the water when the United States created reservations for the indigenous peoples, and that these rights pre-dated all other water claims. Without this, the Aboriginal peoples would be unable to accomplish the major purpose for which the reservation was created, that is, the creation of viable communities, in particular through agriculture. *Arizona* held that water was reserved for the current and future needs of the indigenous peoples, and included enough water to irrigate all the irrigable land on the reservation. This was later expanded in *Adair* when it held that treaty rights to hunt and fish included an implied reservation of water rights. The treaty only confirmed these rights; they were not the source of the water rights.

This approach has been approved within Canada in *Claxton* v. *Saanichton Marina Ltd.* As discussed earlier in this chapter, extensive water-related rights were identified and protected by the court. While *Claxton* did not strictly apply the *Winter's Doctrine*, it clearly made the link between the exercise of treaty rights and the need to protect the context within which they are exercised.

3.4 Treaty Rights to Water

The following passage of the court in *Van der Peet* identifies that the rights to land contemplated in Aboriginal and treaty rights discussions include rights to water, and its resources:

> Thus the treaties recognized that by their own laws and customs, the Aboriginal people had lived off the land and its waters. They sought to

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110 *Winters* v. *United States*, 207 U.S. 564 (1908) 28 S.Ct. 207, 52 L.Ed 340.
111 *Arizona* v. *California*, 373 U.S. 546 (1962) 83 S.Ct. 1468, 10 L.Ed.2d 542.
112 *United States* v. *Adair*, 723 F.2d 1394 (1983).

> preserve this right in so far as possible as well as to supplement it to make up for the territories ceded to settlement. (italics added)[113]
>
> These arrangements bear testimony to the acceptance by the colonizers of the principle that the Aboriginal peoples who occupied what is now Canada were regarded as possessing the Aboriginal right to live off their lands and the resources found in their forests and streams to the extent they had traditionally done so. The fundamental understanding -- the Grundnorm of settlement in Canada -- was that the Aboriginal people could only be deprived of the sustenance they traditionally drew from the land and adjacent waters by solemn treaty with the Crown, on terms that would ensure to them and to their successors a replacement for the livelihood that their lands, forests and streams had since ancestral times provided them. (Italics added).[114]

As discussed earlier, no treaties specifically extinguish Aboriginal rights to water. These water rights still exist, alongside other existing treaty and Aboriginal rights. Discussions as to the scope of these rights can be found in Bartlett and Rush.[115] Bartlett sets out the findings of a 1970 study of the Ontario provincial government, which reported that the following activities could occur should Treaty #3 be read so as to include headland water rights:

- Restriction of public access to the waters and through water routes;
- Restriction of non-Aboriginal fishing and hunting of water-fowl;
- Restriction of public use of islands within the headwaters;
- Restriction or elimination of manufacturing and industrial uses of water;
- Restriction or impacts to fisheries;
- Restriction of creation of hydro-electric power (or the creation of indigenous-controlled hydro-power);
- Mining activities, which could create water pollution;
- Building of dams, which could create fluctuating water levels;
- Loss of provincial revenue from the sale of islands;

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113 *Van der Peet, supra,* note 2 at para. 271.

114 *Ibid.*, para. 272.

115 Bartlett, *supra,* note 103 and Rush, *supra,* note 34.

- Privately-owned land would be within reserve boundaries.[116]

This extensive list indicates that it is very probable that existing treaty water rights may be very broad. In a similar situation, Rush describes how the Piikani in 2002 settled their water dispute out-of-court, with the settlement indicating the broad scope of rights that the Piikani in Alberta held-back regarding the Oldman River when they agreed to the terms of the Treaty #7. The Piikani relied generally upon the *Winter's Doctrine* in asserting that their rights included the amount of water needed to fulfill the purposes of the reserve as contemplated by them when the treaty was negotiated. The Piikani final settlement included payment of settlement funds and per capita payments regarding the diversion of the Oldman River, the settlement of nine specific claims against Canada, guarantees of Piikani participation in the Oldman River Hydro Dam project, and an assured water supply for residential, agricultural needs, plus another 37,000 acre feet of water per year to meet the community's commercial needs.[117] While no party to the settlement likely admitted wrongdoing or liability, it is obvious that such a broad settlement indicates very strong merit to the Piikani water rights claim.

3.5 Treaty Water Rights in Manitoba

In Manitoba, there are seven treaties that have been signed with First Nations: Treaties 1-6, and 10. These treaties were generally intended to extinguish Aboriginal title to lands in the Manitoba and parts of the Saskatchewan and Ontario areas, and to indicate the boundaries of the lands that were reserved by the First Nations. Sometimes, the treaty guaranteed certain rights. As discussed earlier in this section, Aboriginal rights form the basis of treaty rights, which may be described as a continuance of those pre-existing rights that have not been extinquished by the

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[116] This is a summary of the report findings presented in Bartlett, *supra,* note 103, at page 110.

[117] Details of this settlement are in Stuart Rush, *supra,* note 34 at page 17.

terms of a treaty. Treaties are not the basis for the rights that are guaranteed therein (unless they are new rights, in which case their scope is determined by the terms of the treaty); they merely crystallize the specific rights they refer to, rights that flow from pre-existing Aboriginal title.[118] A treaty, however, does not exhaust Aboriginal rights; such rights continue to exist apart from the treaty, provided they are not substantially connected to the rights crystallized in the treaty or extinguished by its terms.[119]

There are no specific references in Treaty #1 or #2 to the reservation, affirmation, or extinguishment of Aboriginal water rights, in either the ceded or reserved territories. This is not surprising given the general level of government inexperience with land cession treaties, and the fact that the treaties were signed without reflecting a clear agreement on negotiated terms. In particular, the written treaty documents did not reflect the oral agreements reached between the Aboriginal and non-Aboriginal negotiators. An Indian and Northern Affairs Canada (INAC) treaty research document refers to government correspondence from the Indian Agent St. John to Deputy Superintendent Indian Affairs Spragge:

> So the Treaty was signed, the Commissioner meaning one thing, the Indians meaning another. The proceedings were over but a short time before it became evident that there was some misunderstanding... This list expressed our understanding of the matter, but it by no means covered the understanding or expectations of the Indians, and from that time to the present we have not visited any band, parties to that Treaty; without the untrustworthy nature of the Commissioner's and Governor's promises being thrown in our teeth.[120]

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118 As discussed earlier, after the assertion of sovereignty by the Crown, this title became subject only to Crown title. "Aboriginal title lands are lands which the natives possess for occupation and use at their own discretion, subject to the Crown's ultimate title (see *Guerin* v. *The Queen* [1985] 1 C.N.L.R. 120 (S.C.C.) at 382)". *Van der Peet, supra,* note 2 at para. 119.

119 *Van der Peet, supra,* note 2 at para. 120.

120 Wayne E. Daugherty. *Treaty Research Report Treaty One and Treaty Two (1871)*. Treaties and Historical Research Centre, Indian and Northern Affairs Canada. (Ottawa: Indian and Northern Affairs Canada) available as of February 17, 2004 at http://www.ainc-inac.gc.ca/pr/trts/hti/t1-2/index_e.html at page 17.

For example, the promise of the continued existence of hunting and fishing rights in ceded territories was not included in the terms of the Treaties 1 and 2, despite being clear promises to this effect having been made by the government. These rights are accepted by virtue of a verbal commitment made by Lieutenant-Governor Archibald in his opening address at the signing of the treaty.[121]

Inferences may be made regarding water rights from the language used in the treaties and from other statements made in the treaty. First, boundaries of all ceded lands are described by some reference to water bodies, but the language here differs from the language used in the "reserved lands" section of the treaty. The ceded lands provisions of Treaties #1 and #2 indicate the use of water bodies in an "as the crow flies" description, that is, from one point to another reached by straight line. Some of these points are references to the centre of water bodies; others are to landforms or international boundary lines. No significance appears to be attached to any water body, or point of reference.

By contrast, the descriptions of "reserved lands" consistently makes reference to that land *on, running along, or around* water bodies. In this case, the water, and access to the water, appears to be the primary determinant, not the land. This would indicate that there was a clear intention to include water as part of the reserved lands, in fact, that water was the primary focus, with land being attached to the water. There is a clear absence of evidence of a similar intention regarding the ceded lands provisions. As such, it could be argued from the wording and approach to describing lands in Treaties #1 and #2 that Aboriginal title to water continues to exist in both ceded and reserved territories.[122]

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121 *Ibid.*, at page 13.

122 Albeit it for different reasons, but based directly on the different ways of describing the two territories: Aboriginal title to water continues to exist in reserved territories because of the focus on water expressed in the descriptions of those territories within the treaties. Aboriginal title to water continues to exist in ceded

Second, Treaties #1 and #2 state that the First Nations are giving up "the land", which would normally be interpreted as "ownership of the lands", although the precise nature of the rights to land being relinquished are not specified. We know however that certain Aboriginal rights continue in force on ceded lands in the form of specified treaty rights. If this reference to giving up "the land" may be interpreted as having included water, it may then include extinguishment of Aboriginal title to water. This is an unlikely interpretation given the complete omission of any reference to the extinguishment of Aboriginal water rights of any kind, including Aboriginal title to water, in the treaties. This description may not necessarily include Aboriginal rights to water; there is no reference to them and therefore they may not have been relinquished on ceded lands. Alternatively, if those water rights are substantially connected to the protected treaty rights (such as fishing rights), then they could be a protected treaty right even if they were not referred to specifically in the treaty as a guaranteed right.

Contrast this wording with that of Treaty #3 which only describes the boundaries of the ceded lands; it does not have a section describing reserved lands, as they were to be set up at a later date. It states that the First Nation signatories were giving up "all rights and titles" to the land:

> ...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....[emphasis added]

While it is impossible to make the comparisons allowed in Treaties #1 and #2, if this reference to ceded lands does not include the water, then the signatories to Treaty #3 have not surrendered their Aboriginal title, nor any other rights, to water.

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territories because there was no clear intention expressed in the treaties to extinguish water rights, or to include water as part of the ceded lands. Any references to water were merely location markers.

If it does include water, then they have likely surrendered all rights to water on those lands.

Treaty #4 adopts the same general approach as Treaties #1, #2 and #3 to describing the boundaries of the territories to be ceded, except as indicated below:

> Commencing at a point on the United States frontier due south of the northwestern point of the Moose Mountains; thence due north to said point of said mountains: thence in a north-easterly course to a point two miles due west of Fort Ellice; thence in a line parallel with and two miles westward from the Assiniboine River to the mouth of the Shell River; thence parallel to the said river and two miles distant therefrom to its source; thence in a straight line to a point on the western shore of Lake Winnipegosis, due west from the most northern extremity of Waterhen Lake; thence east to the centre of Lake Winnipegosis; thence northwardly, through the middle of the said lake (including Birch Island), to the mouth of Red Deer River; thence westwardly and southwestwardly along and <u>including the said Red Deer River and its lakes, Red Deer and Etoimaini</u>, to the source of its western branch; thence in a straight line to the source of the northern branch of the Qu'Appelle; thence along and <u>including said stream</u> to the forks near Long Lake; thence along and including the valley of the west branch of the Qu'Appelle to the South Saskatchewan; thence along and <u>including said river</u> to the mouth of Maple Creek; thence southwardly along said creek to a point opposite the western extremity of the Cypress Hills; thence due south to the international boundary; thence east along the said boundary to the place of commencement.

In this passage the lands are described with equal reference to land-based and water-based points. The connecting pathways use both "as the crown flies" straight-line references mixed with descriptions that follow the boundaries set by waterways and landform ridges. There are three exceptions whereby two rivers, one stream, and two lakes are expressly referenced and included in the ceded territory. A reference to a map indicates that these lakes would not normally be fully included, nor, as with the other river references, would the whole width of the river. For some reason, this was considered necessary, yet was not adopted throughout the passage, indicating that it was not always the intention to cede entire water-bodies.

In fact, the outer boundaries of ceded territories are often described with reference to the midway points of waterways (i.e. to the centre of Lake St. Martin). Given that these boundaries were intended to represent the geographical extent of

Aboriginal title based upon occupation, it is highly unlikely that the indigenous peoples only occupied half of a lake or river. As such, these references are peculiar, and seem to reflect surveyors' approaches rather than an accurate description of the territory under Aboriginal title. Given this, it is quite improbable that a First Nation gave away its title to half a water-body. This uncertainty is further evidence that the title to water was not discussed, and therefore continues to exist unextinguished.

Treaty #5 adopts much the same approach as Treaty #4 to describing the ceded lands, with most points of reference being to a lake. There are two references made to rivers, but they are inconsistent when specifying the point in the river where the treaty ends:

> "...a point dividing the waters of the Albany and Winnipeg Rivers"
> "...thence due south to the 'Saskatchewan River'"

Therefore, it is uncertain whether Aboriginal title to the entire water body was being ceded, or whether there was an intention to, in essence, share the river. All references to lakes do not specify any location within or on the shores of the lake. Treaty #5 adds the following at the end of the ceded lands description paragraph:

> ...including all territory within the said limits, and all islands on all lakes within the said limits, as above described; and it being also understood that in all cases where lakes form the treaty limits, ten miles from the shore of the lake should be included in the treaty.

This passage contemplates continued use of the lake to a point ten miles off shore. Thus there is a treaty right to use water (using the water for any number of purposes, including accessing the products of the lake, such as fish) implied in this reservation of lakeshore. It could be argued that this includes access to the lakebed to a point ten miles off shore.

Treaty #5 also contemplated the creation of an addition to two reserves, whereby the Crown found it necessary to specifically maintain their access and navigation rights, implying that all other water rights in that area would be with the First Nation:

> ...a reasonable addition being, however, to be made by Her Majesty to the extent of the said reserve for the inclusion in the tract so reserved of swamp, but reserving the free navigation of the said lake and river, and free access to the shores and waters thereof,...[emphasis added]

Treaty #10 follows the same pattern as the other treaties with no specific extinguishment of water rights evident from the text. The signatories expressed concern about overuse of the fishery:

> There was a general expression of fear that the making of the treaty would be followed by the curtailment of their hunting and fishing privileges, and the necessity of not allowing the lakes and the rivers to be monopolized or depleted by commercial fishing was emphasized.[123]

The written text of the purposes of the treaties were not specific to the obvious need to use and access water. The purposes of the reserve included establishing and maintaining a permanent agrarian community.[124] For example, the "outside promises" later established to be reflective of treaty promises made at the time, list numerous agricultural implements necessary to implement a permanent agrarian lifestyle:

> In a former letter Lieutenant-Governor Archibald referred to the delay in furnishing the Indians with ploughs, harrows, etc. These things, however, were promised to be given to them only when they adopted the habits of white men and settled on their respective portions of their bands reserve.[125] [emphasis added]

The Indian Agent acknowledged that provision of the means to adopt this lifestyle was necessary:

> St. John forwarded an unsigned list enumerating the outside promises which he said had been written by Lieutenant-Governor Archibald. He also felt that although the Indians' demands could not be met fully, there was a certain paradox in asking them to take up agricultural pursuits without providing them the means of doing so.[126] [emphasis added]

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123 The Hon. Frank Oliver, Superintendent General of Indian Affairs, "*Report of First Commissioner for Treaty No. 10*" (Ottawa: January 18, 1907), available as of February 17, 2004 at http://www.ainc-inac.gc.ca/pr/trts/trty10_e.html.

124 See Treaties #3, #4, #5, #6, and #10, available as of February 17, 2004 at http://www.ainc-inac.gc.ca/pr/trts/hti/site/trindex_e.html.

125 *Supra,* note 120, at page 15.

126 *Ibid.,* at page 17.

These were matters of negotiation, however, and there are no clear indications that water rights were resolved, in any fashion, let alone one that was understood and agreed to by the signatories to the treaties. While there was later agreement on "outside terms" there was such difficulty achieving this resolution of Treaties #1 and #2 that it was hoped that later treaties would be drafted in much clearer terms:

> According to Morris:
> The experience derived from this misunderstanding, proved however, of benefit with regard to all the treaties, subsequent to Treaties One and Two, as the greatest care was thereafter taken to have all promises fully set out in the treaties, and to have the treaties thoroughly and fully explained to the Indians, and understood by them to contain the whole agreement between them and the Crown.[127]

Despite this, the subsequent treaties did not reflect water rights in any clearer terms, although the underlying presumptions become clearer as the protection of Aboriginal rights, such as fishing rights, in the ceded territory are clearly affirmed in the body of some treaties. In Treaty #3 for example, the text affirms both the farming and fishing lifestyles:

> And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians...
> [after numerous farming tools listed] ...all the aforesaid articles to be given once for all for the encouragement of the practice of agriculture among the Indians.
> ...The Indians shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described...

Treaty #5 clearly specifies that there are two kinds of reserves that are promised, those for farming and those for other purposes:

> And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians,...

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127 *Ibid.,* at page 23.

The numbered treaties are inconsistent as to their reference upon water related markets or references to water related rights. Clearly there is no express infringement of extinguishment of any Aboriginal title to water.

3.6 Rights Incidental to Treaty Rights

As discussed earlier in this chapter, the court has held that rights that are incidental to the exercise of a treaty right are part of the protected treaty right. While no authors have articulated what those rights might be, the listings provided earlier in this chapter relating to potential Aboriginal water rights and the rights discussed in the headland – headland dispute would apply to incidental treaty rights, in particular given the broad scope of the judgement in *Claxton* and its contemplation and general affirmation of the American jurisprudence. The broad need for water would be seen as within the general purposes of a treaty, and protected as such.[128]

4 INFRINGEMENT OF TREATY AND ABORIGINAL WATER RIGHTS

The Supreme Court of Canada has held that Aboriginal peoples were sovereign at the time Canada was colonized by Europeans. They possessed Aboriginal title to the land that they occupied and used, and this title existed until specifically extinguished either by treaty or validly enacted legislative limitations.

In *Mitchell* v. *MNR* [2001] 1S.C.R.911, the court held at paragraph 11 that:

> The enactment of s. 35(1) elevated existing common law Aboriginal rights to constitutional status (although, it is important to note, the protection offered by s. 35(1) also extends beyond the Aboriginal rights recognized at common law: *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010, at para. 136). Henceforward, Aboriginal rights falling within the constitutional protection of s. 35(1) could not be unilaterally abrogated by the government. However, the government retained the jurisdiction to limit Aboriginal rights for justifiable reasons, in the pursuit of substantial and compelling public objectives: see *R.* v. *Gladstone*, [1996] 2 S.C.R. 723, and *Delgamuukw*, supra.

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[128] Note that Matsui, *supra,* note 93, references numerous examples of the Crown being aware of the need for water in order to satisfy the purposes of the reserve.

All Aboriginal and treaty rights may be subject to limitations. The case law after 1982 has been focused upon defining Aboriginal and treaty rights and then determining, in particular circumstances, whether or not the right, if it exists, has been infringed by a government laws, action, or decision, and if so, whether that infringement is allowable (or "justified'). The law relating to infringement has been held to be applicable to both treaty and Aboriginal rights infringements; therefore, it is the same test for both.[129] The infringement test was set out in *Sparrow.*[130]

The test involves two steps: the infringement test and the justification test. The infringement test first determines whether there was *prima facie* interference with an Aboriginal or treaty right. This test sets forth a number of questions to be asked in this determination, including:

- Is the imposition or restriction of the right unreasonable?
- Does the restriction impose undue hardship on those affected?
- Does the restriction deny the person their preferred means of exercising their right?
- Does the restriction unnecessarily infringe the interests protected by the right?

Once the Aboriginal rights claimant has proved infringement, then the onus shifts to the Crown to prove that infringement is justifiable.

4.1 Has there been Infringement of Aboriginal and Treaty Water Rights?

As noted in earlier sections, neither Aboriginal nor treaty rights have been legitimately extinguished or infringed by either treaties or legislation, or regulation.

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[129] See *R.* v. *Badger* [1996] 1 S.C.R. 771 at paras. 96 and 97, and more recently *Marshall (#2)* [1999] 3 S.C.R. 533, wherein the court affirmed that the *Sparrow* justification analysis is application to treaty rights cases.

[130] *R.* v. *Sparrow* [1990] 1 S.C.R. 1075.

Courts would not likely imply such extinguishment of rights[131] as this would go against all jurisprudence that has established the "clear and plain intention" test. As well, there is an example in Manitoba where the Province has specifically articulated three distinct water ownership scenarios, one of which deals with First Nations reserve water-bodies. This water-related legislation refers specifically to a presumption of non-provincial ownership of water forming part of a First Nation reserve. The *Fisheries Act*, C.C.S.M. c. F90 states in the licensing and regulation section:

> Presumption of Crown ownership
> 14.1(2) For the purposes of this Part, in the absence of evidence to the contrary, the bed of each wetland, body of water or portion of a body of water within Manitoba is presumed to be owned by the Crown in right of Manitoba unless it forms part of an Indian reserve or a national park. [emphasis added]

There are numerous examples of Crown activities that have very likely infringed water rights, including:

- Allowing non-Aboriginal water users to deplete or degrade water sources that the community requires for any use;
- Approval of water diversion schemes that restrict indigenous use or reliance upon the water resource;
- Approval of activities, such as hydroelectric development, which permanently and drastically damage water quantity and quality of the utilised water systems;
- Enactment of the Manitoba Hydro Act which grants the sole right of the retail supply of power to that Crown corporation;
- Licensing and approval of all forms of water-dependent development such as manufacturing, food and animal processing, hydro-electric development, industrial, farming, and water bottling;

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[131] See for example, *R.* v. *Adams* [1996] 3 S.C.R.101, at page 30, wherein the court held that Crown activities that could be read as extinguishing Aboriginal title could not be seen as extinguishing an Aboriginal right to fish:

> The surrender of lands, because of the fact that title to land is distinct from the right to fish in the waters adjacent to those lands, equally does not demonstrate a clear and plain intention to extinguish a right.

- Allowing impediments to water travel, such as diversions, dams, water regulation structures, and irrigation structures;
- Allocation and over-allocation of water rights to others.

Many of these listed activities may have occasioned such extensive impacts that they have, in effect, illegally impacted or extinguished Aboriginal and treaty water rights. Given that unlike the earlier discussed Piikani case, none of the First Nations have yet been compensated for those impacts, the possibility for extensive liability on the part of the federal and provincial governments, and proponents, is strong.

4.2 The Justification Test

This test involves ensuring that:

- There is a "compelling objective" behind the limitation on the right;
- The means of limitation of the right is in accordance with the honour of the Crown;
- There has been minimal infringement of the right;
- Compensation has been paid;
- Consultation with the First Nation has occurred.

Aboriginal water rights (as with all other rights) have been interpreted as subject to legitimately determined and implemented resource conservation measures. As the court in *Van der Peet* held:

> A further limitation is that all Aboriginal rights to the land or adjacent waters are subject to limitation on the ground of conservation. These Aboriginal rights are founded on the right of the people to use the land and adjacent waters. There can be no use, on the long term, unless the product of the lands and adjacent waters is maintained. So maintenance of the land and the waters comes first.[132]
> To this may be added a related limitation. Any right, Aboriginal or other, by its very nature carries with it the obligation to use it responsibly. It cannot be used, for example, in a way which harms people, Aboriginal or non-

[132] *Van der Peet*, *supra,* note 2 at para. 280.

> Aboriginal. It is up to the Crown to establish a regulatory regime which respects these objectives.[133]

The Supreme Court of Canada has also held that Aboriginal rights are subject to other "compelling and substantial objectives".[134] There has been extensive debate regarding the meaning of this phrase. The low water mark that sets out the valid purposes behind actions that may justifiably infringe treaty and Aboriginal rights is the *Delgamuukw* case. It gives a veritable shopping list of activities:

> ...development of agriculture, forestry, mining, hydroelectric development, general economic development, protection of the environment or endangered species, building of infrastructure and settlement of foreign populations.[135]

Marshall #2 expands this list even further by removing almost every element of specificity; "other public purposes" may now meet the infringement test.[136] As well, *Marshall #2* states that a valid purpose includes recognising the historic significance of the fisheries to non-Aboriginal people. It is important to note that this lax standard regarding the protection of Aboriginal rights is coming under intense criticism. One writer has commented that this approach is, in essence, a total circumvention of the s.35 constitutional protection afforded Aboriginal and treaty rights, and "may amount to a *de facto* extinguishment of Aboriginal title and Aboriginal rights".[137] By purporting to allow this vast array of non-Aboriginal activities to infringe constitutionally-protected rights, the Court almost fully negates their constitutional status, and makes clear that these rights may be in grave danger.

As well, the Supreme Court has moved far astray from the original intent of the "valid objective" component of the justification test, where in *Sparrow* it expressly rejected a general approach to determining a valid objective:

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133 *Ibid.,* at para. 280. The right to conserve a natural resource as a justifiable infringement on treaty or Aboriginal rights has also been affirmed in *Adams, supra,* note 5, *Delgmuukw, supra,* note 1, *and Marshall No.2, supra,* note 129.

134 *Sparrow*, *supra,* note 11 at 1113; *Delgamuukw*, *supra,* note 1, at para. 161, and *Marshall No.2*, *supra,* note 129 at para. 21.

135 *Delgamuukw*, *supra,* note 1 at para. 165.

136 *Marshall #2*, *supra,* note 129 at para. 21.

> An objective aimed at preserving s. 35(1) rights by conserving and managing a natural resource, for example, would be valid. Also valid would be objectives purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to Aboriginal peoples themselves, or other objectives found to be compelling and substantial.
>
> The Court of Appeal below held, at p. 331, that regulations could be valid if reasonably justified as "necessary for the proper management and conservation of the resource or in the public interest ". (Emphasis added.) We find the "public interest" justification to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights.[138] [emphasis added]

The original viewpoint expressed by the minority court in *Van der Peet* was clearly that constitutional rights should not be infringed by merely public interest objectives. As stated earlier in this section, allowing this broad and vague category of infringements reduces constitutionally held rights to the level of every other legislated or common law right, which conflicts with the entire intent behind constitutionalizaton of the rights:

> Put another way, the Chief Justice's approach might be seen as treating the guarantee of Aboriginal rights under s. 35(1) as if it were a guarantee of individual rights under the *Charter*. The right and its infringement are acknowledged. However, the infringement may be justified if this is in the interest of Canadian society as a whole. In the case of individual rights under the *Charter*, this is appropriate because s. 1 of the *Charter* expressly states that these rights are subject to such "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". However, in the case of Aboriginal rights guaranteed by s. 35(1) of the *Constitution Act, 1982* , the framers of s. 35(1) deliberately chose not to subordinate the exercise of Aboriginal rights to the good of society as a whole. In the absence of an express limitation on the rights guaranteed by s. 35(1), limitations on them under the doctrine of justification must logically and as a matter of constitutional construction be confined, as *Sparrow* suggests, to truly compelling circumstances, like conservation, which is the *sine qua non* of the right, and restrictions like preventing the abuse of the right to the detriment of the native community or the harm of others -- in short, to limitations which are essential to its continued use and exploitation. To follow the path suggested by the Chief Justice is, with respect, to read judicially the equivalent of s. 1 into s. 35(1), contrary to the intention of the framers of the Constitution.[139]

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137 Theresa McClenaghan, *supra,* note 18 at pages 42 - 43.

138 *Sparrow*, *supra,* note 11, at page 1113.

139 *Van der Peet*, *supra,* note 2, Mclauchlin JJ. dissenting at para. 308.

Clearly the courts in *Delgammuukw*, *Marshall*, and others that have suggested that these sorts of unreasonable limitations on Aboriginal and treaty rights would be justified have unjustifiably and incorrectly extended the reasoning of *Sparrow* and *Van der Peet* on this point.

The court in *Marshall #2* discussed an approach to protecting rights that turns the justification analysis on its head. The court shifted from a requirement that all limitations on treaty and Aboriginal rights be justified, to an approach of "accommodation":[140]

> As this and other courts have pointed out on many occasions, the process of accommodation of the treaty right may best be resolved by consultation and negotiation of a modern agreement for participation in specified resources by the Mi'kmaq rather than by litigation.

It is submitted, contrary to the above assertion, that other courts have not engaged in "a process of accommodation"; they have engaged in an analysis that allowed a very limited set of infringements to constitutionally-protected rights.

> The Chief Justice correctly identifies reconciliation between Aboriginal and non-Aboriginal communities as a goal of fundamental importance. ... The question is how this reconciliation of the different legal cultures of Aboriginal and non-Aboriginal peoples is to be accomplished. More particularly, does the goal of reconciliation of Aboriginal and non-Aboriginal interests require that we permit the Crown to require a judicially authorized transfer of the Aboriginal right to non-Aboriginals without the consent of the Aboriginal people, without treaty, and without compensation? I cannot think it does.[141]

The justification analysis starts with the assumption that although Aboriginal and treaty rights may be infringed, *they should not be infringed* unless the reason for doing so is "compelling and substantial". As well, the test was created to analyse these reasons on a case-by-case basis. As Isaac states:

> The purpose of the justification test is <u>to determine what constitutes a legitimate and justifiable infringement</u> to an existing Aboriginal and treaty right.[142] [emphasis added]

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[140] This approach was first proposed by the court in *R.* v. *Gladstone* [1996] 2 S.C.R. 723.

[141] *Ibid.*, at para. 310.

[142] Thomas Isaac, "Aboriginal Right to Fish and Otherwise Exploit Water Resources: Achieving Certainty", paper presented at *Aboriginal Water Rights*

The accommodation approach is not an extension of this test. Contrary to the above approach, at the core of an accommodation approach is an acceptance that all infringements may be justified so long as both the Crown and the indigenous peoples accommodate each other's requirements or needs to some extent. This approach could not accord with the Crown fiduciary obligation to act in the best interests of the First Nations, if it allows them to simultaneously negotiate the infringement of those rights in circumstances that are less than "compelling and substantial" even if the First Nation agrees. To do otherwise would violate the fiduciary obligation that the Crown carries, which is discussed in the next section.

4.2.1 Honour of Crown

The *Guerin* case is the leading authority on the existence of a Crown fiduciary obligation[143] to indigenous peoples. *Guerin* held that: 1) Aboriginal title could not be transferred to anyone other than the Crown (because of the Crown assertion of the ultimate or radical title to all lands that indigenous peoples occupied and possessed at the time of colonisation); and 2) this created a special fiduciary obligation on the Crown to deal with the land and Aboriginal peoples fairly and in accordance with the honour of the Crown the best interests of the First Nation.

The requirement to maintain the honour of the Crown was articulated in *Sparrow* and maintained in numerous cases since then, including most recently *Marshall #2.* Relying upon *Badger*, the court affirmed that:

> The honour of the Crown is always at stake in its dealings with Indian people. Interpretations of treaties and statutory provisions which have an impact on treaty or Aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that Crown intends to fulfill its promises. No appearance of "sharp dealing" will be sanctioned.

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conference in Ottawa, Ontario hosted by the Pacific Business and Law Institute, June 5-6, 2003, at page 2.4.

[143] A comprehensive review of the fiduciary obligation is beyond the scope of this thesis. It will only be discussed in the content of the infringement test.

In *Marshall #2*, the court equated ensuring the honour of the Crown was upheld with inferring what the intention of the Crown ought to have been. That is, the court inferred an intention to grant rights to the Mi'kmaq, despite no evidence being offered to that effect. The court held that agreements such as treaties must be interpreted so as to take into account promises made by the Crown.

Isaac further suggests that the honour of the Crown is at stake as governments continue to avoid developing appropriate regulatory mechanisms to deal with resource allocation:

> There is another aspect to the notion of the "honour of the Crown" and that is that the Crown should be proactively examining its regulations before litigation is commenced. This kind of proactive action, I submit, is also part of the Crown's fiduciary duty and honour. The courts to date have been clear about the responsibilities that rest with governments. Governments have the authority to regulate, but they must do so in a manner that is respectful of, and sensitive to, Aboriginal and treaty rights. If the governments continue to make decisions that do not take these rights into consideration or, in the alternative, refuse to make decisions that may affect these rights (for example, by not regulating the fishery but by simply issuing fishing licenses to Aboriginal fishers, leaving the issue of regulation outstanding and uncertain), this can be interpreted as a breech of the Crown's fiduciary duty towards Aboriginal people and their rights.[144]

As previously mentioned, the court in *Van der Peet* had mentioned this requirement in their decision. Still very few laws indicate any acknowledgement of the treaty and Aboriginal rights, nor do they set out any decision making scheme for governments to follow in making decisions that may impact Aboriginal rights.

4.2.2 Minimal Infringement

The Crown must infringe Aboriginal rights as minimally as possible. Despite this, both levels of government have enacted numerous laws that have purported to completely abolish certain rights to water (i.e. riparian rights) or have granted monopoly rights to develop water resources for certain purposes to non-Aboriginal interests (i.e. retail sale of power). Given that these actions were engaged in without

any reference to indigenous needs or rights, it cannot likely be said that they "infringed Aboriginal rights as minimally as possible". Further, Isaac points out that the Supreme Court in *Marshall #1* specifically held that the existence of an "unstructured discretionary administrative regime" in a statute may itself infringe treaty and Aboriginal rights. As the court stated:

> If a statute confers an administrative discretion which may carry significant consequences for the exercise of an Aboriginal right, the statute or its delegate 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 will be found to represent an infringement of Aboriginal rights under the *Sparrow* test.[145]

In fact, there has been no apparent consideration of these rights at all in Manitoba, in any statute or delegate regulations. The Manitoba Fishery Regulation, states at section 13.2 that:

> 13.2 Before varying a close time set out in column III of an item of Schedule XVII, the provincial Minister or the Director shall consider whether the variation
> (a) may infringe any existing treaty or Aboriginal right of an Aboriginal people;
> (b) is reasonably necessary for conservation purposes; and
> (c) respects the priority of the holders of that treaty or Aboriginal right to exercise that right.[146]

It is unlikely that the above would qualify as an "outline of specific criteria" regarding the administrative discretion granted, although it may *begin* to address the requirement stated in *Marshall #1*. As Isaac notes:

> In the eleven years since the *Sparrow* decision was released, governments have been slow in developing sophisticated and comprehensive schemes to ensure that their laws take into account existing Aboriginal and treaty rights. This may seem like a high onus, but the courts have been clear that a failure to do so will usually result in a regulation, statute, or action not being justifiable. ... It must be standard practice for governments to justify laws and

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144 Isaac, "Aboriginal and Treaty Rights in the Maritimes", *supra*, note 76 at page 137.

145 *Marshall (#1)*, *supra,* note 4 at para. 64.

146 *Manitoba Fishery Regulation*, SOR/98-247, s. 6; SOR/2003-107, s. 8.

> regulations that may adversely affect Aboriginal people. If they are not in a position to justify those laws, then those laws need to be revisited.[147]

All water laws in Manitoba need to be revisited given that have not been assessed for their impacts on water rights that Aboriginal peoples may have, nor do they set out in any fashion how administrative decisions made under those laws and regulations are to be reconciled with Aboriginal and treaty rights.

Further, rights are in danger of being impacted every day. Currently in Manitoba, decisions are going to be made in 2004 regarding the implementation of a hydroelectric development in the north of Manitoba. Licenses and approvals are being sought under both provincial legislation (*The Environment Act*[148], *The Crown Lands Act*[149], *The Water Power Act*[150]) and federal legislation (The *Fisheries Act*[151] and the *Navigable Waters Protection Act*[152]). None of these laws, or their regulations, provides any guidance for the Ministers or anyone else exercising discretionary authority thereunder. Yet both levels of government are undertaking a formal consultation with all northern Aboriginal peoples

> "...to hear and understand the views of these First Nations and communities about how their treaty and Aboriginal rights might be affected by the granting of licenses and permits to use Crown lands, waters, and water powers."[153]

It is unlikely that even this effort will pass the infringement analysis, given that once these consultations have been completed and the results forwarded to the governmental decision-makers, there is no direction to guide them in making decisions that ensure the accommodation of Aboriginal and treaty rights. In this circumstance, the salience of the warnings of the dissenting judgement in *Van der*

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147 Isaac, *supra,* note 76 at page 138.
148 C.C.S.M. c.E125.
149 C.C.S.M. c.C340.
150 C.C.S.M. c.W60.
151 R.S. 1985, c. F-14
152 R.S. 1985, c. N-22.
153 Correspondence from Assistant Deputy Minister of Manitoba Conservation Mr. Dave Wotton, and District Manager for Department of Fisheries and Oceans Ms.

Peet, regarding the effects of a poorly defined approach to taking into account Aboriginal and treaty rights, is clear. McLauchlin JJ. held that:

> "In the right circumstances", themselves undefined, governments may abridge Aboriginal rights on the basis of an undetermined variety of considerations. While "account" must be taken of the native interest and the Crown's fiduciary obligation, one is left uncertain as to what degree. At the broadest reach, whatever the government of the day deems necessary in order to reconcile Aboriginal and non-Aboriginal interests might pass muster.[154]

This process is reflective of the dangers of proceeding regarding the consideration of treaty and Aboriginal rights in discretionary decision-making in a piecemeal approach. Recently, discretionary decisions of Crown representatives were overturned due to lack of a criteria-based framework,[155] and this could occur in Manitoba for the same reasons.

4.2.3 Compensation

Compensation may be required if Aboriginal rights are infringed. While there are no publicly available documents detailing compensation paid for infringement or extinguishment of any water rights, the extensive compensation for possible infringement water rights that was paid to the Piikani was discussed in the previous sections of this chapter. This indicates that compensation for loss or impacts to Aboriginal water rights would likely require large compensatory awards.

4.2.4 Consultation

There is a duty to consult with Aboriginal peoples when any decision, action, legislation, or regulation may impact their Aboriginal or treaty rights. The bases for these duties are three-fold: first, there is a common law duty that flows from the

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Kathy Fisher to northern Aboriginal Chiefs and Headmen, dated June 4, 2003 (in possession of the writer).

154 *Van der Peet*, *supra,* note 2 at para. 309.

155 *Taku River Tlingit First Nation* v. *Ringstad* et al. [2002] B.C.C.A 59 (Docket: CA027488); *Haida Nation* v. B.C. (Min. of Forests) [2002] B.C.J. No. 378, 2002 B.C.C.A. 147; reversing [1998] 1 C.N.L.R. 98 (B.C.S.C.)

fiduciary relationship of the Crown with indigenous peoples[156]; second, there is a constitutional duty[157] that flows from section 35 of the *Constitution Act, 1982*;[158] and third, there are statutory duties.[159]

Statutes and regulations are straightforward to define; decisions and actions are less so. Decisions and actions that are subject to this duty include policy statements, plans and planning tools, guidelines and guidance documents. Isaac states that:

> The Crown should always be prepared to justify any and all of its statutes, regulations, and actions that may interfere with existing Aboriginal and treaty rights.[160]

This clearly contemplates all licensing and approval decisions by both the federal and provincial governments, regardless of the authority level of the decision-maker (ie. it is the impact of the decision that matters, not the status of the decision-maker within government). In particular, those decisions related to the following activities are very likely to potentially interfere with existing treaty and Aboriginal rights:

- Land use (such as planning related to and licensing of forestry, mining, and farming);
- Water use planning (such as the setting of water quality parameters and the allowable limits of pollutants).
- Water use (including the licensing of facilities that use water in their processes or that discharge wastewater such as manufacturing, industrial, and agricultural activities);
- Water regulation (such as irrigation and flood control structures);

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156 *Geurin, supra,* note 63.

157 *Liidlii Kue First Nation* v. Canada (Attorney General) F.C. T-22-00, July 21, 2000, at para. 69.

158 *Sparrow, supra,* note 11; *Delgamuukw*, *supra,* note 1; *Mikisew Cree First Nation* v. *Canada (Minister of Heritage*), 2001 F.C.T. 1426; *Halfway River First Nation* v. *B.C.* (1999) B.C.C.A. 470.

159 *Cheslatta Carrier Nation* v. B.C. (2000) B.C.C.A. 539; *Taku River Tlingit First Nation v. Ringstad*, *supra,* note 155.

160 Isaac, *supra,* note 76 at page 138.

- The generation of power (water, wind, biomass);
- Pollution control centres, such as sewage treatment plants (particularly if they are located upstream of Aboriginal fishing grounds).[161]

Delgamuukw held that there is a range of consultation activities that may be required, ranging from the mere provision of information up to full consent being required, depending upon the nature of the right potentially being infringed:

> There is always a duty of consultation. ...The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to Aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an Aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to Aboriginal lands.[162] (emphasis added)

This duty applies in all circumstances involving Aboriginal and treaty rights. Recently, courts have clarified that the duty applies when rights are asserted.[163] As one author states:

> In *Haida*, the Court addressed what it called the "timing fallacy", the notion that the duty to consult does not arise until after a right has been proven and infringed. The Court questioned how the consultation aspect of the justification analysis with respect to a *prima facie* infringement of an Aboriginal right could be met if the consultation did not take place until after

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161 Most wastewater treatment plants are located within urban centres, in particular municipalities, which are not "Crowns"; they are delagatees of the Crown. As such, cities and other municipalities often have their own licensing and environmental assessment processes regarding new developments. Given that these approvals may have a very real impact upon Aboriginal and treaty rights that are implemented outside municipal boundaries, the Crown must consult with Aboriginal peoples to ensure these delegated decisions do not impact treaty and Aboriginal rights.

162 *Delgamuukw*, *supra,* note 1 para. 168.

163 *Taku River Tlingit First Nation* v. *Ringstad* et al., supra, note 155; *Haida Nation* v. B.C. (Min. of Forests) [2002] B.C.J. No. 378, 2002 B.C.C.A. 147; reversing [1998] 1 C.N.L.R. 98 (B.C.S.C.)

infringement: "By then it is too late for consultation about that particular infringement."[164]

That is, Aboriginal and treaty rights must be existing, but need not have been proven in court in order to require discharge of the duty of consultation. In the Haida case, the court suggested that there was a reasonable possibility of Aboriginal title being proven, and a reasonable probability of Aboriginal rights to use of large redwood trees. The court did not rely upon their opinion in this regard, but rather the information provided from the Haida people that they had long asserted Aboriginal title to the area, and that all parties, including the province and the forestry company should have been aware of this, and governed themselves accordingly.

The Crown's duty to consult involves elements of procedural fairness.[165] The Crown must take the initiative in the consultation, and must do so before they take the action or decision.[166] This requires that the Crown ensure that Aboriginal peoples are provided with all necessary information, in a timely way. This timeliness requirement should include the needs of the Aboriginal community to proceed with community review and decision-making processes, particularly given that all Aboriginal rights are rights held in common. As noted by one author, communities have the following very real constraints:

- Lack of technical capacity;
- Concerns regarding confidentiality;
- The imposition of inappropriate timelines by the Crown or project proponent;

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[164] Allan Donovan and Jennifer Griffith, "Duty of Business to Consult with First Nations", Continuing Legal Education Society of B.C., September 21, 2003 available as of February 17, 2004 at http://www.cle.bc.ca/Cle/Practice+Desk/Practice+Articles/Collection/02-app-dutytoconsult.

[165] *Westbank First Nation* v. *British Columbia (Min. of Forests)* [2001] 1 C.N.L.R. 361 (B.C.S.C.).

[166] *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)* 21 October 1998, Victoria 98/2223 (B.C.S.C.)

- Perception of bias/ sense of futility;
- Inability to cope with multiple consultation requests. [167]
- Inability / unwillingness of government to address critical issues.[168]

The indigenous group must be provided with "full information" on the proposed decision, action, legislation or regulation.[169] They must have an opportunity to express their interests and concerns, and they should be provided with reasonable resources in order to be able to understand and formulate responses to the materials presented.

Significantly, the court in *Mikisew* noted that First Nations are not ordinary stakeholders. The fiduciary and constitutional obligations owing to First Nations entitles them to "a distinct process, if not a more extensive one."

In order to demonstrate that consultations were undertaken with the intention of substantially addressing the concerns of the indigenous peoples, the Crown must fully inform itself on the practices and views of the First Nation, and should be able to demonstrate substantively how they have integrated those concerns into their plans, and in particular, how mitigation plans attempt to resolve the indigenous concerns.[170] Aboriginal peoples must be able to ensure that their perspectives are seriously and

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167 The constraints facing communities who are consulted with must be acknowledged by government. For example, regarding the consultation process currently underway in Manitoba dealing with the hydro-electric power proposal of Manitoba Hydro, some northern communities are involved in four separate consultation processes occurring simultaneously involving the same project:

1.The proponent public consultation process;
2.The Northern Flood Agreement, section 9(2) consultation process;
3.The federal-provincial section 35 consultation process;
4.The Clean Environment Commission public hearing process regarding the Environment Act license request for the proposed project.

This represents a significant burden on the time resources of the community, which can find that most of its regular business must be suspended in order to participate in these processes.

168 *Supra,* note 162.

169 *Halfway River*, *supra,* note 158.

170 *Halfway River*, *supra,* note 158; *Mikisew Cree*, *supra,* note 158.

in good faith considered and, wherever possible, integrated into the proposed plan of action.[171]

As held by the court in *Liidlii Kue*:

> The conclusion to be drawn from the jurisprudence then is that the applicants have a constitutional right to be consulted about the proposed use. However, their consent to the proposed use is not required. The scope or content of the consultation required is directly related to the nature of the Aboriginal right in question as well as the nature of the alleged infringing activity, and other relevant considerations. [172]

There is a reciprocal duty on Aboriginal peoples to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown. They, as well, must consult in good faith. They cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions.[173]

The consultation obligation rests with the Crown. As Isaac notes:

> Another important aspect to the consultation issue is that the duty to consult (which is tied to the "honour of the Crown" and its fiduciary obligation) rests with the federal or provincial governments and not with private interests, such as development or logging companies, or with municipal governments.

Two recent cases[174] held that the obligation to consult also rests with the private interests (such as forestry companies). As a result of these cases, which are on appeal to the Supreme Court of Canada, there is an obligation on private interests to consult with Aboriginal peoples. While there was no reasoning in these cases to fully explain the basis of this obligation, it is likely the case that third parties should ensure that they are not the inappropriate beneficiary of benefits received at

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171 *R.* v. *Sampson* (1995), 16 B.C.L.R. (3d) 226 at 251 (C.A.); *R.* v. *Noel* [1995] 4 C.N.L.R. 78 (Y.T.T.C.) at 94-95; *R.* v. *Jack* (1995), 16 B.C.L.R. (3d) 201 at 222-223 (C.A.); *Eastmain Band* v. *Robinson* (1992), 99 D.L.R. (4th) 16 at 27 (F.C.A).

172 *Liidlii Kue*, *supra,* note 157 at para 69.

173 *Ryan et al* v. *Fort St. James Forest District (District Manager)* [1994] B.C.J. No. 2642, (25 January, 1994) Smithers No. 7855, affirmed (1994), 40 B.C.A.C. 91.

174 *Haida Nation* v. *B.C. and Weyerhauser, supra,* note 163 and *Taku River Tlingit First Nation* v. *Ringstad*, *supra,* note 155. *Haida Nation* is currently under appeal to the Supreme Court of Canada.

the expense of Aboriginal and treaty rights, in particular, the crown refusal or negligence in upholding its fiduciary and other responsibilities to Aboriginal peoples.

Finally, the duty extends beyond Aboriginal title issues; it includes Aboriginal and treaty rights (as mentioned above, including those that are as yet only asserted by the First Nation). This could create an untenable situation whereby all government decisions and actions are subject to a duty regarding rights that may not exist. There are two reasons for this: First, the Crown is a fiduciary to the Aboriginal peoples and has a special trust relationship with them. As such, it must act in the best interests of Aboriginal peoples, which would require the Crown to consult so as to err on the side of *not* infringing a right, rather than potentially infringing a right through lack of consultation. Second, Aboriginal rights have been recognized and affirmed by section 35. Whether or not they *still* exist is a matter for determination by the court, but in order for the "negotiated solutions" which the courts strongly promote to proceed, it is obvious that governments must assume the existence of the asserted right.

5 RIPARIAN RIGHTS

Owners and occupiers of land have rights to use the water that is adjacent to or on top of their land. These riparian rights, recognised at common law, serve to protect access and use of water[175], and preservation of water quantity and quality for all landowners adjacent to, and downstream of, a body of water. Riparian rights guaranteed the continuance of the natural flow of water, and also included:

> ...the right of access to water, to receive water in its natural state (subject to limited uses by upper riparians), to fish, and to sue when interference with these rights take place. Such activities as pollution, water diversion or storage would trigger riparian rights thus allowing the possessor of the rights

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[175] Both in terms of removing water, as will be discussed later, or using the water as a source of drainage, which was upheld in *McGillivray* v. *Lochiel* (1904), 8 0.L.R. 446.

> to sue in the absence of statutory authorization of the activity. In this sense, riparian rights do have a significant constraint on the upstream user.[176]

It is clear that First Nation reserve communities, as possessors[177] and occupiers of reserve lands, originally had riparian rights.[178] The question is whether these rights survive to this day.

Professor Richard Bartlett, in *Aboriginal Water Rights in Canada,*[179] reviewed the status of riparian rights in the prairies and concluded that no legislation has been enacted to abolish the riparian rights of First Nation peoples.[180] Regarding Manitoba, the federal *North-west Irrigation Act*[181] applied only in the north, from 1894 to 1930. Southern Manitoba created its first water laws in 1930, after enactment of the *Natural Resources Transfer Agreements* of 1930, which transferred the federal interest in the land (and later, in 1938, the water) to Manitoba, subject to any trusts existing in the province. The question becomes, did either the federal *Irrigation Act* or the post-1930 water laws successfully abolish Aboriginal riparian rights?

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176 Terence P. Douglas, *supra,* note 75.

177 The *Indian Act,* R.S.C, c. I-6, s. 18(1), provides that reserves are set aside for the use and benefit of Bands for which they were set apart.

178 See Gerard La Forest, *supra,* note 89 at 201. Also, see *Pasco* v. *Canadian National Railway Co.,* leave to appeal to S.C.C. refused November 18, 1985, [1986] 1 C.N.L.R.34 (B.C.C.A.). This case affirmed the B.C. Supreme court decision [1986] 1 C.N.L.R.35 (B.C.S.C.) which held that Oregon Jack Creek Band in British Columbia had presented a legitimate issue to be tried concerning its assertion of riparian rights to the Thompson River which ran through its reserve lands.

179 Bartlett, *supra,* note 103 at 154 - 172.

180 This conclusion should apply to the riparian rights of the Métis, although the Supreme Court of Canada has not deliberated upon the scope of these rights and protections that may be available to the Métis peoples. Recently, the Supreme Court of Canada contemplated the application of s.35 of the *Constitution Act, 1982* to the Métis. In R v. Pawley [2003] S.C.C. 43 the court held that the hunting rights of the Sioux Ste. Marie Métis are recognized and affirmed by s.35 of the *Constitution Act, 1982*, and are subject to the same protections and limitations as previously set out in the Aboriginal rights jurisprudence.

181 *The North-west Irrigation Act*, S.C. 1894, c.30. The purpose of this Act was to abolish riparian rights, enact a water-use licensing requirement, and place the "property in and right to the use of the water...in the Crown...."

Regarding the first part of the question, Bartlett finds that the legislators did not express sufficient intention to impose limitations on treaty and Aboriginal rights, and specifically the water rights of Aboriginal peoples. Therefore, under both treaties and riparian law, these rights continue to exist. To reach this conclusion, he characterises Aboriginal *riparian* rights as Aboriginal or treaty rights and then applies the test for abrogating or derogating from an Aboriginal or treaty right by attempting to ascertain the intention expressed in the *Irrigation Act*.

The courts have not directly deliberated on Bartlett's argument that riparian rights are indeed Aboriginal rights. Riparian rights accrue to all occupiers of land adjacent to water, and if those owner/occupiers are Aboriginal, these rights may also meet the test of an Aboriginal right. In *Van der Peet,* the dissenting court explained the process of one type of right becoming another type, with all rights having the same essential characteristic of being "rights accruing to Aboriginal people", which are Aboriginal rights:

> These types of lands are not static or mutually exclusive. A piece of land can be conceived of as Aboriginal title land and later become reserve land for the exclusive use of Indians; such land is then, reserve land on Aboriginal title land. Further, Aboriginal title land can become Aboriginal right land because the occupation and use by the particular group of Aboriginal people has narrowed to specific activities. The bottom line is this: on every type of land described above, to a larger or smaller degree, Aboriginal rights can arise and be recognized.[182]

Riparian rights, in the case of Aboriginal people, could be described as the rights that the Aboriginal people would have had to the use and control of the water within the vast territories they occupied. Today the continued existence of these rights is debated within the context of 'use rights', typically as 'Aboriginal rights', or rights that flow from the broad scope of 'Aboriginal title'. Trying to characterize some Aboriginal water rights as 'riparian' is problematic. Riparian rights are a construct of a property law regime that has limited application to a '*sui generis*' Aboriginal rights

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182 *Van der Peet, supra,* note 2 at para. 123.

regime. Like fee simple, riparian rights maybe a vestige of a system that is not appropriate to Aboriginal rights law.

It is more likely that the Aboriginal riparian rights are not Aboriginal rights, that is, they are not within the group of rights that flow to Aboriginal peoples because a particular (riparian) practice, custom or tradition is a defining feature of the culture in question, is distinctive, and has continuity with the practices, customs, or traditions of pre-contact times.[183] If this assertion is wrong, riparian rights could be protected as an Aboriginal right and, as Bartlett asserts, neither the *Natural Resources Transfers Agreements* nor the *Irrigation Act* would meet the test as a valid infringement.[184]

However, if this assertion is correct,[185] and riparian rights exist as a separate class of rights available to Aboriginal people but unprotected by s.35, then the question becomes the same for both the north and south of Manitoba: did either the federal *Irrigation Act* or the provincial water statutes successfully abolish Aboriginal riparian rights on reserve? The answer in both cases is very likely "no"; clearly there have been no clear and direct references in any provincial or federal legislation to the intention to extinguish, as required by *Sparrow* and other cases. Regarding the federal *Irrigation Act*, there have been no cases in Canada that have considered this issue.

In Pasco v. *Canadian National Railway Co., the court* held that there was a serious issue to be tried regarding the assertion by the Oregan Jack Creek Band in

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183 These are the main elements of the test for proving the existence of an Aboriginal right, as set out in *Van der Peet, supra,* note 2 at paras. 49 – 74.

184 This issue is dealt with in the next section of the chapter.

185 For example see *supra,* note 75 where Douglas points out: "...since riparian rights are not an Aboriginal right, they do not need to meet the requirements of infringement or extinguishment set out in the doctrine of Aboriginal rights found within the Canadian jurisprudence. Consequently, with minimal protection of the Aboriginal interest the assertion of riparian rights can only offer a weak position to an Aboriginal group wishing to assert jurisdiction over a body of water."

British Columbia that it had rights to the Thompson River and riverbed.[186] In *Peters* v. *Queen in Right of British Columbia*[187] members of the Ohiaht First Nation asserted Aboriginal title to the beach, waterbed and foreshore presumably for the purpose of protecting riparian like rights to the adjacent waters. The court held that there was an issue to be tried, but the case did not proceed further. Recently, the Blood First Nation in Alberta asserted that as they had continued to exercise their riparian rights, (which had not been extinguished by any prior agreements, treaties or legislation), they sought an order that they had maintained their riparian, Aboriginal, or treaty rights to ownership and use of the beds and banks within their treaty area:

> When the predecessor members of the Blood Band entered into Treaty No. 7, in 22 September, 1877, the Plaintiffs contend that the intention was to provide to the Plaintiffs the use and ownership of the Rivers, their banks and beds, including the use of the water, in order to provide the means to establish a new economy based on ranching and agriculture.
>
> The Blood Band Plaintiffs say that the riparian ownership at issue has not been extinguished by treaty or legislative enactment and that they are thus owners of the banks and beds either by reason of existing Aboriginal rights, treaty rights, or as riparian owners, having retained water rights in the Rivers for their own use and benefit. The alternative here is that if the Blood Band Plaintiffs do not have the riparian rights which I have described, that is said to be the direct result of a breach of fiduciary duties on the part of the federal Crown.[188]

This case was dismissed for jurisdictional reasons, so while the issue was not determined, a novel use of riparian rights and activities as evidence of land entitlement was presented.

The *Irrigation Act* itself states that no one can acquire riparian rights after the passing of the Act, unless they are acquired because of "some agreement or

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186 *Pasco* v. *Canadian National Railway Co.,* leave to appeal to the S.C.C. denied November 18, 1985 [1986] 1 C.N.L.R. 34 (B.C.C.A.), affirming [1986] 1 C.N.L.R.35 (B.C.S.C.).

187 *Peters* v. *Queen in Right of British Columbia* (1983), 42 B.C.L.R. 373 (S.C.)

188 *Shade* v. *The Queen* [2001] FCT 1067 at paras. 5 - 6.

undertaking existing at the time of the passing of this Act".[189] This could include the creation of a reserve through treaty or other agreement, and could be the source of protection for pre-existing riparian rights. Further, as Bartlett points out, the American law on this point has consistently held that the legislation purporting to abolish riparian rights is not applicable to any Indian water rights (riparian or otherwise).[190]

Regarding provincial attempts to abolish riparian rights, the province, upon enactment of the *Natural Resources Transfers Agreements*, accepted the transfer of federal land into its hands "subject to any trusts existing in respect thereof and *to any interest* other than that of the Crown". These "trusts" would include the riparian interests (and all other land and water interests) of the First Nation people. Therefore, neither the federal nor province governments have validly abolished them through the *Natural Resources Transfer Agreements*.

Further, there is the issue of the applicability of provincial laws of general application. It is *ultra vires* the province to legislate in matters of federal jurisdiction, such as regarding Indian lands, due to the doctrine of jurisdictional immunity. This doctrine allows general provincial laws to apply in areas of federal competency, but it has been held that any provincial laws that purport to extinguish any Aboriginal right, are by definition, not general laws: if a hypothetical provincial statute seeking such extinguishment is specific and clear enough to meet the *Sparrow* test of "clear and plain intent", then it logically cannot be not be a 'general' provincial law. Still, while a province cannot extinguish Aboriginal rights, it may "touch on the core of Indian-ness" (which it would also not normally be allowed to do) because of provisions in section 88 of the Indian Act.[191] The dividing line for determining exceptions from the

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189 *The North-west Irrigation Act*, S.C. 1894, c.30, section 6.

190 Bartlett, *supra,* note 103 at page 155.

191 Section 88 essentially creates an exception from the doctrine of jurisdictional immunity for a general provincial law that also touches on the core of "Indian-ness".

doctrine is whether or not the general provincial law merely touches on the area of federal jurisdiction (such as the core of Indian-ness), or rather impacts it in a more significant way (such as through extinguishment or abolishment of an Aboriginal or treaty right). Section 88 does not extend sufficiently far as to allow a province to create a general law that also extinguishes or abolishes an Aboriginal right, as a law that expressed enough of a "clear and plain intent" to do so (thereby meeting the *Sparrow* test) would still be a clear, specific and direct excursion into an area of federal jurisdiction. This would be a violation of the doctrine of inter-jurisdictional immunity.[192]

Further, the rights arising out of a treaty are immune from provincial legislation -- even that enacted under s. 88 of the *Indian Act* -- unless the treaty incorporates such legislation, as in *R. v. Badger*.[193]

Provincial attempts at extinguishment of an Aboriginal riparian right, even if this right is not one of the rights protected by section 35(1) and therefore subject to the *Sparrow* test for valid infringement, would clearly still be intrusions into federal jurisdiction over Indian lands (and therefore waters).[194] For example, the Manitoba

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This type of Provincial law is one (meaning, that regarding Aboriginal people and it is not actually a "general" law...it has specific and unique effects upon them and their rights which would normally place it beyond the competence of the province to enact.

192 *Delgamuukw*, *supra,* note 1 at paras. 179 – 183.

193 [1996] 1 S.C.R. 771.

194 The Supreme Court of Canada, in *Delgamuukw* v. *British Columbia supra,* note 1 at paragraph 177, has held that s. 91(24) protects a "core" of Indian-ness from provincial intrusion through the doctrine of interjurisdictional immunity. Thus, despite Section 88 of the *Indian Act*, which allows for laws of general application that do not affect "Indian-ness" to apply to Indians, this section does not apply to "lands reserved for Indians". As held in *Delgamuukw* at paragraph 178:

> Laws, which purport to extinguish those rights, therefore touch the core of Indian-ness, which lies at the heart of s. 91(24), and are beyond the legislative competence of the provinces to enact. The core of Indian-ness encompasses the whole range of Aboriginal rights that are protected by s. 35(1). Those rights include rights in relation to land; that part of the core derives from s. 91(24)'s reference to "Lands reserved for the Indians". But

Provincial legislation, *The Water Resources Conservation and Protection Act,* C.C.S.M. c.72, that purports to ban the bulk export of water from Manitoba, could not prohibit exports from First Nation lands and waters, based upon this reasoning. A general law that extinguishes the riparian rights of an Aboriginal person would thus be *ultra vires* the province. The question of whether a riparian right is an Aboriginal right would be determined on a case–by-case basis, according to the legal tests set out in *Van der Peet* and some subsequent cases.

6 CONCLUSION

Aboriginal peoples in Canada have water rights that have not been extinguished by treaty or by "clear and plain" intention of the federal or provincial governments. Daily, these rights are being impacted without the required due process and compensation. Further, international agreements may be permanently impairing Aboriginal rights, without providing any corresponding mechanism to redress the damage done or adhering to any domestic constitutional requirements regarding protection of those rights. The federal and provincial governments have not engaged in the consultation that is necessary to justify infringements of this sort, and it is uncertain whether current trade rules would allow them to be able to fulfill their obligations in this regard. Governments have committed to international

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> those rights also encompass practices, customs and traditions that are not tied to land as well; that part of the core can be traced to federal jurisdiction over "Indians". Provincial governments are prevented from legislating in relation to both types of Aboriginal rights.

Further, this applies to waters on First Nation lands. As Bartlett states in *ibid*, at page 122, "The Privy Council has recognised that water rights are as much 'of the essence of' jurisdiction over lands as is possession. Stuart Rush, Q.C., in "Aboriginal Water Rights In Canada", *supra,* note 34 at page 5, agrees: "It would be a fair reading of the law on Aboriginal title that title means the Aboriginal interest in both the land and water on it." In *Burrard Power Co.* v. *The King,* Lord Mersey declared, "if the Province could by legislation take away the water from the land it could also by legislation resume possession itself." This would clearly be *ultra vires* the Province given the federal power under section 91(24).

agreements that may, through their expansive trade and investment provisions, restrict any power the Crown may possess to fulfill section 35 protections of Aboriginal and treaty rights. This is the subject of the next chapter.

CHAPTER 3 - NAFTA AND WATER

This chapter discusses the scope of the North American Free Trade Agreement as it relates to water in Canada. There has been a long-standing question as to whether this trade agreement puts Canada's water, particularly water that is currently in its natural state, at risk, by being made subject to international trade rules and standards. This chapter analyses the relevant sections of the NAFTA to demonstrate that the NAFTA deals with all resources when and even before they are traded (that is, in their "natural state") through its goods, services and investment prescriptions. It is argued that to make the distinction that water in its "natural state" is protected from the reach of the NAFTA is to ignore the situation that in most parts of Canada, vast bodies of "natural water" are subject to extensive, and in some cases all-encompassing allocations, licenses, and other forms of commerce-related legal entitlements. It is highly likely that very little "natural water" remains in Canada.

The result of water being included in the NAFTA is that this agreement may be permanently impairing Aboriginal water rights, without providing any corresponding mechanism to redress this damage. The federal and provincial governments have not complied with domestic constitutional requirements necessary to justify infringements of Aboriginal water rights, and it is unlikely that current NAFTA rules would allow them to be able to fulfill their obligations in this regard. This latter argument is contained within the general focus of Chapter 4.

1 INTRODUCTION

For over 100 years there have been extensive political and legal discussions in Canada about the potential for removal of water from Canada's watersheds for use by others, particularly those in water stressed regions of North America.[1] These discussions have become more urgent in their tone as climate change impacts, once only a theoretical concern, are felt in numerous regions of Canada and the world.[2] Discussions have dealt with all possible sources of water: surface water (including

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[1] Maude Barlow, "Blue Gold: The Global Water Crises and the Commodification of the World's Water Supply" (International Forum on Globalization, Sausalito, California (1999) at 14 – 25. See also Marc de Villiers, *Water*, (Stoddart Publishing Co: Toronto, 2000), pages 264 – 291. David Crane, "The Pressure to Sell Our Water", in *Water and Free Trade,* (James Lorimer and Company: Toronto, 1988) at 21 – 27.

[2] For an extensive discussion of the predicted impacts of climate change on Canada's water resources, see Natural Resources Canada, "Climate Change Impacts and Adaptation: A Canadian Perspective – Water Resources" Government

freshwater lakes, rivers, streams, and bodies of saltwater such as oceans), groundwater (including water from underwater streams and aquifers), rainwater and fog, and water in its solid form, such as ice and snow. Numerous methods of removal and transfer have been debated at one time or another:

- Relocation (generally pumped from a local surface- or groundwater source and used within the originating watershed, as with local irrigation),
- Diversion (out-of-watershed relocation through the use of extensive dams, reservoirs, and systems of pipes and pumps),
- Containerisation (pumped or captured from ground or surface water, or glaciers, stored in containers such as bottles, bags, or freezer boxes, and then shipped by truck, supertanker, or other mode of transport), and,
- Capture (rainwater, and fog, usually for local use).

Finally, numerous uses and quantities have been debated:

- Variable quantity range (small quantities such as bottling facilities, larger export quantities by supertanker shipments, to bulk export through large diversion), and,
- Hierarchy of uses including both direct (alleviation of drinking water shortages) and indirect (irrigation and electricity production) uses.

Whether water is defined as a renewable or non-renewable resource, or a resource at all, has entered into the debate, as has the meaning of "water in its natural state" and the appropriateness of a characterisation of water as an economic good. The legalities of moving water by any method within and across jurisdictions and international boundaries have been analysed. Each of these aspects will be reviewed below, but it is regrettable that, after many decades of debate, the state of Canada's water remains threatened. More questions remain than answers have been provided regarding key policy, scientific and legal questions, and a clear

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of Canada, available as of February 1, 2004 at

consensus regarding the best approaches to deal with these issues has not yet been reached.[3]

Water became the subject of widespread political and public debate during the discussions and negotiations leading up to creation of the Canada-US Free Trade Agreement ("FTA"). The subject of water arose once again during negotiations leading up to the North American Free Trade Agreement ("NAFTA"). During these highly contentious discussions, the Canadian government assured the public that Canada's water was not, and never would be, at risk by virtue of either the FTA or the NAFTA.[4] Despite these assurances, there remains a high degree of scepticism as to the enforceability of the Canadian government's claims, and the legal community has not yet reached a consensus on the matter.[5]

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http://adaptation.nrcan.gc.ca/home2_e.asp?CaID=9&PgID=25.

[3] Steven Chase. "Our Water is at Risk, Climate Study Finds." The Globe and Mail, August 13, 2002. See also, Heathcote, I.W. "Canadian Water Resources Management" in *The Environment and Canadian Society*, T. Fleming ed., ITP Nelson (1997) at 59 - 84.

[4] Tom Macmillan, then M.P. and Minister of Environment for Canada stated at page 1 of the Introduction to the Federal Water Policy that: "...the Government of Canada emphatically opposes large-scale exports of our water." Further, the 1993 Joint Statement by the Governments of Canada, Mexico and the United States stated:

> "The NAFTA creates no rights to the natural water resources of any Party to the Agreement. Unless water, in any form, has entered into commerce and become a good or product, it is not covered by the provisions of any trade agreement including the NAFTA. And nothing in the NAFTA would oblige any NAFTA Party to either exploit its water for commercial use, or to begin exporting its water in any form. Water in its natural state in lakes, rivers, reservoirs, aquifers, waterbasins and the like is not a good or product, it is not traded, and therefore is not and never has been subject to the terms of any trade agreement. International rights and obligations respecting water in its natural state are contained in separate treaties and agreements negotiated for that purpose. Examples are the United States-Canada Boundary Waters Treaty of 1909 and the 1944 Boundary Waters Treaty between Mexico and the United States".

[5] See for example: Maude Barlow, "Blue Gold: the Global Water Crisis and the Commodification of the World's Water Supply", A Special report of the International Forum on Globalization, June 1999; Centre for International Environmental Law Issue Brief for the third World Water Forum "Water Traded (Draft Version)", March

2003, available as of February 18, 2004 at http://www.ciel.org/Tae/WaterForum_24Mar03.html; Howard Mann, "Who Owns "Your" Water: Reclaiming Water as a Public Good Under International Trade and Investment Law", August 2003, available as of February 18, 2004 at http://www.iisd.org/publications/Publication.asp?pno=563; Dean D.R. Percy, "Who Owns the Water in Canada?" in *Fresh Outlook*, Issue 16 August 2003 at 13; Steven Shrybman, "Why is the Federal Government so Reluctant to Protect Canadian Water Resources? A Water Fact Sheet" West Coast Environmental Law, September 1999 available as of February 18, 2004 at http://www.wcel.org/wcelpub/1999/12968.html; Steven Shrybman, "A Legal Opinion Concerning Water Export Controls and Canadian Obligations Under NAFTA and the WTO" West Coast Environmental Law, September 1999, available as of February 18, 2004 at http://www.wcel.org/wcelpub/1999/12926.html; Christopher Rolfe, "Clarifying the Water", West Coast Environmental Law, February 1994 available as of February 18, 2004 at http://www.wcel.org/wcelpub/7512.html; Council of Canadians "Thirst for Control" available as of February 18, 2004 at http://www.canadians.org/browse_categories.htm?COC_token=23@@86d19cbf8ea222f2ba91095f313e88fd&step=2&catid=9&iscat=1; International Joint Commission, "Protection of the Waters of the Great Lakes: Final Report to the Governments of Canada and The United States" February 2, 2000, available as of May 15, 2002 at http://www.ijc.org/php/publications/html/finalreport.html; Wendy Holm, "A Primer on Water Policy and Trade Issues" *Country Life in British Columbia*, December 2001; Christine Elwell, "NAFTA Effects on Water: Testing for NAFAT Effects in the Great Lakes Basin", Sierra Club of Canada, September 19, 2000; David Johansen, "Bulk Water Removals, Water Exports and the NAFTA", Parliamentary Research Branch, Law and Government Division, January 31 2002; David Johansen, "Water Exports", Parliamentary Research Branch, Law and Government Division, September 4, 1990; Sophie Dufour, "The Legal Impact of the *Canada-United States Free Trade Agreement* on Canadian Water Exports," (1993) 34 *Les Cahiers de Droit* 705; Barry Appleton, Chapter 25, "Frequently Raised Concerns on the NAFTA," *Navigating NAFTA: A Concise User's Guide to the North American Free Trade Agreement* (Toronto: Carswell, 1994); Canadian Environmental Law Association "NAFTA and Water Exports" (Toronto Ontario, 1993); North American Commission for Environmental Cooperation, "North American Boundary and Transboundary Inland Water Management Report 2001" available as of February 18, 2004 at http://www.cec.org/files/pdf/LAWPOLICY/NAELP7e.pdf; Katsumi Matsuoka, "Tradable Water in GATT/WTO Law: Need for New Legal Frameworks?" presented at AWRA/IWLRI-University of Dundee International Specialty Conference on *Globalization and Water Resources Management: The Changing Value of Water*, August 6-8, 2001, available as of February 18, 2004 at www.awra.org/proceedings/dundee01/Documents/Matsuoka.pdf; Finally, according to Dr. Isabel Al-Assar, presenting at the Third International Water Law Symposium at the University of Dundee on June 14, 2000 (available as of February 18, 2004 at http://www.waterbank.com/Newsletters/nws18.html):

> Once governments allow water to be withdrawn from its natural state - as they have done on numerous occasions for purposes that range from large-scale industrial use to personal consumption - the same rights must now be

The debate has comprised both ethical and technical dimensions. The ethical perspective is founded upon the "every drop is sacred" argument, the premise being that water is unique, given that it is one of the two basic non-substitutable requirements for most life (the other being air), and therefore requires unique economic and legal treatment, as well as approaches to ensure its continued availability. It frames the water debate within the context of human and ecosystem needs, values, and rights. It tends to disagree with attributing certain economic characteristics to water and its use, such as the right to profits from the sale of water. This perspective makes frequent linkages to the privatising dangers of increasing corporate power over water, particularly in relation to Canada's ability to ensure the long-term safety and security of its water sources.

By contrast, the technical argument has focused primarily upon whether the NAFTA legally applies to water. This has been the approach most heavily relied upon by the Canadian government and others who advocate that water in Canada has not been put at risk by the NAFTA.[6] This debate has operated under the assumption that since the NAFTA applies to goods, if water is a good then the NAFTA applies to water, and if it is not, it does not. Therefore, analysis of the NAFTA definition of a "good" has been the cornerstone of this argument; and, not surprisingly, many have argued that water either is or is not a "good" under NAFTA.[7] Arguments on both sides of this debate tend to be both confusing and myopic, joining highly speculatory, with frequently self-serving conclusions.

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accorded to foreign investors. Water would be subject to the services provisions of the NAFTA, for similar reasons."

[6] David Johansen, "Bulk Water Removals, Water Exports and the NAFTA", *ibid.*; David Johansen, "Water Exports", *ibid.*, Department of Foreign Affairs and International Trade, "Bulk Water Removal and International Trade Considerations" February 2001 available as of February 18, 2004 at http://www.dfait-maeci.gc.ca/can-am/menu-en.asp?act=v&mid=1&cat=11&did=488.

The ethical arguments generally discussed in the mainstream, public literature are presented in a summarised fashion, but will not be further explored.

2 THE ETHICAL ARGUMENTS[8]

2.1 Human Rights

This argument frames access to water as a human right. It states that each human being on the earth has the right to satisfaction of basic needs for safe potable drinking water and healthy sanitation, and that these needs of local people and farmers should take priority over other users such as the water needs of industry and agri-business. This argument is often met with the response that support the privatisation of sewer and water services as the best approach to meet existing human needs, that there is enough water available to meet all needs, and that large scale water use (through industrial and corporate farming) is necessary to meet the growing product and food needs of humans.

2.1.1 Rights of Other Life

Because water is necessary for all life, the needs of all life must be taken into account when water use decisions are made. Key to this value is respecting nature's original choices, for example, through leaving water in its the watershed as fundamental to the well-being of the local ecosystem. This argument is usually countered through reliance upon hierarchy of needs that places humans first before other species, and that relies upon science to be able to assess adequately the

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[7] Johansen, *ibid.*; Dufour, *supra* note 5; and Jon Johnson (in the Rawson Academy papers) for a related argument stemming from analysis of the previous the FTA.

[8] This is summarized from a paper (and later book of the same name) written by Maude Barlow in her capacity as Chair of the International Forum on Globalization Committee on the Globalization of Water, entitled "Blue Gold: The Global Water Crisis and the Commodification of the World's Water Supply" International Forum on Globalization, Sausalito, California (1999).

minimum needs of an ecosystem. Further, many view unused water in rivers making its way to the ocean as a wasted resource.

2.1.2 Economic Arguments

These debates focus upon the historic fact of public ownership of public resources such as water. Due to the nature of the resource, as one that tends to defy ownership, many argue that water should remain as a public resource, subject to control by the public. Arguments against this tend to rely upon a neo-classical economic argument that people only value those things that they own or that they must pay for. As such, the only rational way to conserve water is to place it in the hands of private owners.

2.1.3 Precautionary Principle

Exercising caution in decision-making in the face of uncertainty as to the level and extent of potential environmental harm is referred to as the Precautionary Principle.[9] Given the varying predictions regarding the extent of severity of climate change and the level of population growth, both of which would dramatically increase stresses on water availability and use, many argue that extreme caution should be exercised in making all water use decisions. Those who discount climate change and who rely upon technological solutions to solve environmental stresses would tend to disagree with this approach.

2.1.4 Corporate Profit-Making

The need of corporations to attain maximum profits, in particular through pricing levels that are beyond the ability of many of the poorest to pay, mandates that water use be beyond the reach of corporate interests. This perspective is countered with the argument that a corporation, out of pure self-interest, protects its

product as the key means by which to ensure the long-term viability of the corporation itself (through continued profits).

2.1.5 Sovereignty

This argument states that due to the nature of the globalised economy, and in particular the rights afforded corporations through numerous international trade agreements, corporate interests appear no longer truly accountable to domestic governments in countries where they operate. As such, there is decreasing public control, and an increasing inability to ensure that corporations operate in accordance with local laws and values. This argument is countered with the argument that government interference in corporate activities is inefficient and therefore sub-optimal, and that corporations remain subject to the application of domestic law.

2.1.6 Water is Unique

Water is non-substitutable, there is no other resource we can use in place of water, and as such we must protect it. Arguments that dismiss this perspective tend to rely upon the presumption that water is in endless supply.

3 THE TECHNICAL ARGUMENTS

Whether or not water is "included in the NAFTA" has been the subject of much debate. The exact meaning of this query has caused a great amount of confusion in the NAFTA-water debate, and it may assist the discussion to restate the question in a different way: does the NAFTA apply to activities that utilise water in an

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[9] Environment Canada, "A Canadian Perspective on the Precautionary Approach/Principle Discussion Document" September 2001, available as of February 18, 2004 at http://www.ec.gc.ca/econom/discussion_e.htm.

economic fashion? There are two[10] parts of NAFTA that are relevant in attempting to answer this question:

- Part Two: Trade in Goods, which includes Chapter Three – Trade in Goods and Market Access, Chapter Six – Energy and Basic Petrochemicals, and Chapter Seven – Agriculture and Sanitary and Phyto-Sanitary Measures;
- Part Five: Investment, Services and Related Matters, which includes Chapter 11 – Investment, Services and Related Matters and Chapter 12 – Cross Border Trade in Services.

3.1 Part Two: Trade in Goods

3.1.1 Chapter Three: Trade in Goods and Market Access

This is probably the most debated section of the NAFTA in the water-NAFTA debate. Attempts to determine whether water is covered by the NAFTA have focussed primarily upon whether water is a "good", with the assumption that if water can be proven to be a good, then it must be subject to NAFTA (with all the implications that would flow from this). The definition of "goods of a Party" (or, in a closely related argument, by the inclusion of water in the tariff schedules) is the fundamental argument that is relied upon under this category.[11] This thesis will present the basic arguments found in the literature, extend them to the extent relevant, and then pose an alternative interpretation that more appropriately reflects the goals and purpose of the NAFTA.

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[10] It may be that Part Three: Technical Barriers to Trade, which includes Chapter Nine: Standards-Related Measures is relevant to an extended version of this discussion, but this is beyond the scope of this thesis.

[11] Dufour, *supra* note 5; Holm, *supra* note 5; Shrybman, *supra* note 5; Elwell, *supra* note 5; Barlow, *supra* note 5; Johanson, *supra* note 5; Department of Foreign Affairs and International Trade, "Bulk Water Removal and International Trade Considerations" *supra* note 6; The Canada-US-Mexico Joint Statement, *supra* note 4.

3.1.2 "Goods of a Party"

NAFTA applies to the "goods of a party", which is defined in Article 201 as:

> domestic products as these are understood in the *General Agreement on Tariffs and Trade* or such goods as the Parties may agree, and includes originating goods of that Party.

Based upon this definition, there are three ways that items become "goods of a Party": i) if they are treated and understood to be "domestic products" within the GATT, ii) if they are deemed to be goods through agreement of the Parties, or iii) if they qualify as "originating goods" of a Party.

3.1.2.1 "Domestic Products" as "Understood" in GATT

Neither "products" nor "domestic products" are defined within the GATT. The NAFTA definition (and the FTA before it) relies on the GATT's "understanding of domestic products", and as evidenced in the GATT documents and the common usage given to those terms through application of the GATT over time. Determining the "understanding in the GATT" is an inexact science, but it has been suggested that the tariff listings define the items that are considered products.[12] Others have suggested that this approach is inappropriate.[13] Despite this, it is clear that the intention of the NAFTA definition was to utilise the approach that the GATT relies upon to create its "understanding of domestic products". While it may be the case that the GATT classifications do not of themselves *define* "product", they do clearly list the items that would be considered as worthy of protection from trade restriction under the Agreement, and comprise the list of items that are intended to be covered by the NAFTA.

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[12] Mel Clark and Don Gamble, "Water Exports and Free Trade" in *Canadian Water Exports and Free Trade*, Rawson Academy Occasional Paper No. 2, December, 1989, at 9-10.

[13] Sophie Dufour, "The Canada-United States Free Trade Agreement: The Latest threat of Water Diversions From the Great Lakes Basin?" LL.M Thesis, August 1990, University of York at 112.

The system that the GATT relies upon to classify goods for custom tariffs and other purposes is the Harmonized Commodity Description and Coding System (HS).[14] This system lists items, and characterises them as being in one of a number of "Staging Categories". These categories indicate the orderly progression of the removal of duties currently in place for the item (usually in an equally-staged proportional reduction occurring each year until no further duty exists). This process is referred to as "negative integration" – the removal of barriers.[15]

Under the HS system, a number of items found in their natural state are listed, including coal, peat, natural gas, water, and air. Different tariff classifications apply, but most of these raw materials are listed as Staging Category "D", indicating that they are already duty-free, and will remain so. For example, water (both natural and artificial) is listed as an item subject to the NAFTA through tariff classification 22.01, but before 1998 only plain unsweetened and unflavoured mineral waters and aerated waters were free from duties:

Item	**Article Description**	**Staging Category**	**Base Rate**
22.01	Waters, including natural or artificial mineral waters and aerated waters, not containing added sugar or other sweetening matter nor flavoured; ice and snow.		
2201.10.00	- Mineral waters and aerated waters	D	Free
2201.90.00	- Other	B	5.1%
22.02	Waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured, and other non-alcoholic beverages, not including fruit or vegetable juices of heading No. 20.09.		
2202.10.00	- Waters, including mineral waters and aerated waters, containing added sugar or	B	8.7%

[14] *Harmonized Commodity Description and Coding System*, GATT, BISD, 34 Supp. 5 (1988) (L/6112 and L/6292).

[15] J.G. Castel et al. *The Canadian Law and Practice of International Trade*, 2nd Ed. (Emond Montgomery Publications Limited: Toronto, Canada) 1997 at 69.

	other sweetening matter or flavoured		
2202.90	- Other		

All other waters, ice and snow, if traded, were a Staging Category "B" item, and were subject to duties until 1998. In addition, they are subject to all other NAFTA provisions unless specifically exempted. No other provision of the NAFTA exempts the items shown in the above table. Therefore, all other provisions, rights and obligations in the NAFTA would apply to the trade in this good.

The HS further refers to water in the "VI. – Miscellaneous" section of the tariff headings dealing with various chemicals and inorganic elements:

Item	**Article Description**	**Staging Category**	**Base Rate**
2851.00.00	Other inorganic compounds (including distilled or conductivity water and water of similar purity); liquid air (whether or not rare gases have been removed); compressed air; amalgams, other than amalgams of precious metals.	A	8%

This specifically refers to water that has been physically produced by humans, as neither distilled nor conductivity water are found naturally in nature. Interestingly, this section also refers to air; an item previously considered untouched by free trade agreements. This section indicates that air that has been liquefied or merely compressed and containerized is subject to all NAFTA provisions.

GATT provides additional guidance to assist in understanding the meaning of this reference to water in 22.01. The Harmonized System Explanatory Notes[16] state

[16] Customs Co-operation Council, Harmonized Commodity Description and Coding System: Explanatory Notes, vol. 1, 1st ed. (Brussels, 1986), 1. The preamble to Volume 1 of these notes provides that "for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes".

that this reference to water includes "ordinary water of all kinds (other than sea water). Such water remains in this heading whether or not it is clarified or purified". This means that snow, ice, and natural or ordinary freshwaters are subject to the operation of 22.01. This is clear evidence of a general understanding, as contemplated under the first part of the "goods of a party" definition. As a previously listed tariff item under the GATT, the drafters of NAFTA were aware of its existence in GATT, and therefore contemplated its inclusion in this definition.

Despite this, some authors have argued that the GATT does not provide adequate direction regarding the definition of "product", and that resort must then be had to the rules of public international law to determine an understanding and guide the interpretation of GATT, given its status as an international treaty.[17] The NAFTA in Article 102.2, states that it will be interpreted and applied in light of its objectives and in accordance with the applicable rules of international law. The *Vienna Convention on the Law of Treaties, 1969*[18] provides guidance in this circumstance in that it provides rules for the interpretation of treaties. Article 31.1 states:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

3.1.2.2 "In Accordance with the Ordinary Meaning"

The Shorter Oxford English Dictionary defines "product" as "2. A thing produced by nature or a natural process" and also, "3. That which is produced by any action, operation, or work". This definition clearly contemplates both natural and human-made products. In this case, water in all its forms, whether or not modified by humans, could be considered a product.

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17 *Ibid.*, *supra* note 1 at 113.

18 *Vienna Convention on the Law of Treaties*, U.N. Doc. A/Conf.39/27, 23 May 1969.

3.1.2.3 "In Their Context and in the Light of its Object and Purpose"

The objectives of the NAFTA are to:

> "eliminate barriers to trade in, and facilitate the cross border movement of, goods and services between the territories of the Parties, promote conditions of fair trade in the free trade area, to increase substantially investment opportunities in the territories of the Parties, provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory, ...and to establish a framework for further trilateral, regional, and multilateral cooperation to expand and enhance the benefits of this Agreement".[19]

These purposes clearly indicate that a good faith approach to interpreting the NAFTA would be to uphold the trade liberalising intent of the agreement and to be inclusive rather than exclusive regarding ambiguous definitions of products.[20] Indeed, the parties agreed to "interpret and apply the provisions of this Agreement in light of the principles set out in paragraph 1".[21] This would further mean that, in the event of uncertainty, a good faith interpretation of the "products" definition would indicate that water was intended to be covered by the scope of the NAFTA.

3.1.2.4 Items that may be Deemed to be Goods by Agreement of the Parties

The three Parties have not issued an agreement taking any position on whether water, in any of its forms, is a "domestic product". They have however issued a joint statement that provides that:

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19 Article 102.1 of the NAFTA.

20 As Professor John Jackson has commented, the approach to interpretation of trade agreements is shifting towards a more "textual" approach:

> This is based on general principles of international law, and particularly, Articles 31 and 32 of the Vienna Convention on the Law of Treaties that relate to Treaty Interpretation. Those principles urge the international system to be very textual, to pay a lot of attention to the specific words of the treaty. We are hearing some diplomats saying, "But I was there, I was in negotiation, that's not what we meant." But of course, it is what the words say in the minds of the Appellate Body or first level panels, coloured by context, object, purpose, that is what counts.

"Regulation and Deregulation of International Trade: Introductory Remarks" in *Foundations and Perspectives of International Trade Law*, ed. Ian Fletcher, L. Mistelis, M. Cremona (Sweet and Maxwell, Ltd.: University of Copenhagen Law School, 2001) at 77.

> Unless water, in any form, has entered into commerce and becomes a good or product, it is not covered by the provisions of any trade agreement, including the NAFTA. And nothing in the NAFTA would oblige any NAFTA party to either exploit its water for commercial use, or to begin exporting water in any form. Water in its natural state, in lakes, rivers, reservoirs, aquifers, water basins, and the like is not a good or product, is not traded, and therefore is not and never has been subject to the terms of any trade agreement.

The NAFTA definition of "goods of a party" allows for the inclusion, not exclusion, of goods by agreement of the Parties. Presumably, this is because the negotiating process was directed at the inclusion of goods, an interpretation supported by the objectives of NAFTA. The above joint statement excludes rather than includes water and therefore is beyond the scope of the deeming provision of the "goods of a Party" definition. Further, the NAFTA provides the Parties with the opportunity to modify or add to the Agreement, but mandates that the modification or addition must be approved in accord with the applicable legal procedures of each Party.[22] As none of the parties to the joint statement has followed appropriate domestic procedures to ratify the joint statement, it does not carry the force of law.[23] Therefore, if the NAFTA through any of its provisions includes water as a good, this statement does nothing to change that. Shrybman quotes a U.S. State Department position on the use of joint statements:

> It has long been recognised in international practice that governments may agree on joint statements of policy or intention that do not establish legal obligations. In recent decades, this has become a common means of announcing the results of diplomatic exchanges, stating common positions on policy issues, recording their intended course of action on matters of mutual concern, or making political commitments to one another. These documents

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[21] Article 102.2 of the NAFTA.

[22] NAFTA, Chapter 22: Final Provisions, Article 2202: Amendments.

[23] For example, through the development and implementation of enabling legislation. For more on this see Steven Shrybman, "The Accord to Prohibit Bulk Water: Will it Actually Hold Water?" remarks prepared for the BC Freshwater Workshop, May 9 2000, at 8, available as of February 18, 2004 at www.wcel.org/wcelpub/2000/13104.pdf.

> are sometimes referred to as non-binding agreements, gentleman's agreements, joint statements or declarations.[24]

In addition, many questions remain. As Rolfe explains:

> The clarification [above joint statement], however, did little if anything to resolve the more important issue of when water does become a good under NAFTA or CUSFTA. The issue that remains unresolved is whether or not water is a good once it is dammed or diverted into pipelines, canals, or distribution systems. While the December 1993 clarification stated that water in its natural state in reservoirs was not a good, there is no reference as to whether water in a human-made reservoirs [sic] or water which has been diverted is a good. It is unresolved whether water becomes a good if it is diverted for domestic, municipal, or industrial use; if it only becomes a good only if prices are charged for it; or if it only becomes a good once sold on a commercial basis.[25]

It is important to note that the United States Supreme Court held in the *Sporhase* case that groundwater has "entered into commerce".[26] It held that water was an article of commerce partly because it was used in the production processes of goods that were traded. The court commented on the inter-state dimension of groundwater, and held that the federal government was validly regulating the water in question under its Commerce Clause power.[27] Canadian courts have not so held, but this may be more a matter related to the fact that the United States has a constitutional Commerce Clause power that differs in scope from the Canadian "trade and commerce" power. The *Sporhase* case further articulated the court's view that to consider water anything other than an article of commerce is a legal fiction. In the view of the United States Supreme Court, water is no longer truly a publicly held resource, and the right of a government to regulate it is not dependent

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[24] Steven Shrybman, "Legal Opinion Commissioned by the Council of Canadians re: Water Export Controls and Canadian International Trade Obligations" available as of February 18, 2004 at http://www.canadians.org/display_document.htm?COC_token=COC_token&id=240&isdoc=1&catid=78.

[25] Christopher B. Rolfe, *Clarifying the Water: Canadian Water, Canada's Trade Obligations and B.C. Water Policy,* West Coast Environmental Law, February 24, 1994. http://wcel.org/ at 1.

[26] *Sporhase* v. *Nebraska*, 458 U.S. 941 (1982).

[27] *Supra,* note 12 at 3462 – 3463.

upon this legal fiction. The theory of water being publicly held is merely the method by which citizens make it know that they wish the government to have the power to regulate and preserve the resource. These views create great uncertainty as to the intention of the American Party to the NAFTA on the inclusion of water in the Agreement, given that the legal position of the U.S. on water as an article of commerce was well known prior to the NAFTA.

Dendauw provides two further sources of the treatment of water as a good, even when in its natural state:

> Thirdly, water is a good under international law, as the European Court of Justice has interpreted the term "good" to include anything capable of monetary valuation and of being an object of a commercial transaction. (*Commission v. Italy,* Case 7/68). Fourthly, a very large part of Canada's water resources can already be considered as subject to commercial use. In British Columbia, as of 1993, approximately 40,000 licenses for the withdrawal of surface water were in existence in the province (Shrybman, 1999).[28]

De Aquino comes to the conclusion in her thesis that water can be considered a product, and that:

> The authorization of bulk water removal projects in Canada would give NAFTA country-members the rights to access Canada waters.[29]

Given the recent amendments that provide that boundary waters shall not be used, obstructed or diverted except in accordance with a license granted by the Minister of Foreign Affairs, this could result in a troubling scenario. These amendments were brought as a result of public pressure, and in accord with the Canadian governments belief that it is important to prohibit the export of water prior to its commodification, that is, while still in its natural state.[30] While the amendments

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[28] Isabel Dendauw, "The Great Lakes Region and Bulk Water Exports – Issues of International Trade in Water", *Water International*, 25 (2000) No. 4 at 12.

[29] Sandra De Aquino, "Water Resource Allocation in Canada (Manitoba) and Brazil (Ceara): Legal and Institutional Impacts on Bulk Water Removal". LL.M. Thesis, University of Manitoba, 2001 at 89.

[30] Johansen, *supra,* note 5 at 20.

to the *International Boundary Waters Treaty Act*[31] came into force December 2002, they provide numerous exceptions to each prohibition or requirement. Further, the Minister may issue the license subject to regulations that have yet to be developed. As such, the requirement for a license is not yet operative, and these amendments provide little comfort regarding the ability of the Canadian government to control validly the export of Canadian water, even from boundary waters.

3.1.2.5 "Includes Originating Goods of the Party"

Water may also be a good through the third component of the definition of "goods of a Party" definition, the element dealing with "originating goods". These goods are defined in Article 201 as those goods that qualify under the rules set out in Chapter Four (Rules of Origin). Given that the NAFTA only gives benefits regarding trade in North American goods and services, Chapter Four details what will be considered to be good that "originates" in North America and defines "originating goods" in Article 401 and 408. The purpose of Chapter Four is to:

- Define an originating good, so that those goods can be freely traded;
- Define how certain products containing non-originating goods can still be freely traded:
    - If the non-originating good goes through a tariff classification change, meaning, in most circumstances, that the production process changes the material sufficiently so that it changes from being listed under a tariff heading in one chapter to a different tariff heading in a different chapter, or,
    - Even if it does undergo an appropriate tariff change, some non-originating goods must have a sufficient Regional Value Content, meaning, in most circumstances, that over 50% of the

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[31] *International Boundary Waters Treaty*, S.C., c.40, s.16.

value of the final good must be made from originating materials, or,

- If less than 7% of the value of the goods is non-originating material.

Article 401, is comprised of six sections, which provide an exhaustive list of situations that constitute an "originating good", and sets out the primary rule that all goods that are obtained or produced within a NAFTA country are considered to have originated there. The first section provides that originating goods are goods "wholly obtained or produced entirely in the territory of one or more of the Parties, as defined in Article 415". Article 415, a definitions section, provides definitions for the phrase "goods wholly obtained or produced entirely in the territory of one or more of the Parties". This section exhaustively lists various types of goods, such as live animals, minerals, vegetables, and goods taken from outer space. Neither of these sections reference water.

Article 408 further defines "originating goods". This section states "an indirect material shall be considered to be an originating material without regard to where it is produced." Article 415 defines "indirect material":

> A good used in the production, testing, or inspection of a good but not physically incorporated into the good...including...(a) fuel and energy, and, (h) any other goods that are not incorporated into the good but whose use in the production of the good can be reasonably demonstrated to be part of that production.

Because there are no tariffs in place regarding numerous industries that use water, for example the electricity and water bottling industries, it is critical for them to be able to prove that they are originating goods in order to access these highly beneficial free trade protections of the NAFTA. Other industries that continue to pay tariffs also benefit from the inclusion of water as an "indirect material" in an originating good, because they can include costs related to water to increase their Regional Value Content determination. The point of NAFTA is not to define *goods*,

but rather to define "*originating* goods", because the focus is not whether or not something is a good, but *where* it is a good. If it is originating in a NAFTA party, and it is traded, then it is entitled to all the benefits and obligations that flow from the NAFTA. If not, then it cannot rely upon the NAFTA protections.

1.1.1 Article 301: National Treatment

The principle of national treatment, along with most-favoured-nation treatment and transparency, is stated in Chapter Three of the NAFTA as being a fundamental principle that should be used to elaborate the objectives specifically listed in sections (a) through (f). Article 102.2 states that the NAFTA is to be interpreted in light of the objectives listed in 102.1, and the rules of international law. Thus, national treatment, along with the other stated principles of most-favoured-nation treatment and transparency are keys to understanding the general and specific meaning of the NAFTA.[32] As well, they create specific rights.

As previously mentioned, Chapter Three sets forth the rules governing trade in goods. The national treatment obligation applies to trade in goods of a party, including goods dealt with under other chapters, unless exempted in an Annex or chapter provision.[33] The national treatment standard states that Canada, the U.S. and Mexico, including the provinces and states,[34] will each treat goods of the other countries the same as they would treat comparable goods in their own country.[35]

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32 *Supra*, note 15 at 71.

33 NAFTA, Article 300.

34 NAFTA, Article 301.2.

35 This has been interpreted as applying to imported goods once they are in the domestic country, that is, non-discriminatory treatment would apply only after the goods were allowed in accordance with applicable laws, regulations, or requirements of the domestic nation. There has been a push to expand this concept to the entry and establishment phases, particularly regarding investments, thereby creating a *right of establishment.* As one commentator has noted regarding application of the concept to investor rights, "This right would normally be subject to certain exceptions; in absolute terms, however, governments would be required to allow one hundred per cent foreign access and ownership in every economic sector. Any

This provision was enacted to minimize the use of special domestic taxes and other measures, which are designed to give preference to domestic products or create a disadvantage for imported products. For example, a national of another Party exports into Canada a product part or raw material, which is then assembled or finished with the assistance of vast quantities of local water, and then exported back to another Party. Canada could not discriminate against that company through imposing more restrictive water license terms or water use costs than have been normally applied against Canadian nationals. In addition, if extra treatment facilities are required to clean the water after use in processing, this cost would likely have to be borne by the local municipality, rather than being charged against the company, unless the licensing body or local government has a demonstrated history of off-loading costs of wastewater treatment to local industry.

It has been argued that national treatment would mean that U.S. interests would now be able to access Canadian water in exactly the same extent and under the same circumstances as Canadian nationals.[36] In response to these arguments, there has been legal opinion that the national treatment obligation applies only to imports; that this standard of treatment does not apply regarding the exports of a country, and therefore exports of water are not at risk by the national treatment standard.[37] Others have disagreed[38], with the remaining uncertainty likely due to the language of Article 301.1, which states "Each Party shall accord national treatment to the goods of another Party in accordance with Article III of the GATT...", that is,

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barrier to free foreign access and ownership in the domestic economy would potentially be open to an investor attack." Gus Van Harten, *Guatemala's Peace Accords in a Free Trade Area of the Americas,* Yale Human Rights and Development L.J. (2000) Vol. 3:113 at 134.

[36] Mel Clark, "A Response to Jon Johnson's Paper" in *supra*, note 12 Appendix A at 13.

[37] Barry Appleton, *supra* note 5 at page 203. See also Castel, *supra,* note 15 at 73.

import goods. This appears to suggest that the national treatment standard does not apply to goods of the Party itself (that is, export goods). If this is the case, it appears to be a change from the previous FTA, which applied to the trade in goods of a Party.[39] The NAFTA wording is more specific than that in the FTA, with the addition of the reference to "another Party". The application of Article 301 to both imports and exports would have the effect of limiting a Party's ability to enact measures against its own goods, in addition to goods that are imported.

The interpretation that national treatment applies solely to imports conflicts with the broad applicability of the standard as stated in Article 300. It also appears to be in conflict with a number of references in the Canadian, U.S., and Mexican Annexes to this Article, which reference the inapplicability of Article 301 to exportation from all three countries of logs, and the exportation from Canada of fish and liquor. The U.S. has stated that national treatment, as the fundamental statement of non-discrimination in the NAFTA, clearly applies to trade in goods.[40] Canada's interpretive statement is not helpful in clarifying this issue. It may be that a technical reading of this obligation could result in a situation where a U.S. company acquires water rights, which it then utilises to export water to meet U.S. needs. Given that Canada has granted numerous water licenses without export restrictions, and in fact has a number of arrangements whereby water is exported to the U.S.,

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[38] See the comments of Wendy Holm, in *NAFTA and Water Exports supra,* note 5 at 6.

[39] See Article 105 of the FTA, which states "Each Party shall, to the extent provided in this Agreement, accord national treatment with respect to investment and to trade in goods and services.

[40] North American Free Trade Agreement Implementation Act U.S. Statement of Administrative Action, *NAFTA Treaties*, (Oceana Publications: Dobbs Ferry, New York, 2002), Booklet 8 at 16.

which must by contract continue,[41] it is possible that any restriction of this nature on a U.S. company would be discriminatory.

Once again, the confusion likely stems from taking an overly narrow view and disregarding the purpose of both the NAFTA and national treatment. As shown above, these two elements must be viewed in tandem. The national treatment obligation was meant to address certain kinds of protectionist measures, in particular, those related to discrimination against goods from another country so as to give local goods an advantage. Protectionism relating to preferences for domestic goods can be enacted through measures taken to make it harder for imported goods to be competitive. These would include outright bans, or lesser restrictions such as performance requirements mandating domestic content, through measures taken to make it easier for domestic goods to be competitive, such as subsidies, or tax concessions. Prohibitions against exporting could impact an imported good that was destined, after subsequent manufacturing, for export and could constitute differential treatment of the two goods. It could also be argued that refusing to allow the

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[41] Canada, Inquiry on Federal Water Policy, *Final Report: Currents of Change* (Ottawa, 1985) at 125. This document reports three situations of permanent transborder water transfer: Coutts, Alberta to Sweetgrass, Montana; Gretna, Manitoba to Neche, North Dakota; and St. Stephen, New Brunswick to Calais, Maine. Further, the International Joint Commission in its report "Great Lakes Diversions and Consumptive Uses" January 1985, reviewed four more existing diversions: the Long Lac and Ogoki diversions, the Lake Michigan Diversion at Chicago, the Welland Canal, and the New York State Barge Canal. David Johansen, in *Water Exports*, *supra* note 5, agrees with this report in arguing that these situations, and also including supertanker exports, are not large enough to invoke issues of national concern and therefore are not water exports in the true sense. With respect, this is not a valid argument. All waters that leave Canada are relevant regardless of quantity. The definition of an "export" does not have a quantity parameter. Small quantities of water may not impact the ability of Canada to legislate, but it will not change a characterization of the cross-border movement of the water as an export.

In addition, the Columbia River Treaty mandates the transfer of water from the Arrow River to the Columbia River and then to the United States for their irrigation and power generation needs. This treaty specifically prohibits Canada from diverting any of this water from the Columbia back to Canada.

exportation of a good that is in direct competition with a similar imported good of another Party constitutes an unfair increase in the level of competition experienced by the imported good. This was in fact the case regarding the *S.D. Myers* case, where an export ban was validly enacted against the export of P.C.B.'s to the U.S. This ban applied against both Canadian and American companies, of course, but was held to be a violation of the national treatment provisions of Chapter 11, in that it had a discriminatory impact against American companies who needed to export the P.C.B.'s in order to process them.

A situation involving water could easily arise. For example, extensive facilities already exist in Canada regarding the bottling and export of water.[42] Plastic water bottles could be imported into Canada from the U.S., filled with bottled spring water in Calgary, and then exported to Mexico; but then Alberta brings a measure prohibiting the export of water (in any quantity) from the Albertan watershed. This could violate the national treatment standard: like goods must be treated in like fashion, and Canada created a level of competition for the U.S. firm that didn't previously exist, or eliminated a market (i.e., if the export market was the only market that that firm accessed).

One possible reason why national treatment does not specifically refer to export goods in the NAFTA is that they are already bound by the obligations inherent in the general purposes of the NAFTA, and the specific prohibitions against export restrictions contained in Article 309.1. This article states:

> Except as otherwise provided in this Agreement, no Party may adopt or maintain any prohibition or restriction on the importation of any good of another Party or on the exportation or sale for export of any good destined for the territory of another Party, except in accordance with Article XI of the GATT, including its interpretive notes....

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[42] There is extensive data on water export quantities and values from 1988 to 1998 at the trade website of the University of Toronto: http://www.datacentre.chass.utoronto.ca/

Article XI of the GATT prohibits any form of restriction (other than duties, taxes or other charges) by a Party against their own exports, or the imports of others into their country. If no form of restriction is allowable, then preferential treatment of either imports or exports cannot be allowable. In the above example, this would mean that the export prohibition regarding the Albertan watershed would be in violation of the NAFTA and GATT as a discriminatory action.

There are two important exceptions to this, in Article XI and Article XX of the GATT. Article XI, section 2(a) allows an export prohibition if it is applied temporarily, and is intended to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting Party.[43] This would not likely include shortages experienced on a regional basis, for example, those water shortages experienced in the province of Alberta in the summer of 2002, because these could arguably be relieved by water sources in other parts of the country. It would likely have to be a nation-wide shortage in order to be considered a valid "critical shortage". In addition, one would have to concede that water was a "product" in order to rely upon this section.

Article XX allows the adoption of measures that:

- Are necessary to protect human, animal or plant life or health (section (b));
- Relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restriction on domestic production or consumption (section (g);
- Essential to the acquisition or distribution of products in general or local short supply, providing the measures recognizing that all Parties are entitled to an equitable share of the international supply of the products (section (j)).

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43 GATT Article XI: 2(a).

Section (g) of Article XX provides the greatest opportunity to successfully support a measure in violation of Article XI. As noted by Isabel Dendauw:

> It is clear that Article XX (g) of the GATT could provide a justification for as violation of Article XI of the GATT. However, there is a fair amount of controversy as to whether ore not water in its natural state falls under Article XX (g) of the GATT. More exactly, the question is whether or not surface water qualifies as an 'exhaustible' resource and whether the latter term was intended to be restricted to non-living finite resources such as oil, gas, or coal. According to the 1996 *Reformulated Gasoline* case, the renewability of a resource does not prevent the resource from being exhaustible. In that case, the U.S said this could apply to lakes. In the 1998 *Shrimp-Turtle* case, the term 'exhaustible' has been interpreted broadly, and this leads to the conclusion that the Great Lakes could be considered an 'exhaustible natural resource' within the scope of Article XX (g).[44]

Other writers are of the view that even though it appears to provide a necessary counter-balancing perspective to the general supremacy of the free trade goal, it would not apply to most circumstances that are environmentally significant.[45] In particular, that Article (g) must be "primarily aimed" at the "conservation" of exhaustible natural resources. As the GATT panel in the *Salmon and Herring* case found:

> The panel noted that some of the subparagraphs of Article XX state that the measure must be "necessary" or "essential" to the achievement of the policy purpose set out I n the provision (cf. subparagraphs (a), (b), (d) and (j) while subparagraph (g) refers only to measures "relating to" the conservation of exhaustible natural resources. This suggests that Article XX (g) does not only cover measures that are necessary or essential for the conservation of exhaustible natural resources but a wider range of measures. However, as the preamble of Article XX (g) indicates, the purpose of including Article XX (g) in the General Agreement was not to widen the scope for measures serving trade policy purposes but merely to ensure that the commitments under the General Agreement do not hinder the pursuit of policies aimed at the conservation of exhaustible natural resources. The panel concluded that for these reasons that, while a trade measure did not have to be necessary or essential to the conservation of an exhaustible natural resource, it had to be

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[44] Denduaw, *supra,* note 28 at 14. See also Jon Johnson in *Canadian Water Exports and Free Trade*, *supra* note 7, for another perspective in support of the usefulness of Article XX exemptions.

[45] *Supra,* note 36, Appendix A at 8 - 11.

primarily aimed at the conservation of an exhaustible natural resource to be considered as "relating to" conservation within the meaning of Article XX (g).[46]

There is one final exception to applicability of Article XX of the GATT. Chapter 21 of the NAFTA, Article 2101 provides that GATT Article XX applies to Part Two (Trade in Goods) and Part Three (Technical Barriers to Trade), again with qualifications. Article XX does not apply to any services or investment provisions in Part Two: Trade in Goods, and that it does not apply to any investment provisions relating to Technical Barriers to Trade (Part Three).

Even if successful in meeting the requirements of Article XI: 2(a) or XX, this is limited under NAFTA by Article 315, which requires that the measures:

- Be applied to domestic supplies *in the same proportion* as to exports (i.e., this increases the GATT responsibility from "equitable share");[47]
- Be the same price domestically and as an export (i.e., new requirement not in GATT); and,
- Not disrupt normal channels of supply, or the "normal proportions" among goods supplied by export (i.e., new requirement not in GATT).

Therefore, any law whose purpose is the general restriction of export of water, for example through forbidding the general removal of water out of the water basin,[48] would:

- Be in contravention of GATT Article XI, as a "non-temporary, non-critical" export restriction;
- Likely not meet the standard set out in Article 315.1, as a disruption of supply, and certainly as a violation of the

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[46] Report of the Panel, *Canada Measures Affecting Exports of Unprocessed Herring and Salmon*, adopted on March 22 1988 (L6268 – 35S/98) at para.4.6.

[47] Based upon the proportion prevailing in the last 36-month period prior to the imposition of the measure.

[48] For example, as with the Manitoba *Water Resources Conservation and Protection and Consequential Amendments Act*, C.C.S.M. c.W72.

proportionality aspect (if applied in practice against a U.S. or Mexico-bound removals in hopes of meeting local needs);

- If the law was used to restrict the activities of an American or Mexican company in Canada without equal application against Manitoba companies, it would also violate the national treatment obligation.

While some have argued that application of the national treatment obligation to exports should be understood from the text of Annex 301.3 (which is contradictory in its wording[49]), it really does not impact the final scenario regarding Canada's rights to restrict exports. As previously discussed, Canada cannot restrict exports due to other articles under the NAFTA and the GATT that give effect to the principle of non-discrimination. Even government "encouragement" to restrict or minimise exports through support of VER's (voluntary export restraints) would likely be an infringement of the GATT and the NAFTA.[50]

1.3 Chapter Six: Energy and Basic Petrochemicals

Chapter 6 of the NAFTA deals with Energy and Basic Petrochemicals. Unlike other chapters, this chapter begins with a statement of principles that confirms the parties "full respect for their Constitutions".[51] In this section, the parties further assert their agreement that, despite these limitations, it is important and desirable to strengthen and enhance their level of trade in energy.[52] In particular, this chapter expresses in NAFTA terms the desire of the United States to ensure freer access to long-term sources of energy from Canada. The Commission for Environmental

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[49] See NAFTA, Annex 301.3 Section A – Canadian Measures, sections 1, 2, and 3 (b) provide that Articles 301 and 309 do not apply to controls on the exports of logs, unprocessed fish, and certain liquor exports.

[50] For more on this topic see John H. Jackson, "Consistency of Export-Restraint Arrangements with the GATT", in *The Jurisprudence of GATT and the WTO* (Cambridge University Press: Cambridge, U.K. 2000) at 69 – 86.

[51] See NAFTA, Article 601.1. This provision is due to sensitivity of the parties to the reality that under the Mexican Constitution electricity is predominantly a national enterprise.

Cooperation ("CEC"), the secretariat body created by the environmental side agreement to the NAFTA,[53] recently published a report on the challenges and opportunities facing the electricity sector in North America, in which it includes a "Statement and Recommendations of the CEC Electricity and Environment Advisory Board". It states:

> Once a visionary idea, the prospects for developing an integrated North American electricity market have never been better. Though not widely recognized, continental energy links have proliferated over the last two decades, spawning a complex array of cross-border transactions and relationships. Indeed, the sale of electricity by a British Columbia marketer to Baja California, the construction of the 2,300-mile Alliance Pipeline to transport natural gas from western Canada to Chicago, and the fact that the size of the snow pack in eastern Canada directly influences wholesale electricity prices in the US north-central and New England states, provide eloquent testimony to our growing regional connectivity.[54]

This statement highlights two points of note; that there is already a high level of trade in electricity between Canada and the United States, and that it is the apparent desire of governments that this increase. This latter sentiment is expressed by the Parties in the first Article of Chapter Six, which states the goal to achieve "sustained and gradual liberalisation" in the energy and petrochemical sectors. This is further supported by the projected gross increases in U.S. trade in electricity provided in the CEC report, and reproduced in Table 1, below.

Table 1: United States Projected Gross Trade in Electricity (thousand GWh)

	1999	2000	2001	2002	2003	2004	2005	2006	2007
Imports from Canada and Mexico	38.9	47.9	48	45.5	57.6	60.3	66.1	57.9	54
Gross Exports	13.5	13.0	13.1	13.1	12.7	16.6	16.7	16.8	16.9

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52 *Supra,* note 10 Articles 601.2 and 601.3.

53 That is, the North American Agreement for Environmental Cooperation (NAAEC).

54 Commission for Environmental Cooperation, "Environmental Challenges and Opportunities of the Evolving North American Electricity Market", (Commission for Environmental Cooperation: Montreal, Canada, 2002) at 30.

Source: Energy Information Administration (EIA) Annual Energy Outlook, 2002

The report states:

> Utilities, private developers and energy planners currently have announced plans (as of August 2001) to build nearly 2,000 new power generating units in North America by the year 2007. This represents roughly a 50% increase over current installed capacity.[55]

In Canada, over 5300 MW are targeted through new hydro development alone.[56]

As mentioned, the NAFTA refers to electrical energy in Chapter Six, and it is also included in the HS list. The HS also lists other items generally utilised for energy, such as petroleum items like natural gas and propane. Electrical energy, like liquid natural gas and liquid propane, are Staging Category "D" items, meaning that at the time of the NAFTA ratification, these goods were already duty-free and would remain so.[57]

Item	Article Description	Staging Category	Base Rate
27.11	Petroleum gases and other gaseous hydrocarbons		
	-Liquefied:		
2711.11.00	--Natural gas	A	8%
2711.12	--Propane		
2711.12.10	---In containers ready for use	C	8%
2711.12.90	---Other	D	Free
2716.00.00	Electrical energy.	D	Free

Owen Saunders has presented the interesting and plausible suggestion that the production of hydro-electricity, which involves the use of huge quantities of water

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55 *Ibid.*, at 12.

56 This figure is compiled from figures provided in the map shown *Ibid,* at 12.

57 Note that propane, in containers and ready-to-use, was charged a duty when exported (this was gradually phased-out to elimination as of January 1, 2003). This meant that liquefied propane and natural gas that was not in containers and not

and results in massive consequences for the health of the surrounding and downstream ecosystems, is a *de facto* water export and may be subject to trade agreements such as the NAFTA. He comments (originally regarding the FTA but also applicable to the NAFTA):

> It is true that hydroelectric exports do not normally result in the physical export of water. From the point of view of a water manager, though, they can lead to much the same result. This is most obvious in a case such as the Columbia, where Canada committed itself to managing long-term flows in accordance with the downstream needs of American hydroelectric production. However, even the commitment of purely Canadian-generated hydroelectricity under long-term contracts can effectively tie up Canadian water sources for decades.
>
> [Due to the constraints of the FTA] As Canadian demand for electricity grows, it will not be possible to simply to add to domestic supply by refusing to renew expiring export contracts. Rather, there will be pressure to add new capacity, and if past experience holds true, much of the financing for such new capacity would be predicated at least partially on further guaranteed export sales. In this way, the agreement could encourage a ratcheting up of the level of water development activity in Canada and increase the pressure to consider environmentally borderline projects. Without exporting a drop of water to the United States, Canada could find its ability to dictate the use of its water resources severely constrained.[58]

Chapter Six of the NAFTA applies to measures related to energy as a good, and as a subject of investment. It specifically provides that the requirements of non-discrimination, and prohibition against import, export, and tax restrictions, apply to the energy and petrochemical industry.[59] It also references the applicability of all these disciplines to not only energy as a good, but also the regulation of the industry.

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ready for use (for example, natural gas transported through a pipeline) was not subject to any form of duty, and remains subject to other NAFTA provisions.

[58] Owen Saunders, "A Legal Perspective on Water Exports", *Water and Free Trade*, ed. Wendy Holm, (James Lorimer and Company, Publishers: Toronto, 1988) at 71.

[59] NAFTA, Article 606.

Article 606[60] states the Parties agree to "allow existing or future incentives" for the industry in order to maintain the reserve base. Presumably, this is a statement of a commitment to allocate financial incentives, even ever-increasing incentives in the case of increasing exploration and development costs or other barriers, to maintain viable energy reserves.[61]

4 CHAPTER SEVEN: AGRICULTURE

Chapter Seven of the NAFTA deals with agricultural goods and sanitary and phyto-sanitary measures. This chapter contains within it a list of definitions in Article

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[60] Given that the national treatment requirement is specifically directed at "measures", Article 606 would appear redundant, but is likely intended to ensure that energy is accessible by all.

[61] *Supra,* note 2 at 8, where the highly likely impacts of climate change on hydroelectric development are detailed as follows:

> Another major demand on water resources is hydroelectric power generation, which fulfills approximately two-thirds of Canada's electricity requirements. Studies suggest that the potential for hydroelectric generation will likely rise in northern regions and decrease in the south, due to projected changes in annual runoff volume. For example, lower water levels are expected to cause reductions in hydro generation in the Great Lakes basin. An increase in annual flows, however, will not always lead to increased hydro production. Increases in storms, floods and sediment loading could all compromise energy generation. In western Canada, changes in precipitation and reduced glacier cover in the mountains will affect downstream summer flows and associated hydroelectric operations. Moreover, changes in the ice regimes of regulated rivers will likely present the hydro industry with both opportunities, in terms of shorter ice seasons, and challenges, from more frequent midwinter break-ups. The seasonality of the projected changes, with respect to both the availability and demands for water resources, is another important factor. For example, during the summer months, lower flow levels are projected to reduce hydroelectric generation potential, while more frequent and intense heat waves are expected to increase air-conditioner usage and therefore electricity demand. Demand for hydroelectric power exports is also likely to increase in the summer, due to increased summer cooling needs. Increased demand in any or all of these sectors would increase the conflict between alternative water uses, including in-stream needs to retain ecosystem sustainability. Improvements in water use efficiency may be required to prevent the extinction of some aquatic species and the degradation of wetlands, rivers, deltas and estuaries.

708 (for the purposes of that chapter), which includes a definition of Agricultural goods. This definition states: "Agricultural goods means a good provided for in any of the following: a) Harmonized System (HS) Chapters 1 through 24...". This is further evidence of the use of water in a production process, in this case irrigation water, and the applicability of the NAFTA to this type of water use. It appears to extend the definition to make water an "agricultural good," thus making it subject to the requirements of Chapter Seven.

One such requirement is in Articles 704 and 705. These articles highlight the fact that the agricultural industry is heavily subsidised in the three Parties, and that these measures are often of critical importance in maintenance of the viability of local producers. One area in which farming is heavily subsidised is in its water use, which costs currently do not reflect the real cost of the vast quantities of water that are routinely used, for example, in the irrigation and animal and food processing stages. The agricultural sector has fought strenuously against the imposition of more accurate water pricing.[62] These two articles commit to the elimination of all export subsidies, and to reduction in any domestic support that could have any trade or production disruption effects. This would appear to create an obligation to create more accurate water pricing in the agricultural industry.

5 PART FIVE: INVESTMENT, SERVICES AND RELATED MATTERS

5.1 Chapter Eleven: Investment, Services and Related Matters

This chapter has been the cause of great concern among many groups since the inception of the NAFTA, with concern increasing more recently as the NAFTA panels interpret its provisions in a manner that results in the appearance of great

intrusions into the Parties' rights to implement domestic legislation or policies to protect the environment.[63]

Chapter 11 applies not to goods but to investments and investors. As such, the question about whether water is a good under the NAFTA becomes irrelevant under this section. Unlike Chapter 3, Chapter 11 applies to both imports and exports, and is specifically exempted from access to the GATT Article XX exceptions.

Investors are defined as Parties, nationals, or enterprises that want to, are making, or have made an investment.[64] Thus it is retroactive. This definition also encompasses present and future investment activity, including investment intentions. Given the breadth of this definition, the meaning and scope of "investment" becomes critical to an understanding of the application of this chapter. Investment is very broadly defined in Article 1139 as an enterprise (a business); most equity securities, debt securities, or loans to an enterprise; an interest that entitles the owner to a share in the profits of an enterprise or the assets upon dissolution of the enterprise; real estate bought in expectation of business; and "interests arising from the commitment of capital or other resources to an economic activity". This definition includes foreign direct investment (FDI) in businesses, and portfolio investments (stocks and bonds). The *S.D. Myers* case made clear that the scope of the term "investment" is broad, and implied (but left open) that it could also include market access and market share in a sector.[65]

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62 Sandra De Aquino, *Water Resource Allocation in Canada (Manitoba) and Brazil (Ceara): Legal and Institutional Impacts on Bulk Water Removal,* LL.M. Thesis, (Winnipeg: University of Manitoba, 2001)

63 NAFTA Chapter 11 cases have been accused of impacting other spheres, such as human health, but this topic is beyond the scope of this thesis.

64 NAFTA, Article 1139.

65 *S.D.Myers, Inc. and The Government of Canada*, *S.D. Myers, Inc.* v. *Canada*, Final Award on Merits, November 13, 2000 available at www.naftalaw.org as of January 27, 2004 at para. 232. Despite this, Given the large role that governments

Chapter 11 applies to "measures" adopted or maintained by a Party relating to investors or their investments.[66] Measures are defined in Chapter 2 as "any law, regulation, procedure, requirement or practice".[67] *S.D. Myers* held that "relating to" should be interpreted broadly and that nothing in the NAFTA or Chapter 11 gave any indication that it should be narrowed to a standard that limits the application of the section in any way. Thus, measures that "affect", even "incidentally" or "inadvertently" may be discriminatory.[68] The Tribunal, relying on *Pope and Talbot*,[69] found that "different chapters overlap and the rights it provides can be cumulative"; in particular, that a measure aimed at goods could also be a measure relating to an investor by virtue of the fact that the investor has invested in the goods.[70] This means the fact of investment in any good provides Chapter 11 protections against any measure that may be discriminatory. While this may seem just on its face, it broadens the application of Article 1101 (Scope and Coverage) well beyond the original wording, effectively negating the words "relating to", and removing the requirement of the investor to demonstrate that the measure was "related to" their investment. Essentially, any measure, which happens to deal with an economic area that has investment, will be subject to Chapter 11 protections.

Certain sections apply [environmental measures adopted by the Party (Article 1114) and the prohibition of performance requirements (Article 1106)] against all investments in the Party, that is, not just investments of another Party. Therefore,

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continue to play in the distribution of water, including directly or indirectly discharging the responsibility for provision and maintenance of water infrastructure, it is important to note that NAFTA Article 1139 provides that debt securities of government 'enterprises' and loans to government 'enterprises' are not included in the definition of investment.

66 NAFTA, Article 1101.

67 NAFTA, Article 201.

68 *Supra,* note 65. See paras. 47 – 64 of the *Separate Opinion of Dr. Bryan P. Schwartz* that was concurring with the partial award of the panel on this point.

69 *In the Matter of Pope and Talbot, Inc. and the Government of Canada* Interim Award of June 26, 2000 at para. 104.

Canada may not impose any restrictions in the form of performance requirements against any investment (from any source in the world) in Canada, as detailed by Article 1106. In certain circumstances, this extends to not making 'advantages' granted conditional on any kind of performance requirement. This article provides two environmental exceptions where measures will not be construed as imposing an illegal performance requirement:

- A measure that requires an investment to use technology that meets generally applicable health, safety and environmental requirements,
- A measure that is necessary to:
  - To protect human, animal or plant life or health,
  - For the necessary for the conservation of the living or non-living exhaustible natural resources,
  - Necessary to ensure compliance with laws or regulations that are not inconsistent with NAFTA.

There are a number of investment protections provided by Chapter 11, in particular, national treatment[71] or most-favoured-nation treatment[72] (whichever is higher standard in the particular circumstance), minimum standard of treatment,[73]

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70 *Supra*, note 65 at paras. 294 – 295.

71 This standard is discussed more fully in Chapter 4.

72 This treatment, originating in GATT Article I.1, refers to the obligation to provide to the goods of one Party, treatment (defined as any advantage, favour, privilege, or immunity) at least as good as your best treatment of any other Party. As stated *ibid.*, note 15?Castel or 50? Jackson at page 27:

> No other article of the GATT has such a significant and wide-reaching impact. By virtue of this article, any tariff concession made by one tariff member to another is immediately and unconditionally made available to all other WTO members. A single concession is transformed into 120 concessions without others having to offer any reciprocal benefit, thus crating potentially new trading opportunities for all of the states.

73 This refers to the international law standard to treat investments of investors in accordance with international law, which includes, but is not limited to "fair and equitable treatment", and "full protection and security". In *S.D.Myers*, *supra,* note 65 at paras. 259 – 269, the tribunal held that in order for there to be a breach of this obligation as set out in NAFTA Article 1105, it must be of such a nature that it is

prohibition against performance requirements,[74] and prohibition against mandating appointments of senior management and boards of directors to enterprises that are investments.[75] These provisions (other than minimum standard of treatment which continues to apply) do not apply if they are specifically exempted in Chapter 11, or in any of the Annexes to the NAFTA. The relevant Annexes do not contain any exemptions related to water use or export in any form.[76]

Likely the most controversial section of the NAFTA are Articles 1102: National Treatment and 1110: Expropriation and Compensation. The national treatment obligation applied to investments is:

> Each Party shall accord to investors [and, investments of investors] of another Party treatment no less favourable than it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

The requirement for this treatment is a very broad right, as recognised by Isabel Dendauw in the following passage:

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elevated to the realm of international law. Not every egregious measure of government will qualify, especially given the "high measure of deference that the international law generally extends to the right of domestic authorities to regulate matters within their own borders". The determination must take into account any applicable rules of international law.

A breach of another provision of NAFTA, for example as in the *S.D.Myers* case, *supra,* note 65, which dealt with NAFTA Article 1102, does not mean a breach of 1105 has occurred. However, the tribunal seemed to leave the door open for this interpretation by holding, at para. 266, that a breach of Article 1102 "essentially establishes" a breach of Article 1105. (This would appear to suggest that individual clauses of NAFTA have been elevated into the realm of customary international law.)

[74] These are requirements for an enterprise or investment to do certain things, usually activities that ensure some benefit for local industry, in order to be able to access import or export markets. It is considered to be an illegal restriction on trade.

[75] Barry Appleton comments in *supra,* note 5 at 82, that the inclusion of senior management (in addition to other requirements) touches on "sensitive domestic sovereignty issues" in Canada. In his opinion, NAFTA clearly limits government regulation in investment. Regarding the appointment of corporate directors, it states that a majority of corporate directors must be of a particular nationality, but prohibits any such requirement regarding the senior management of an enterprise.

[76] These Annexes are discussed in greater detail in the next chapter, Chapter 4: NAFTA and Aboriginal Water Rights.

> The disciplines of Chapter 11 of the NAFTA apply to Canadian water resources, including access rights to Canadian water in its natural state. Once governments allow water to be withdrawn from its natural state – as they have done on numerous occasions for purposes that include large scale industrial uses to personal consumption – the same rights will then have to accorded to foreign investors. This is a consequence of the national treatment obligation to be found in Article 1102: [Article text omitted here]. The requirement of national treatment at the stage of the establishment of investment is clearly an obligation that goes beyond that recognised by customary international law.[77]

According to Barry Appleton:

> Thus, if governments prohibit water exports, they will not be able to insulate themselves from NAFTA investor-state tribunals or dispute settlement panels.[78]

As mentioned above, one of the special and highly controversial sections of Chapter 11 is the expropriation provision. Article 1110 applies not only to expropriation but also to acts that are "tantamount to expropriation". Neither of these terms is defined in the NAFTA. Article 1110 states that the expropriation, in order to be valid, must be for a public purpose, be on a non-discriminatory basis, be in accordance with due process of law and the minimum standard of treatment, be accompanied by the (prompt) payment of compensation.

Steven Shrybman has noted that:

> While it is true that under Canada's constitution, with the exception of certain northern waters, the provinces own Canadian water resources, these proprietary rights are not unqualified. Countless individuals, private and public corporations have broad rights as riparian users, or as licensees under federal and provincial permits. It is entirely possible that a foreign investor seeking to exercise such rights for the purposes of bulk water export might assert a claim that any denial of the opportunity to do so represents expropriation within the expansive terms of Article 1110.[79]

In the *Metalclad v. Mexico*[80] case, the tribunal[81] held that a NAFTA expropriation includes:

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77 *Supra*, note 28 at 16.

78 *Supra*, note 5 at 204.

79 *Supra*, note 2 at 4.

80 *Metalclad Corporation v. the United Mexican States*, ICSID Case No. ARB (AF)/97/1.

> ... not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit to the host state. (paragraph 103) [82]

The tribunal used the scale-of-impact test formulated above and was upheld upon judicial review on its finding that it:

> "need not decide or consider the motivation or intent of the adoption" of the measure.[83]

One concern with this approach is expressed by Howard Mann:

> [In referring to *S.D. Myers*] Unfortunately the decision creates a genuine ambiguity; it states that the main reasoning that the measure in that case does not amount to an expropriation is that it is a temporary one with a temporary impact. One implication is that if the measure had been permanent, it would have been considered confiscatory even though it was the kind of government action usually considered a legitimate exercise of police power.

The most critical point of these cases is that they turn to scale-of-impact as the critical test of whether governmental action amounts to expropriation. This approach not only limits the scope of the police powers rule, but also would effectively eliminate this traditional international law test from consideration in the review of an international law case. Following this reasoning, regardless of the purpose, compensation must be paid if there is a significant impact. This is alarming since *any environmental law worth adopting* will affect business operations and may often end the use of, or trade in, certain products, and therefore will have a significant impact on the business in question. This would reverse a well-accepted

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81 This finding was not considered on judicial review as a finding of law with which the Court could not interfere under the *International CAA*. See The *United Mexican States* v. *Metalclad Corporation*, Docket: Vancouver L002904, 2001 BCSC 664 at para. 99. It did agree that the tribunals definition was very broad, and mused that it would include "a legitimate rezoning of property by a municipality or other zoning authority."

82 *Pope and Talbot, supra,* note 69, adopts the same reasoning.

83 *Ibid.*, note 80 at paras. 82 – 83.

tenet of sound environmental policy: that polluters should bear the cost of their pollution, rather than enjoy a right to be paid not to pollute.[84]

6 CHAPTER TWELVE: CROSS BORDER TRADE IN SERVICES

Chapter 12 of NAFTA applies the national treatment standard, most-favoured nation treatment, prohibition on local presence requirements, to the cross-border provision of services, except those exempted in Chapter 12 or Annexes I or II. There is no definition of services, and the application of the chapter is regarding any measures taken by a Party regarding a service, including:

- Production, distribution, marketing, sale, and delivery of a service;
- The purchase or use of, or payment for, a service;
- Access to and use of distribution and transportation systems in connection with services;
- The presence of another Party's service provider in the territory of the Party;
- The provision of a bond or other financial security as a condition of providing the service.

No exceptions relate to water in either of these annexes. Provisions in these Annexes that may relate to Aboriginal peoples are the subjects of the next chapter.

7 AN ALTERNATE APPROACH

Despite the effectiveness of the arguments supporting the assertion that "the NAFTA covers water", they may be the correct answers to the wrong question. A more helpful question is to ask: what is the purpose of the NAFTA? The over-riding purpose of the NAFTA is to abolish all forms of trade discrimination, and to provide greater security to investors from Canada, the United States or Mexico when they

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[84] Howard Mann, *Private Rights, Public Problems*: *A Guide to NAFTA's Controversial Chapter on Investor Rights* (International Institute for Sustainable

make investments in these countries. The first article of the NAFTA states that the parties to the NAFTA, through this agreement, establish a free trade area as the only purpose of the NAFTA, creating the free passage of every item and every service that crosses a North America border. The target is complete and full free movement of all North American goods and services by 2008.[85] The parties agreed to the terms of the NAFTA given their existing resolve, stated in the Preamble, to expand world trade, create a secure market for the goods and services produced in their countries, reduce trade distortions, create a predictable framework for business planning and investment, and promote sustainable development.

Through NAFTA a free trade area was established. The primary method for achieving completely free trade is through negative and positive integration - the elimination of existing barriers to trade - and regulatory integration. This is accomplished by eliminating tariffs, the primary method by which countries restrict both imports and exports of targeted goods, and by converting other forms of barriers, such as subsidies and taxes, to tariff form, and then gradually eliminating them.

Although, as demonstrated above, there exists strong evidence demonstrating that water is in fact part of the list of goods covered by NAFTA, this exercise misses the point, which is that all North American goods are covered by NAFTA, even those that do not yet exist or that do not have any current tariff barrier. The goal is the free trade of all North American goods, and even if a good is not listed in the tariff listings it is a subject of the NAFTA if it is traded. If for example, one were to begin trading bottled water today, that activity would be entitled to the

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Development: Winnipeg, 2001) at 32 – 33.

[85] It accomplishes this through prohibiting the creation of any new tariffs in NAFTA Article 302.1, and mandating the progressive elimination of customs duties in NAFTA Article 302.2. As well, see Ralph H. Folsom and W. Davis Folsom, *NAFTA Law and Business*, (Kluwer Law International: Boston, 1998) at 3-15.

protection of free trade guaranteed under the NAFTA. If one were to begin to trade a "just-invented-not-ever-listed-in-the-NAFTA-tariff-schedules" widget, it would similarly be entitled to duty free border crossings, given the protection provided in Article 302.1. The issue is not whether or not NAFTA applies to water, because it does, just as it does to any other processed or unprocessed good in a NAFTA party. This latter point is clearly acknowledged by the parties in their joint statement regarding the applicability of the NAFTA to water.[86] Further, the *North American Free Trade Implementation Act*[87] states:

> (1) For greater certainty, nothing in this Act or the Agreement, except Article 302 of the Agreement, applies to water.
> (2) In this section, "water" means natural surface and ground water in liquid, gaseous or solid state, but does not include water packaged as a beverage or in tanks.

While this is merely a statement of the domestic position regarding the inclusion of water in the NAFTA, and therefore cannot legally modify the NAFTA, it has been offered as an indication that the NAFTA does not apply to water in its natural state. A close reading[88] of the sections indicates that in the view of Canada:

- All of the NAFTA clearly applies to water that has been packaged as a beverage or in tanks;
- Article 302 of the NAFTA (which is the Article that deals with the commitment to prohibit all new tariffs on originating goods, and eliminate, through progressive reduction, existing tariffs) applies to natural surface and groundwater in liquid, gaseous or solid state.

It is important to note that no section of the NAFTA could apply if water (that is, natural surface and groundwater in liquid, gaseous or solid state) was not considered either a traded or tradable good, or service, or subject to investment

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86 *Supra*, note 4.

87 *North American Free Trade Implementation Act*, S.C., c.44, section 7.

88 Section 7 (1) also appears to create a problem whereby it states that the entire Act, presumably including section 7 itself, does not apply to water. In this case, any assistance that the Act may have provided may have been eliminated due to a drafting error.

interests. Given this, nothing can restrict the application of the NAFTA to water to just Article 302, except an amendment to the NAFTA to that effect. This has not happened. There is therefore a very strong argument to be made that this legislation makes clear that all water, in the view of Canada, is governed by NAFTA.

Barry Appleton and others have stated that the NAFTA applies to water in its natural state,[89] (just as it does regarding coal, natural gas, propane, and many other items found in their natural state), but he qualifies this statement by adding that only when water is traded, would it be "covered" by the NAFTA.[90] The issue is presumably that the rights and obligations of the NAFTA are implemented or felt only when water is actually traded.

If this is the case, it now becomes clear that an important question that needs to be answered is the following: "is water traded"? One source of information regarding water use can be found in the water licenses granted by a province. A review of the British Columbia government website provides a table of all water licenses in that province.[91] Earlier in this chapter another author provided statistics from 1994, and a current review indicates that there remain vast numbers of water licenses. For example, there are dozens of water use categories for which water

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89 Barry Appleton, *supra*, note 5 at 201.

90 Barry Appleton argues in *supra,* note 5 at 202 (note 55), that when water is not traded it is dealt with under other international agreements relating to boundary waters, such as the *1909 Treaty relating to* B*oundary Waters and Questions arising along the Boundary between Canada and the United States* (commonly referred to as the *Boundary Waters Treaty* (BWT)). With respect to this assertion, water that is traded could be dealt with under both agreements simultaneously, there is nothing in the BWT that states that matters coming within the purview of that treaty are solely governed by that treaty. It is not unlikely that a particular water diversion or water transfer (particularly if it involves any economic valuation of the water, or involves any private sector investment) could require the involvement of both governments under the requirements of the BWT and also be subject to NAFTA. The NAFTA is not an environmental approvals process, nor is the BWT an agreement to regulate the trade in water. Both would be applicable.

91 Available at the Government of British Columbia's Land and Water British Columbia Inc. website as of February 18, 2004 http://lwbc.bc.ca/water/surface.html.

licenses may be given, ranging from domestic use such as lawn watering and public swimming pools, to power generation, pulp mills and processing. In particular, there are forty-three licenses regarding water bottle sales, five of which are still in the application stage (but are listed as having been cleared), seven more are approved but are awaiting signature, and thirty-one are active. These licenses allow over 5.8 million gallons per day, from various sources within British Columbia, to be bottled for sale and consumption. The licensee's are all Canadian companies, but not all are resident within British Columbia. The final destination of these bottles of water is not indicated, but the intention for sale is clear. In addition, Alpine Glacier Water Inc. has an active license to export 200 acre/feet per year by marine export (that is, export by supertanker). There are thirty-two licenses for water delivery held by numerous forestry, lumber, water bottling, and individual interests. There are 190 licenses under the "processing category", which include numerous industries such as fish processing, mining and smelting, concrete processing, oils and gas development, and forestry operations. There are licenses for power generation. These licenses allow for the total use of billions of gallons of water per day in the production processes of the licensees.

In Manitoba, it is not possible to determine the total quantity of water used per day according to granted licenses as this information is not publicly accessible, but the situation can be looked at from an alternate perspective, that of extent of "economic" control over water systems. According to this approach, if water was under the control of an economic entity for economic purposes, it could be argued that regardless of the current location of the water, it has entered into trade. In Manitoba, very large quantities of the water in the province are under the full control and regulation of Manitoba Hydro; Lake Winnipeg and the Churchill, Nelson and other smaller connecting rivers have been under their full control for over thirty years, through an extensive series of generating stations, channel diversions, and control structures created for the sole purpose of power production. A large quantity

of this power has been generated for export, and all future power will be generated solely for export to the United States. A strong argument could be made that this water, as water if not indirectly as electricity, is subject to the NAFTA.

The use of water in all of these industries is critical; in fact, many of them would not be able to produce their products without extensive access to water sources.[92] As indicated earlier, materials that are used in the production, testing, or inspection of a good, but not physically incorporated into the good are originating goods under Article 415. Water is used as an originating good in the water bottling and marine export industries, and an indirect material in the production of electrical energy and in the processing stage of numerous industries. Both of these types of goods receive the benefits and protections of the NAFTA, and both are subject to all provisions of the NAFTA unless specifically exempted.

This is also the view of the Canadian government, clearly expressed in the documentation surrounding the amendments to the *Boundary Waters Treaty of 1909*. According to Johansen, the government:

> ...Agrees that measures need to be taken to protect the integrity of Canada's water resources but feels that this would best be achieved by its strategy of prohibiting the bulk water removal from all major drainage basins in Canada.[93]

Further, he states that the government argues that:

> ...nothing in Canada's international trade obligations would require approval to be given to future projects for the bulk removal of water for export, just because previous projects of this kind received approval. It notes that Canadian governments, federal and Provincial, retain full sovereignty over the management of Canadian water in its natural state. According to the government, water in its natural state is not a good and therefore is not subject to trade obligations. The government maintains that "From the standpoint of trade obligations, the fact that the government has allowed the

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92 And, as discussed earlier, water has likely been put into trade through extensive diversions that exist across Canada and divert water, for industrial, manufacturing, irrigation uses (in addition to flood control and domestic uses, which likely are not trade-related).

93 David Johansen, "Bill C-6: An Act to Amend the International Boundary Waters Treaty Act", Library of Parliament – Parliamentary Research Branch, Legislative Summary LS-383E, February 12, 2001 (revised February 4 2002) at 9.

> extraction and transformation of some water into a good, including for export, does not mean it (or another government within Canada) must allow the extraction and transformation of other water into a good in the future (emphasis added).[94]

The first quote above begs the question: why is a strategy needed to protect the integrity of Canada's water resources if, in fact, the government currently is not limited in its power to prohibit the extraction and transformation of water into a good at any time in the future? As the second quote makes clear, all current water that has been extracted and transformed, which amounts to a lot of water in many sectors and through many uses, is a good. This water is subject to rules of the NAFTA. Given that water has been put into trade in the past, and remains in trade currently, the national treatment and investment provisions of the NAFTA mandates that Canada treat all American companies and investors the same as Canadian companies and investors. This means that, if water licenses have been given, they must continue to be given, and under the same terms as those granted to Canadian companies, unless Canada can demonstrate that the exempting articles of GATT or NAFTA apply and meet their requirements. If it cannot, it is true that a government in Canada may still manage that water as it wishes, but it will just have to pay for the right to do so,[95] or withdraw from the NAFTA and WTO (a highly unlikely option).

If water is traded as a good then it is true that water is subject to all terms of the NAFTA, unless specifically exempted. But even if water is not traded, *the rest of the NAFTA still applies*. In particular, the second major approach taken by the NAFTA, that of positive integration --- "the promotion of common forms of regulation in order to facilitate integration within the domestic economies of the three parties"[96] --- applies, which includes protections set out in the NAFTA's major expansion of

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94 *Ibid*, at 10.

95 See discussion in Chapter 4 regarding NAFTA Chapter 11.

96 *Supra*, note 15 at 73.

investment rights. As such, the investment provisions in Chapter 11 would be available to investors and businesses interested in Canadian water.

5 CONCLUSION

In Canada water is extensively used, both directly and indirectly, in the production of numerous goods and services. This use is subject to numerous policies, approvals, licenses and legal entitlements, which if withdrawn by Canada or a province, would likely be in violation of numerous provisions of the NAFTA as many of these products are exported. Canada has stated that water in its "natural state" is not subject to the NAFTA. Even if true, this assertion ignores the reality that vast quantities of "natural" water are currently diverted, controlled, allocated, consumed, and utilised in the production of numerous exported commercial goods and services. Within the focus of this thesis, Canada is in a very difficult situation, in that Aboriginal water rights that are already jeopardized, through ongoing domestic governmental decisions and neglect, may also be further adversely impacted by Canada's commitments made in the NAFTA. The next chapter reviews the specific ways that the NAFTA may impact Aboriginal water rights, given the application the NAFTA to water, and expands this review to include a general discussion of the impacts of the NAFTA on indigenous interests.

CHAPTER 4: NAFTA AND ABORIGINAL WATER RIGHTS

This chapter discusses the implications of the inclusion of water in the NAFTA on existing First Nation water rights in Canada. It is demonstrated that the Crown is not fulfilling its duties regarding the protection of Aboriginal water rights when they may be impacted by international trade. Most importantly, indigenous peoples are not involved or consulted regarding these decisions that may impact their rights. The numerous decision-making and consultative mechanisms that exist in government regarding the development and negotiation of international trade agreements do not meaningfully or consistently involve indigenous peoples and their governments. While the assessment of the environmental impacts of trade agreements prior to their signing is a potentially positive development, such assessments have not included any consideration of indigenous rights or interests that may be affected.

An exemption found in the NAFTA Annex II is discussed and shown to provide limited protection regarding Aboriginal interests, but no protections regarding Aboriginal or treaty rights. Indeed, the Crown may be in a position where it is unable to fulfill its obligations regarding treaty and Aboriginal rights and the NAFTA.

The review in this chapter is not meant to be an exhaustive discussion of this subject, as there are likely numerous possible infringements to Aboriginal and treaty rights and interests that may be occasioned through the negotiation and implementation of international trade agreements, even when the discussion is limited to water-related issues. Rather, this review is intended to highlight the complexity of the topic, and to demonstrate the remarkable omission from almost all circles of any discussion of these issues. More attention is needed in order to comprehensively determine the scope of the issues involved, and to fully understand the implications for Aboriginal peoples, the Crown, and their respective rights and responsibilities. A proposed immediate response to this situation is provided in the final chapter, Chapter 5.

1 INTRODUCTION

This chapter looks at how NAFTA may limit the water rights of First Nations. This question is of fundamental importance as earlier chapters have shown that Aboriginal water rights continue to exist in many parts of Canada, and there are no special provisions that exempt either water or Aboriginal rights from the application of the NAFTA. Given the speculative focus of this chapter, it may be useful to outline scenarios that could give rise to the considerations to be discussed.

1.1 Canadian Scenario – SunBelt

In 1990, Snowcap Water Inc., a Canadian company, sought to expand a water license that it already had been granted by the B.C. government, to take advantage of the newly emerging American demand for export water. The license allowed Snowcap to remove water from Toba Inlet, in B.C. It had a partnership with an American company, Sunbelt Water Inc., which could provide access to Californian markets. Fears of insatiable Californian demand for water fuelled public demand in B.C. for a moratorium on the bulk export of water provincial water outside Canadian borders. The British Columbia provincial government passed the *Water Protection Act* in 1991 banning the bulk export of water by marine transport. In 1996, the B.C. government settled with Snowcap, paying it $218,000 in compensation for the money it had spent on infrastructure to export water. In contrast, the B.C. government did not negotiate a compensation settlement with Sun Belt. As a result, in December 1998, Sun Belt filed a NAFTA Chapter 11 arbitration claim, and sought in excess of $1.5 billion in damages resulting from alleged violations of Article 1105 (Fair and Equitable Treatment), Article 1102 (National Treatment), and 1110 (Expropriation). These allegations were based upon the B.C government's failure to pay compensation for damages required under Article 1116, and later refusal to engage in consultations required by Article 1118. Sun Belt also alleged that it suffered temporary lost business opportunity costs, permanent losses, and loss of reputation. Further, Sun Belt requested that British Columbia restore the export licensing opportunity pursuant to Article 1135(1)(b).[1]

There is no reference in any of the publicly available documents to the needs or rights of nearby First Nation communities. Despite this, nearby indigenous

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[1] Sun Belt Water Inc., *Notice of Claim and Demand For Arbitration*, October 12, 1999, available as of February 19, 2004 at http://www.naftalaw.org.

communities have very real concerns about the impacts of large-scale water removal:

> Our people are very dependent upon the shellfish industry [for] both food and commercial income. A major natural shellfish spawning area is located at Pendrell Sound, in the vicinity of Toba Inlet. We are concerned about any impacts to the water quality, temperature, nutrients, or salinity as a result of large-scale withdrawals of fresh water from Toba Inlet.
>
> [The] Inlet has some major salmon runs in its various rivers [and] streams. Even if water is not taken directly from rivers, we humans do not know what guides a salmon to particular stream of its origin. By interfering with natural flows into a waterway, what might we be doing [to] the water salinity, temperature, or other markers on [which] salmon may be relying? What may appear to be a trivial to humans may be a matter of life or death to the fish [in] that system.
>
> Water contamination from large supertankers frequently [passing] through our waterways is another concern. Discharge of dirty or contaminated ballast water concerns us, just as it led to problems such as the zebra mussel outbreak in the Great Lakes. Oil spills from an accidental grounding would be devastating to the marine waters in this area, not only to ourselves but to commercial fishermen, tourists and others who depend on this area in one way or another.
>
> There is also the issue of the impacts of structures and built along the creeks and rivers and at their mouth order to facilitate the storage and loading of water. This will include in some cases the building of dams for storing the water in reservoirs and pipelines, power generation equipment, loading facilities and living quarters. All this is proposed to occur in what is presently an undeveloped and remote area, relatively devoid of large scale impacts other than logging activity.[2]

Clearly, if the water-export contract was implemented, or if the Sunbelt case ever proceeds on its Chapter 11 claim, the Canadian government will be faced with the challenge of ensuring that it has met its fiduciary, statutory and constitutional obligations to implicated First Nations regarding their rights. In particular, there is the question of whether there would be a violation of NAFTA if the government chose to restrict the export of water in order to protect (or allow only minimal

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[2] Chief Kathy Francis, from a speech "*First They Come and ...,*" published in the proceedings of a conference sponsored by Canadian Water Resources Association, 1992, available as of January 20, 2004 at http://www.schoolnet.ca/future/teacher/publications/water/tanker/content.htm

limitation of) Aboriginal water rights. Even if the Crown stopped short of imposing a restriction on water exports, could a company claim that it suffered compensable losses if it was subjected to delays or requirements, such as the Crown requirement to engage in Aboriginal rights-consultations processes,[3] that caused market or profitability losses?

1.2 Canadian Scenario – First Nation

As highlighted in previous chapters, extensive water transfers already occur in many parts of Canada through numerous water-export mechanisms, including by means of bottling and containerization, vehicle or ship transport, ice commerce, inter-basin transfer (usually through diversions), and generation of or conversion into electricity.[4] First Nations[5] may engage in any number of these activities based upon

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[3] This could be argued even if Crown actions do not violate national treatment, that is, an investor may argue expropriation even if all non-Aboriginal companies in Canada are subject to the same requirements.

[4] It could be argued by at least some First Nations, that to date, the Crown has unfairly subsidized all of these water export industries at the expense of the First Nations who have rights to the water. This is particularly the case regarding those non-Aboriginal water-transfer activities that have been approved by government with the payment of only a minimal administrative fee. As discussed in Chapter Three, governments contend that they have not given away or sold ownership rights to water when they grant a license, as evidenced by the very low fees associated with the license. In their view, if the water were being sold, the fees would be much higher. The low value of the fees is purported to be evidence that they are meant to cover only the administration associated with the license, not the value of the resource. Conversely, if a First Nation was the water producer, it could argue that production entitlement was based upon its Aboriginal or treaty rights to do so, and as such, was not an unfair subsidy. These arguments were the essence of the two First Nation submissions in the *Softwood Lumber* case, which is discussed in greater detail later in this chapter.

[5] For purposes of this thesis, no distinctions are made between: First Nation community members acting as individuals; First Nation governments (which engages in economic development which it owns [incorporated or not], but which it operates for the economic benefit of its community members); and, the independent, but on-reserve, First Nation corporation. Clearly there are distinctions between these players, each of whom may wish to engage in the export of water for economic purposes. This analysis is clearly relevant, and requires attention in the context of the findings of this thesis, but is beyond its scope.

their water rights. If they chose to do so, a number of issues arise, including: the role of the Crown in approving, prohibiting or limiting the scope of the activity, and the protection or limitation of Aboriginal or treaty rights.

1.3 Guatemalan Scenario

Gus Van Harten has explored the impact of NAFTA Chapter 11 provisions on the security of Guatemalan indigenous peoples' land rights.[6] These rights are currently the subjects of two national agreements that set forth a number of far-reaching commitments by the Guatemalan government to:

- Facilitate access to land and encourage the productive use of land by means of:
  - A land trust fund;
  - Potential redistribution of land under Article 40 of the Constitution;
  - A land tax.
- Resolve land conflicts and provide security of land tenure by means of:
  - A comprehensive land registry;
  - Recognition of communal land ownership;
  - Reinstatement of usurped lands, or compensation of their former owners.
- Promote indigenous land rights, including
  - Indigenous access to traditional lands for subsistence and spiritual activities;
  - Indigenous rights regarding natural resources on their traditional lands;
  - The elimination of discrimination against indigenous women;

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[6] Gus Van Harten, *Guatemala's Peace Accords in a Free Trade of the Americas*, 3 Yale Hum. Rts. & Dev. L.J. [2000] 113 at 115, available as of January 18, 2004 http://www.yale.edu/yhrdlj/vol03/contents.htm.

- Settlement of indigenous land claims.[7]

Harten explains that these critical land reforms may be at risk:

> Given that one of their central purposes is to "discipline" governments, and thereby protect investors, international investment agreements may provide investors with unwarranted leverage to influence political decision-making and thus constrain the scope for governments to pursue national strategies for development and reform. ...Indeed, after decades of conflict, the prospect that the hard-won Government commitments to pursue critical land-related reforms might be undermined by the threat of investor challenges under an FTAA investment agreement is a cause for serious concern.[8]

The specific challenges that may be faced are detailed below.

2 SUMMARY OF IMPACTS

The NAFTA impacts, or has the potential to impact, the water rights[9] of First Nations in Canada in at least seven ways. First, as discussed in Chapters two and three, all governments in Canada must fulfill specific duties to indigenous peoples where there is a possibility that their decisions (in this case, the decision to become a signatory to and then implement the NAFTA) may limit the rights of indigenous peoples. This applies whether or not the right has yet been proven through litigation, and as such, includes a broad scope of Aboriginal rights, including water rights. Despite this, the NAFTA was negotiated and signed without the fulfillment of these duties to First Nations.

Second, there is no specific reference in the text of the NAFTA to the Aboriginal and treaty rights of Canadian indigenous peoples. Therefore, there is no comprehensive exemption for their unique rights in the NAFTA text or its Annexes.

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7 Gus Van Harten, *ibid.,* at 125.

8 *Ibid.,* at 124.

9 While a discussion of all Aboriginal rights is beyond the scope of this chapter, the arguments presented here may be even more compelling when applied to other more clearly defined rights, such as fishing rights. These rights have received greater judicial and policy consideration, and therefore may be more accessible to further analysis.

The NAFTA contains a general, limited exemption in Annex 2, which will be discussed later in this chapter.

Third, the assessment of trade impacts prior to the negotiation and signing of a trade agreement has recently begun to occur, but this assessment does not deal with trade impacts on Aboriginal rights or interests.

Fourth, the long-term negative or positive impacts of increased freedom of trade on Canadian indigenous peoples are not monitored. The NAFTA, through the operation of its individual sections, may uniquely and specifically impact the rights of indigenous peoples in Canada. Indigenous groups identified this issue when NAFTA was being negotiated but the Canadian government does not monitor the impacts of trade on indigenous peoples and their rights.

Fifth, the NAFTA precludes redress of Aboriginal concerns and complaints because of its very limited access to existing dispute resolution structures. Therefore, indigenous peoples lack a mechanism to seek redress when liberalised trade (or the obligations and protections created in trade agreements) impact their unique legal rights.

Sixth, trade negotiations have generally overlooked the desires of indigenous peoples to participate in international trade. Given that indigenous participation in trade is not measured, there are no data by which to assess whether indigenous peoples and their businesses benefit from either the economic or protective elements of trade agreements, and whether they do so to the same extent as non-Aboriginal businesses and people.

Finally, the role of indigenous governments (some of which have broad powers of governance under self-government agreements) in the implementation of the NAFTA is uncertain.

Each of these issues is discussed briefly below.

3 SPECIFIC IMPACTS

3.1 Crown Obligations

5.1.1 Fulfillment of Crown Obligations

The federal government may exercise its powers to make treaties under its powers to regulate trade and commerce,[10] deal with broad environmental issues,[11] and engage in international treaty-making.[12] The approach of the federal government has been to consult with the public, including the provincial governments, as a matter of policy and sound treaty-making process.[13]

Numerous authors speak of a greater public role in trade negotiations and the development of trade policy.[14] Calls for greater transparency, inclusion of the public,

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10 *Constitution Act, 1867*, R.S.C.1985, Appendix II, No. 5, Section 91(2).

11 This matter is discussed in Chapter Two.

12 While the Constitution of Canada is silent as to the power to make treaties, given that the framers did not contemplate that Canada would ever be an independent nation and require such powers, section 132 of the Constitution gives Canada the power to implement Empire treaties (that is, treaties made by the United Kingdom on Canada's behalf). The right of Canada engage in its own treaty-making was clarified through a document granting to the federal government all prerogative powers previously held by the King of England regarding Canada. (reproduced in R.S.C. 1985, Appendix II, No.31). In *A.-G. Canada v. A.-G. Ont.* (Labour Conventions) [1937] A.C. 326 it was clarified that the source of the treaty implementation power was the division of powers within the Constitution. Therefore, treaties falling within the subject matter of a federal head of power are implemented by legislation falling under that competency, whereas those treaties dealing with provincial matters are implemented through provincial enabling legislation. This finding is not without controversy, and has been extensively debated in the literature. See discussion by Peter W. Hogg, *Constitutional Law of Canada*, (Carswell, Thompson Canada Ltd: Scarborough Ontario, 1997) at 11-10 and 11-18.

13 Richard Benedick, "Ozone Diplomacy" in David Hunter et al, eds. *International Environmental Law and Policy* (University Casebook Series: Foundation Press, New York, 1998) at 211 – 214, discusses the role of non-state actors in negotiations leading up to the Montreal Protocol.

14 Russel Barsh in *Papers, Presentations and Proceedings of the Conference: "Impact of NAFTA on Aboriginal Business in North America"*, Saskatoon, May 28-29, 2001; Charles M. Gastle, Shadows Of A Talking Circle: Aboriginal Advocacy Before International Institutions And Tribunals, The Estey Centre For Law And Economics In International Trade December, 2002, available as of February 19, 2004 at

and access to information in the trade treaty-making process, have been made and in recent years accession to these requests has occurred through such decisions as those made by the previous Minister for International Trade, Pierre Pettigrew.[15] Despite this, the matter of public participation in international decision-making is clearly treated as a matter of state discretion, rather than law.[16] The federal

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http://www.esteycentre.com/; Valerie Phillips, in *Papers, Presentations and Proceedings of the Conference: "Impact of NAFTA on Aboriginal Business in North America"*, The Estey Centre for Law and Economics in International Trade, Saskatoon, May 28-29, 2001 available as of February 19, 2004 at http://www.esteycentre.com/.

[15] Department of Foreign Affairs and International Trade, *Contribution of Canada to the Improvement of the WTO Dispute Settlement Understanding (January 2003)* available as of February 19, 2004 at http://www.dfait-maeci.gc.ca/tna-nac/wto_dispute-en.asp; *WTO External Transparency - Informal Paper by Canada* available as of February 19, 2004 at http://www.dfait-maeci.gc.ca/tna-nac/Transparency2-en.asp; Sectoral Consultations - WTO Transparency (March 24, 2000) available as of February 19, 2004 at http://www.dfait-maeci.gc.ca/tna-nac/transparency_paper-en.asp.

[16] This has become clear in the recent discussions regarding Canadian ratification of the Kyoto Protocol dealing with the reduction of production of greenhouse gases. In that process, the federal government recently distributed its "Climate Change Plan for Canada" (Climate Change Plan for Canada, Government of Canada, undated but received by author November 2002, page 32) in which it sets out the three-step federal plan to achieving Canada's goal of the reduction of greenhouse gases in Canada by 240 megatonnes. The transmittal letter accompanying the plan states that:

> This Plan is the result of intensive consultations, held since 1987, with the provinces and territories, stakeholders, and individual Canadians. (Correspondence from Ministers David Anderson and Herb Dhaliwal, undated, accompanying package entitled Climate Change Plan for Canada, Government of Canada, undated but received by author November 2002.)

The Plan sets out that:

> The Government of Canada agrees with the principle identified in the provincial and territorial statement on climate change policy that calls for Canadians to have the opportunity to provide input into the development of the Plan. [page 9]
>
> The options that were presented in the Discussion Paper itself, as well as the initiatives in the Plan, have been developed after extensive consultations with provincial and territorial governments, industry, non-

government operates under the assumption that there is no formal requirement for the Canadian government to consult with any members of the public throughout the treaty-making process:

> Finally, in calling for improved NGO access to the WTO, the Guidelines note the special character of the WTO, that it is both a legally binding inter-governmental treaty of rights and obligations among its Members and a forum for negotiations. Consequently, while it is not possible for NGOs to be directly involved in the work of the WTO or its meetings, constructive engagement could occur at the national level when public interest concerns are integrated into trade policy-making.[17]

This view is increasingly being challenged by civil society as governments are being held more accountable for their actions, and as citizens refuse to accept that paternalism that characterized the last century of development of international law:

> The collapse of this "club model" more generally may also have been part of a larger social phenomenon. Sylvia Ostry has argued that the growth in citizen engagement "reflects a broader and more pervasive secular change in the industrialized countries – an alienation from the elite." As she notes (citing the work of American sociologist V.O. Key, Jr.), a "permissive consensus" existed for several decades following World War II: the general public supported the government's foreign policy, including trade policy, while knowing little about the details. This left governments free to sort out issues as they saw fit or expedient. Ostry points out: "The deference to government, and more broadly to the establishment as it was then termed, underlay the permissive consensus and has dramatically declined since the 1960's in all OECD countries as many recent analyses of opinion polls have demonstrated. Perhaps the Uruguay Round was the last gasp of the permissive consensus – and barely that."[18]

> governmental organisations, community leaders and individual Canadians over several years. [page 9]
>
> Discussions will continue with industry, provincial and territorial governments and other stakeholders with the intention of arriving at a general approach to industrial emissions reductions in early 2003. It is then expected that the details of the system will then be developed in the 2003-2004 period and implemented as soon as possible thereafter. [page 32]

[17] Department of Foreign Affairs and International Trade, *Retrospective Analysis of the 1994 Canadian Environmental Review: Uruguay Round of Multilateral Trade Negotiations* available as of February 19, 2004 at http://www.dfait-maeci.gc.ca/tna-nac/social_archives-en.asp at 6.

[18] John M. Curtis, *Trade and Civil Society: Toward Greater Transparency in the Policy Process,* Department of Foreign Affairs and International Trade, 2001

Further, even if this were still the acceptable manner of engaging in trade negotiations, Gastle points out that the government is in a conflict of interest in its roles as both fiduciary to indigenous peoples and representative of other, particularly private, interests:

> The federal and provincial governments appear to have been placed in a position of conflict of interest, once the Interior Alliance/Northern Cree appeared in the proceeding, at least with respect to the aboriginal issues. This conflict of interest arises from the tension between the fiduciary obligations that are owed to Canadian aboriginal peoples, and the vested lumber interests that have significant, if not determinative, influence over the Canadian position before the various tribunals. Although it has not been confirmed, it appears that the Canadian government advocated a position that is contrary to that of the Interior Alliance/Northern Cree. It can be expected that the Department of Commerce – and the WTO – would give significant weight to the Canadian government's position in respect of aboriginal rights within Canada, due in part to the existence of the fiduciary obligations. The question arises as to how the Canadian government can provide an opinion – or take a position – that is contrary to that of an aboriginal group in Canada before an international tribunal? The Canadian government immediately appears to assume the position of both advocate and judge and jury because, in effect, the Canadian government is rendering the decisive "opinion" on the position of Canadian law regarding aboriginal law within Canada. Such an opinion is rendered even through the issues are currently before the courts (e.g. *Joshua Bernard v. The Queen,* N.B.C.A. Court File No 113/01/CA). The problem is that this "opinion" is being rendered in a proceeding in which the Canadian government is desperately trying to defend key softwood lumber interests that constitute an economic engine in certain provinces within Canada. In circumstances such as these, the Canadian government would do well to acknowledge the conflict of interest in which it is placed and to allow an "independent" voice to provide an opinion regarding the nature – and extent – of aboriginal rights within Canada. The authority to provide such an opinion does not flow from the nature of the fiduciary obligation, which instead gives rise to the conflict. The existence of such a conflict of interest is one of the central issues that need illumination, due to the importance of establishing who should speak for Canadian aboriginal groups before international institutions and tribunals.[19]

Finally, contradictions in the "state-to-state" argument posed by governments are being exposed:

> Most WTO governments oppose NGO participation on the grounds that the WTO is an exclusive club of States/governments. Although this view of the

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available as of February 19, 2004 http://www.dfait-maeci.gc.ca/eet/research/TPR_2001-en.asp at 305.

[19] Gastle, *supra* note 13 at 39.

> WTO is certainly accurate on one level, it misses the possibility of a fuller conception of the WTO and its constituents. The recent WTO Section 301 panel, perhaps recognizing the hollowness in conventional images of the WTO, called our attention to the needs of individual traders. According to the panel, the multilateral trading system is 'composed not only of States but also, indeed mostly, of individual economic operators' (para. 7.76). One might doubt that the panel accurately states the international economic law of today, but I predict that they postulate the international law of tomorrow." See S. Charnovitz, "On Constitutionalizing the WTO: A Comment on Howse and Nicolaidis," discussants' comments delivered at the conference *Efficiency, Equity and Legitimacy: The Multilateral Trading System at the Millennium,* Center for Business and Government, Harvard University (www.ksg.harvard.edu/cbg/trade).[20] (emphasis added)

If the system is currently giving access to economic interests, it can and must expand this access to ensure democratic participation of all of society:

> Over the decades, the policy process had been progressively opened up to a wider range of interested parties in many countries around the world. While business representatives in many countries had been consulted on trade policy matters regularly or on an ad hoc basis from the 1950s onwards, over time the list broadened to include labour unions, small and medium-sized enterprises, public interest advocacy or citizen action/human rights groups, and consumer groups, never mind environmental associations – whether at the behest of governments looking for advice or analysis, in response to demands of the nongovernmental groups to be heard, or in the interest of forging partnerships to implement agendas.[21]

As the issues increase in complexity, citizens are less willing to assume that governments will represent their own, and the interests of their fellow citizens, adequately or accurately:

> Thus, at a time when the widening application of market instruments and the in-reach of trade policy are creating tensions both within and among trading partners over domestic norms and the social institutions that embody them (which are also issues of great concern to civil society), trade policy institutions have acquired powerful leverage over these very same issues. It should come as no surprise that CSOs want "in" to trade policy – and not merely to be listened to and politely shown the door when the time comes for serious decision making.[22]

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20 Curtis, *supra* note 17 at 326.

21 *Ibid.*, page 306.

22 *Ibid.*, at 308 - 309.

This is likely because trade policy, in the current era of globalisation, has increasingly far-reaching effects, many of which carry profound, long-term domestic implications:

> Thus, what many see as the success of more open markets and of better international trade rules, others in our societies see as an irreversible march down a road toward ever-wider inequalities. This is something that they do not understand and something over which they sense they have little control. To some extent, this has fuelled the emergence of the CSO movement as a politically relevant social structure that responds to these issues.[23]

The involvement of Aboriginal peoples in trade policy involves issues of even greater complexity given that their rights are constitutionally-protected.[24] Processes designed to meet the needs of the public may not suffice regarding ensuring Crown obligations to Aboriginal peoples are met.[25]

5.1.2 Scope of Crown Obligations

As discussed in an earlier chapter, the *Sparrow*[26] case set out the test for determining whether an infringement of a treaty or Aboriginal right has occurred, and if so, if it is valid. The court stated at paragraph 64, that:

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23 *Ibid.*, at 310.

24 Unlike the domestic situation where a license that has been granted by the Crown, without proper discharge of its responsibilities to Aboriginal or treaty rights holders, may be held to be invalid and of no effect, the result of improper or non-existent discharge of Crown responsibilities to Aboriginal peoples may have no practical result. Gastle and Young argue: "The fact that a trade agreement or treaty conflicts with the Canadian constitution is not in and of itself sufficient to validate the treaty. Canada will be bound by Section 46 of the *Vienna Convention on the Law of Treaties*. As a result, the remedy would appear to sound in damages, as it would not be possible to obtain a declaration that the particular trade agreement itself is invalid." Chuck Gastle and Danielle Young, "Aboriginal Groups Should Be Consulted on Free Trade" in *The Lawyers Weekly*, April 18, 2003 at 17.

25 For example, the business community cites the need for confidentiality regarding its business information when asserting that the public should not generally be allowed to participate in dispute-resolution processes. While these interests may outweigh those of the general public (although this is in no way certain or uniformly the case), they would not outweigh the interest of the Crown in ensuring its has met its obligations regarding Aboriginal and treaty rights.

26 *R.* v. *Sparrow,* supra note 13.

> By giving Aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that Aboriginal rights are affected.

In *Halfway River*,[27] the court held that the protections contained within the words "recognised and affirmed" in section 35(1) of the Constitution Act, 1867 required a generous, liberal interpretation. In summarizing *Sparrow*, the court described the nature of the relationship between governments and First Nations:

> It held the relationship between government and Aboriginal peoples was trust like, rather than adversarial, and the words "recognised and affirmed" incorporated a fiduciary relationship, and so imported some restraint on the exercise of sovereign power. Federal legislative powers continue to exist, but those powers "must be reconciled with the federal duty", and that reconciliation could best be achieved by requiring "justification" of any government regulation that infringed or denied Aboriginal rights. Section 35 was therefore "a strong check on legislative power".[28]

To briefly summarize the discussion set out in earlier chapters of this thesis, the *Sparrow* test requires that there be an existing Aboriginal right, and that (in that case) the impugned federal legislation has the effect of interfering with the right. Subsequent cases have clarified the test to determine an Aboriginal right,[29] extended the impacts of Crown activity to infringements of treaty rights[30], included executive and administrative conduct rather than just legislative enactment,[31] clarified that the provinces are also bound by this duty[32] and that non-governmental proponents of activities cannot discharge governmental responsibilities created by Section 35(1)[33] (although two recent cases currently under appeal to the Supreme Court of Canada have held that third parties may have their own obligations to consult with First

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27 *Halfway River First Nation* v. *British Columbia* (1999) 64 BCLR (3d) 206 at para. 123.

28 *Ibid*, para. 123.

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

30 *R.* v. *Marshall (#1)* [1999] 3 S.C.R. 456.

31 *Supra*, note 10 and *infra* note 16.

32 *Haida Nation* v. *B.C. and Weyerhauser* [2002] 2 C.N.L.R. 121 and *Taku River Tlingit First Nation* v. *Ringstad* (2002) 98 B.C.L.R. (3d) 16.

33 *Mikisew Cree First Nation* v. *Sheila Copps, Minister of Canadian Heritage, and The Thebacha Road Society* (2001) F.C.T 1426.

Nations[34]). Recently the court in *Liidlii Kue* clarified that the duty to consult is not merely a common law duty as provincial or federal law that purported to take away that right would be held in violation of section 35(1). As a result, that court held that the duty to consult is also a constitutional duty.[35]

The *Sparrow* case sets forth the following test:

1. Does the legislation in question have the purpose or effect of interfering with an existing Aboriginal right?[36] The court in *Mikisew Cree*,[37] relying upon information contained in an environmental assessment report prepared by a third-party consultant under requirements of the *Canadian Environmental Assessment Act*[38], held that geographical limitations on an Aboriginal right, potential adverse economic consequences, and potential adverse cultural consequences constituted *prima facie* infringement. If so, it will be a *prima facie* infringement of an Aboriginal right and must be justified.

2. Justification test: a) is there a valid legislative objective?[39], and b) has the objective been obtained in way that upholds the honour of the Crown and is in keeping with the unique contemporary relationship between the

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34 *Haida, supra,* note 31, and *Taku River, supra,* note 31.

35 *Liidlii Kue First Nation* v. *A.-G. Canada* (2002) F.C.C. Docket Number T-22-00 at para. 50.

36 *Sparrow supra,* note 25 listed a three-part, non-exhaustive test when answering this question: 1. Is the limitation unreasonable? 2. Does the regulation impose undue hardship? 3. Does the regulation deny the holders of the right their preferred means of exercising their right? This test has been interpreted loosely, and is generally recognised as being a list of considerations relating to the second part of the *Sparrow* test, rather than a strict and contradictory test to determine *prima facie* infringement. See *R.* v. *Breaker* [2001] 3 C.N.L.R. 213, *R.* v. *Van der Peet supra*, note 28, *R.* v. *Gladstone* [1996] 2 S.C.R. 723.

37 *Ibid.,* para. 98.

38 *Canadian Environmental Assessment Act*, S.C. 1992, c.37.

Crown and Aboriginal peoples (Does the measure infringe the right as little as possible? Do the benefits of the measure outweigh the negative impacts on the right? Was compensation offered in cases of expropriation? Was meaningful consultation conducted with the Aboriginal person or group to determine the nature and scope of the treaty or Aboriginal right and the extent of the impacts?)

While the SCC has expanded the acceptable list of valid objectives, as discussed in Chapter 3, recently the federal court in the *Mikisew* case held, relying upon McLaughlin J.'s dissenting judgement in *Van der Peet,* that a compelling and substantial objective must not trivialise Aboriginal rights or be used as the mechanism by which to accede to economic demands of non-Aboriginals.[40] The Court in *Mikisew* affirmed a statement to this effect in *Marshall #1*[41]:

> Writing for the majority in Marshall, Binnie J.'s approach to section 35(1) focuses on upholding the honour of the Crown. The decision makes no mention of "reconciliation" [*of Aboriginal and non-Aboriginal interests*] as a purpose underlying section 35(1). The focus is not on accommodating economic and non-native interests with Aboriginal rights, but on the obligations and responsibility of the Crown toward First Nations. [italics added]

The court further articulated a priority of objectives as follows: first priority, conservation, second priority, treaty and Aboriginal rights, third priority, economic interests, and fourth, recreational interests.[42]

Finally, the Crown is a fiduciary regarding Aboriginal peoples.[43]

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39 In answering this question, cases have held conservation and resource management to be valid legislative objectives. *Kruger* v. *The Queen* [1978] 1 S.C.R. 104, and *Jack* v. *The Queen* [1980] 1 S.C.R. 294.

40 *Mikisew Cree, supra,* note 32 at para 21.

41 *Ibid.,* at paras. 175 – 181.

42 This case is currently under appeal to the Supreme Court of Canada.

43 See Chapters 1 and 2 for more on this.

5.1.3 Potential Limitations on Treaty or Aboriginal Rights

In a situation regarding the development, negotiation and implementation of international treaties, numerous elements of government behaviour could impact treaty or Aboriginal rights of First Nation peoples in Canada. This matter has not yet come before the courts.

Significant impacts on Aboriginal and treaty rights could result from the executive decision to open Canadian borders to freer trade in goods and services and to grant extensive new protections for investors in Canada. For example, at a very general level, increasing demands for raw materials used in manufacturing and processing adds pressure to expand the development of these primary resources (such as timber and water resources), many of which are located in the territories where Aboriginal peoples live and exercise their rights. More particularly, new industries may utilise resources that First Nations require for not only the exercise of their rights, such as wildlife and unique plants, but for their survival. Also, new industries may utilise or damage lands that Aboriginal peoples have, or are in the process of securing Aboriginal rights or title to, for example, lands that are required for exploration and development, manufacturing (which can consume large amounts of water) or forestry purposes.

Before the implementation of the *Canada-U.S Free Trade Agreement*, the Native Council of Canada and the Assembly of First Nations commissioned an extensive study dealing with native rights and interests in trade negotiations.[44] This report set out a detailed list of findings, including the following:

- Native people are in a disadvantaged position regarding being able to respond to free trade opportunities, due to low skill and education levels;

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[44] Canada East – West Centre Ltd. "*Native Rights and Interests in Canada – U.S. Trade Negotiations*", (Native Council of Canada and the Assembly of First Nations: March 1987) at 248 – 254 (in possession of the author).

- Native businesses are ill-prepared for the transition to freer trade;
- Native people stand to receive much fewer benefits from free trade than non-natives because they participate much less in the wage economy and the manufacturing industries;
- Traditional lifestyles remain the key sources of survival for many native people;
- An entrepreneurial, market-driven approach to building sustainable native communities is unlikely to succeed;
- There is a broad range of special issues that require attention to address trade impacts on native people (such as the fur industry, cultural and community diversity, tax treatment of First Nations, native land claims, special relationship with water, environmental protection, the Jay Treaty, and the recognition of treaty and Aboriginal rights).

This report set forth a number of detailed recommendations regarding Canada's trade policy. The following, taken from the broader list, have not been commented upon or implemented by governments in Canada, to the knowledge of the author:

- Participation by Aboriginal peoples should parallel provincial participation;
- Native people should participate directly in dispute settlement;
- Canada should formulate a comprehensive water policy;
- Environmental commitments should override trade policy;
- Aboriginal rights must be recognised in trade agreements;
- The treatment of treaties and land claims vis-à-vis trade should be clarified.[45] (emphasis added)

Liberalisation of trade may affect First Nations in similar ways to other non-Aboriginals, particularly in rural locations. However, if trade may limit treaty and Aboriginal rights, and the above list would seem to indicate that it may, a

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45 *Ibid.*, at 254 – 258.

constitutional duty that has been clearly articulated by the Courts since the *Sparrow* decision first began to shed light on the meaning and substance of Section 35(1) is engaged. No level of government in Canada has yet discharged this constitutional duty. While some may argue that the purpose of free trade is of sufficient importance to justify any infringements that may have occurred, the cases discussed above and in prior chapters shed doubt on the ability of an economic objective to be of sufficient justification. Regardless, it is impossible to ascertain whether this is the case, without any consultation having occurred with First Nations in Canada on this matter.

5.1.4 Consultation Regarding International Agreements and Treaties

As discussed above, there are specific duties that the Crown must fulfill, such as engaging in prior meaningful consultation with Aboriginal peoples, where there is a possibility that government action or decisions may limit Aboriginal or treaty rights.[46] In terms of the requirement for the Crown to consult prior to making a decision in the international arena, such as signing a treaty or trade agreement on behalf of Canada, the scope of the obligation has not been defined, but the doctrine should apply to all stages of treaty development including negotiation, adoption, ratification and implementation. This is the case because, at each of these stages, the Crown may make decisions or take actions that may limit treaty or Aboriginal rights.

As Gastle affirms,

> The duty to consult with aboriginal peoples appears to be dependent on the degree to which the proposed legislation or regulation may interfere with an aboriginal or treaty right. Implicit in this duty is a requirement that government consider whether a particular trade agreement might impact upon aboriginal or treaty rights. The federal government has an obligation to consult with Canada's aboriginal peoples in a meaningful way, possibly allowing them a

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[46] These duties, known as the infringement and justification tests, are primarily set out in *Sparrow*, *supra* note 25 and are discussed in greater detail in Chapter 3 of this thesis.

> seat at the negotiating table depending on the degree of the interference with such rights. The failure to undertake meaningful consultation will be a contributing factor to any finding that the provision of the trade agreement in question is invalid as an unjustifiable infringement of an aboriginal or treaty right.[47]

Sexton J.A. touched on the issue of the interaction between an international treaty and Aboriginal rights in the Federal Court of Appeal decision in *Mitchell*.[48] The court held:

> In my view, the Jay Treaty could not possibly be employed to limit the scope of the Aboriginal right. As the Trial Judge rightly points out at page 71, the Jay Treaty "cannot serve as a limitation on a constitutionally protected Aboriginal right". Once it has been determined that the test for the existence of an Aboriginal right established in Van der *Peet, supra*, has been satisfied, this right is protected by the Constitution unless the right has been extinguished.

Mitchell affirmed that a pre-existing international treaty cannot impact rights protected under section 35.[49] Given this decision, it is even more likely that the Crown's fiduciary obligations exist and must be appropriately discharged in ensuring that it's current and future international trade-related actions cause no infringement of rights. It is very likely that both the act of becoming a party to an international treaty (an international activity), and the passage of a treaty's implementing legislation (a domestic activity), are decisions or actions of the Crown that may impact or limit the exercise of a treaty or Aboriginal right. The honour of the Crown would not be upheld if it were able to limit rights internationally in a fashion that it could not do domestically. It is logical that a constitutional constraint upon the Crown could not be ignored merely through a shift in arena from the domestic to the international.

An example of where the government has likely infringed upon treaty and Aboriginal rights, but has done so with greater involvement of Aboriginal peoples, is

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47 *Supra*, note 5 at 14.

48 *Mitchell* v. *Canada (Min. of Natural Revenue)* [1999] 1 F.C.375.

49 Thomas Issac, "*Aboriginal and Treaty rights in the Maritimes: The Marshall decision and Beyond*" (Saskatoon, Purich Publishing Ltd, 1999) at page 87.

regarding the *Convention on Biological Diversity*. This convention, while containing sections that purport to protect indigenous knowledge, was the impetus for the creation of Canada's *Species at Risk Act* (SARA).[50] As stated on the Government of Canada's website, this Act:

> ..is a key federal government commitment to prevent wildlife species from becoming extinct and secure the necessary actions for their recovery. It provides for the legal protection of wildlife species and the conservation of their biological diversity.[51]

While the extended purposes state that the Act will be consistent with treaty and Aboriginal rights, this does not mean that both the Convention and the SARA will be consistent with the exercise of treaty and Aboriginal rights. In fact, it will impact Aboriginal rights (justifiably) by restricting or prohibiting the use of listed (i.e. threatened) species currently used by Aboriginal peoples.

It may be that some infringements, such as those created by Canada becoming a party to the *Convention on Biological Diversity*, are justifiable infringement on conservation grounds. Other infringements though, such as those arising from Canada becoming a party to multilateral and bilateral free trade agreements, are not generally agreed upon, particularly by those in the NGO sector,

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50 S.C. 2002, c.29.

51 Government of Canada, *Species at Risk Act Public Registry*. Available as of February 19, 2004 at http://www.sararegistry.gc.ca/the_act/default_e.cfm. Note that the full list of stated purposes of the Act are:

More specifically, the Act will:

- Establish the Committee on the Status of Endangered Wildlife in Canada (COSEWIC) as an independent body of experts responsible for assessing and identifying species at risk;
- Require that the best available knowledge be used to define long and short-term objectives in a recovery strategy and action plan;
- Create prohibitions to protect listed threatened and endangered species and their critical habitat;
- Recognize that compensation may be needed to ensure fairness following the imposition of the critical habitat prohibitions;
- Create a public registry to assist in making documents under the Act more accessible to the public; and

as actions that are undertaken in the public interest and positive in their effects. Nonetheless, even if these agreements are based upon justifiable, valid, ecosystem-protection objectives, there certainly has not been consultation with Aboriginal peoples in the development of these agreements, especially not regarding their potential to limit treaty and Aboriginal rights.

The implications of certain international agreements (or parts of international agreements) become clearer at the domestic level through the legislation these agreements impact (for example, through revisions to domestic legislation that must be undertaken in order ensure its compliance with treaty commitments). Examples are changes to financial, customs, and government procurement legislation and policy that the NAFTA has precipitated. In this case, section 35 consultations with Aboriginal peoples should have occurred prior to each amendment being considered and passed.

Other impacts occur through nothing more than executive action, that is, adherence by the Crown to the commitments made in the agreement itself. An example of this type of commitment is the investor-state dispute resolution mechanism provided in Chapter 11 of the NAFTA. Arguably, this chapter provides the rights to investors and investments that impact treaty and Aboriginal rights. In this case, section 35 consultations with Aboriginal people must occur prior to a commitment to the NAFTA being made by the Crown. This did not occur.[52]

By contrast, the Crown appears to recognize the legitimacy of non-Aboriginal interests and involvement in international trade negotiations. The federal government appears to see its obligation to consult with the general public in the international treaty-making process as non-legal and discretionary, but as useful; as

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- Be consistent with Aboriginal and treaty rights and respect the authority of other federal ministers and provincial governments.

[52] According to publicly available information.

a matter of good public policy. Increasingly, the non-governmental organization community has been demanding greater access and input prior to and throughout trade-negotiation processes. As a result, the Department of Aboriginal Affairs and International Trade (DFAIT) has undertaken numerous civil society consultations regarding various multilateral and bilateral trade negotiations issues arising under the FTAA, WTO, and NAFTA.

Most of these consultations do not include indigenous organizations, and if they do, the indigenous participants are likely viewed (by all parties) as "stakeholders", rather than as Aboriginal rights holders. Recently, one set of consultations dealing with the FTAA included both political and non-political Aboriginal organizations.[53] It is highly unlikely that that these consultations were directed specifically, even in part, at treaty and Aboriginal rights infringements (the final report states nothing to that effect). Without Aboriginal awareness of that intention, the consultations certainly could not be construed as meeting section 35 justification requirements. As well, and even if the consultations had any such focus, these organizations do not represent all Aboriginal peoples, nor do they have the authority or mandate to accede to any infringements of treaty and Aboriginal rights that may be discussed in these sessions.

Yet, despite the lack of Crown-Aboriginal rights consultation, potential infringements have been recognized as important and discussed by some participants in processes focused on multi-lateral trade liberalisation. For example, DFAIT's website includes a report of a meeting that took place on July 28, 2003:

> The Minister for International Trade, Pierre Pettigrew, took part in two information exchange sessions on the margins of the Montreal Informal Mini-Ministerial (MIMM) meeting (a session with NGOs and a lunch with business

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[53] Government of Canada, Department of Foreign Affairs and International Trade, "*Multistakeholder Consultations Summit of the Americas - Multistakeholder Information Exchange Session Ottawa, March 28, 2001*" available as of February 19, 2004 at http://www.dfait-maeci.gc.ca/tna-nac/summit-lop-en.asp.

> persons). WTO's Director General (DG) Dr. Supachai Panitchpakdi, and the Director of the WTO DG office, Mr. Stuart Harbinson, were also in attendance, as well as Canada's Deputy Minister for International Trade, Mr. Len Edwards, and Canada's Ambassador to the WTO, Mr. Sergio Marchi.
>
> An organization remarked that there are many environmental problems in Canada that affect especially poor and natural resource dependent communities such as First Nations. It added that the environmental assessment process of trade negotiations in Canada is inadequate and makes it impossible to know whether the Government is negotiating from a state of some environmental certainty. Hence, it wondered what mechanisms (if any) were there to contemplate environmental problems within trade negotiating positions.
>
> Dr. Supachai explained that the Doha Round included a mandate to work on three areas related to trade and the environment: the relationship between WTO rules and specific trade obligations in Multilateral Environmental Agreements (MEAs); procedures for information exchange between the WTO and MEA Secretariats; and the liberalization of trade in environmental goods and services. The members have made notable progress in all of these areas. Minister Pettigrew added that he is very sensitive to the concerns expressed by NGOs on the environment. He noted however that while Canada has been a long-time advocate of mutually reinforcing trade and environment regimes, it is often the developing countries that oppose the inclusion of environmental norms in the WTO. [emphasis added]

As the response of both the WTO official and the Minister makes clear, neither of their respective institutions appear to be publicly acknowledging the potential for, nor taking responsibility for examining the extent of, potential impacts of the trade agreements on the constitutionally-protected rights of Canadian indigenous peoples. At times, representatives for Canada's First Nations are also silent on the point. At a Round Table with Non-government Experts in 2002,[54] a national political body for the First Nation communities of Canada, the Assembly of First Nations, participated but did not raise issues related to the protection of treaty and Aboriginal rights. At that time, access to trade opportunities by indigenous peoples in Canada seemed to be a more pressing (and less controversial) issue for that organization.

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[54] Government of Canada, *Report on Round Table with Non-Governmental Experts, April 15*, 2002 available as of September 23, 2003 at http://www.americascanada.org/eventsummit/anniversary1/ngo/april_report-e.asp#top

Alternatively, the Assembly of First Nations may have declined to raise an issue which only the Crown was legally responsible for introducing.

Ironically, the Minister for International Trade recently expressed concern and awareness about indigenous issues in Ecuador, but has yet to do so regarding the rights of Canada's indigenous peoples:

> Asked if he had heard the concerns expressed by the leader of the Indigenous Peoples in Ecuador, the Minister responded that he was attentive and sensible to their concerns. He added that governments have to make difficult choices and have to take their responsibilities towards their citizens seriously. Canada is the most open country in the world and its decision to put as much information as possible on the Department's website was not always well received by government officials in other countries. The Minister called the "transparency plus" agenda a work in progress. [emphasis added][55]

There has been limited discussion in legal jurisprudence or governmental policy statements regarding obligations that the Crown has to Aboriginal peoples in Canada if their rights may be limited by international government actions or decisions. While indigenous peoples around the world have been actively campaigning for some time for such recognition of their concerns and their need for inclusion in government trade-related decision-making and processes[56], this has not

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[55] Government of Canada, Department of Foreign Affairs and International Trade, *Report on FTAA Civil Society Multistakeholder Consultations, 2003*, available as of February 19, 2004 at http://www.dfait-maeci.gc.ca/tna-nac/FTAA/multitask-report-en.asp

[56] See for example: Valerie Taliman, "*Native Peoples Protest WTO Activists fear threats to sovereignty*" available as of March 19, 2004 at http://forests.org/archive/general/hayohhay.htm; *Indigenous Peoples Seattle Declaration on the Occasion of the Third Ministerial Meeting of the World Trade Organisation* 30 November – 3 December 1999, available as of March 20, 2004 at http://www.ldb.org/indi99.htm; *Indigenous Peoples Occupy World Bank Premises in New Delhi Protest against the Destruction of Livelihoods and the Environment by the World Bank and WTO* available as of March 19, 2004 at http://csf.colorado.edu/mail/elan/may99/msg01042.html. See also, Rodney Bobiwash, *Indigenous Leaders Forum meets in Seattle During World Trade Organisation Meetings – Challenges Civil Society*, February 2000, available as of February 19, 2004 at http://www.cwis.org/fweye-7.html. Also, *Temuco-Wallmapuche Declaration on the North American Free Trade Agreement, Indigenous Peoples and their Rights*, December 2, 1994, available as of February 19, 2004 at

translated into a domestic political or policy statement acknowledgements of the need to fulfill these requirements. Nor have Aboriginal peoples been consulted themselves, directly on these matters:

> In the light of these obligations, it appears to be somewhat surprising that aboriginal peoples have been all but ignored in the *Canada-United States Free Trade Agreement* (CUSFTA), the *North American Free Trade Agreement* (NAFTA),[20] the *Canada-Chile Free Trade Agreement* (CCFTA), or the *Canada-Costa Rica Free Trade Agreement* (CCRFTA).[57]

The failure of the Crown to acknowledge and fulfill its constitutional and fiduciary duties to Aboriginal peoples (particularly regarding consultation requirements) is more striking when the array of potential infringements is laid out. As Phillips points out (summarizing Van Harten's speculations around the FTAA negotiations), investors have numerous avenues by which to secure investment protection against exertion of Aboriginal rights:

> 1. Attacking a Governmental policy to recognize communal land ownership as flowing disproportionately or exclusively to indigenous communities, as discrimination against foreign investors, and a violation of national treatment.
> 2. Attacking any possible Governmental restrictions on private individual entitlement to own common and municipal land as a violation of the right of establishment, claiming lost profits on such land.
> 3. Attacking any Governmental recognition of "special" rights of access to traditional lands as a potential violation of national treatment and discrimination against foreign investors.
> 4. Attacking any Governmental grant of "special" indigenous rights of access to sacred sites within portions of an investor's land as "tantamount to expropriation" of the land.
> 5. Attacking any Governmental grant of any degree of indigenous authority over local natural resources, including possible restrictions of participation in resource development projects to community members, as discriminatory or perhaps a lost business opportunity that requires compensation from either the Government, or even the indigenous authority as a "recognized" governmental entity.
> 6. Attack Government commitments to eliminate discrimination against indigenous women seeking access to land as an affirmative action program that violated national treatment since "affirmative action to make up for historical discrimination suffered by indigenous women entails contemporary

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www.nativeweb.org/resources/speeches_statements_essays/statements/state_relations/.

[57] Gastle, *supra,* note 13 at 14.

discrimination against foreign investors" and/or a prohibited performance requirement.
7. Attacking Governmental attempts to settle indigenous claims to communal land either through restoration or payment for the land as a loss of profits/assets and/or an impediment to carrying out a planned resource development project.[58]

5.1.5 *Effect on Validity of International Treaty*

Based upon a technical reading of the provisions of the *Vienna Convention,* it may be argued that the NAFTA is invalid. In domestic jurisprudence, a license that has been granted by the Crown, without proper discharge of its responsibilities to Aboriginal or treaty rights holders, may be held to be invalid and of no effect. This is so given the fundamental importance of the need to deal with Aboriginal peoples and their rights in a manner that upholds the honour of the crown.

By contrast to the licensing scenario posed above, the result of improper or non-existent discharge of Crown responsibilities to Aboriginal peoples on the validity NAFTA is uncertain. Gastle argues:

> The fact that a trade agreement or treaty conflicts with the Canadian constitution is not in and of itself sufficient to invalidate the treaty. Canada will be bound by Section 46 of the *Vienna Convention on the Law of Treaties.* As a result, the remedy would appear to sound in damages, as it would not be possible to obtain a declaration that the particular trade agreement itself is invalid.[59]

Section 46 of the *Vienna Convention on the Law of Treaties,*[60] states:

> 1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance. (emphasis added)
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> 2. A violation is manifest if it would be objectively evident to any State conducting itself in the manner in accordance with normal practice and in good faith.

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58 Phillips, *supra*, note 13 at 12 – 13.
59 Gastle and Young, *supra,* note 23 at 17.
60 *Vienna Convention on the Law of Treaties* (1969) 1155 U.N.T.S. 331, in force 1980.

This provision relates to the competence to conclude treaties. The fact that Canada may have signed a treaty without undertaking its proper domestic processes (i.e. Aboriginal consultations) does not *necessarily* mean that Canada was incompetent to enter into that treaty; "competence" is not defined in the *Convention.* Aboriginal consultations are a matter of domestic law, and the Supreme Court has been very clear that actions taken in violation of Aboriginal and treaty rights will be held to be invalid. An argument may be made that Canada does not possess the authority to act in violation of treaty or Aboriginal rights, even regarding its treaty-making power, unless it has followed the procedure outlined in the infringement cases.

Assuming that failure to comply with Aboriginal consultation requirements relates to competence, Article 27 of the *Vienna Convention* states that after having consented to a treaty a party may not invoke its internal law as a justification for its failure to perform the treaty. Therefore, the treaty will still be valid, even if the treaty was entered into without "competence", unless that violation was "manifest" and concerned an "internal law of fundamental importance".[61] In this regard, it may be argued the constitution of Canada is clearly an "internal law of fundamental importance". Further, the provisions of the constitution relating to Aboriginal peoples are manifest, having been in place 14 years before NAFTA came into force. While the impact of these provisions, particularly the accompanying consultation requirements mandated by *Sparrow* in 1992, may have been ignored by Canada as NAFTA was being negotiated, this does not diminish their significance. Constitutional provisions are of fundamental importance.

Regarding the second part of the test under Article 46 of the *Vienna Convention,* Article 46(2) defines "manifest", and relies on an objective test of

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[61] Article 6 of the *Vienna Convention* assumes that every state has the capacity to conclude treaties, but as stated above, it does not define "competence".

"normal practice and good faith". Under this test, the violation by Canada of its internal law relating to Aboriginal and treaty rights requirements may have been "manifest". For example, it is reasonable to assume that a country will abide by the provisions of its constitution when concluding treaties; it will negotiate within the scope of its authority, according to its regular process, while ensuring that the limits of its negotiating positions are maintained. Under Canadian law, these kinds of decisions are very often constrained by their potential to limit treaty and Aboriginal rights. Therefore, under this objective test, failure to adhere to the requirements imposed by s.35 of the constitution may have been a "manifest" violation of Canada's internal law, and also rendered Canada incompetent to conclude the NAFTA. While a declaration of invalidity may not be possible for political reasons, the most significant of which being that all of the Parties currently want to maintain the NAFTA, it may still be that the NAFTA is invalid, based upon a technical reading of the provisions of the *Vienna Convention*.[62]

3.2 Aboriginal Rights Exemption Within the NAFTA

As discussed in Chapter Three, the NAFTA has one fundamental purpose: the free passage of goods and services, and the increased protection of investor capital in North America. The provisions of the NAFTA bind each signatory to the agreement; these provisions relate to all North American goods, and also to the specific services and investment provisions covered by the agreement. To exempt

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[62] As new trade agreements are being negotiated, the application of the *Vienna Convention* provisions may assist indigenous groups in their attempts to protect their interests. The involvement of indigenous peoples and the protection of their rights has been the subject of discussions and numerous international agreements for so long that these matters are now likely an established element of general international law. Article 53 of the *Vienna Convention* states that a treaty is void if at the time of its conclusion it conflicts with a fixed or authoritative norm of general international law. This provision would apply to the negotiation of the FTAA, as well as all other bilateral or multilateral investment or trade treaties, and would imply the requirement for compliance with both domestic Aboriginal law and international norms regarding the protection of indigenous peoples, and their lands and rights.

certain industries or services (referred to as "sectors") from the provisions of NAFTA, a Party must include those sectors in the exemptions (referred to as "reservations") listed in the Annexes to the agreement. Each Party has an Annex that lists all reservations it has claimed. In Annex II Schedule of Canada, there is the following reservation:

Sector: Aboriginal Affairs

Sub-Sector:

Industry Classification:

Type of Reservation:

National Treatment (Articles 1102, 1202)
Most-Favoured-Nation Treatment (Articles 1103, 1203)
Local Presence (Article 1205)
Performance Requirements (Article 1106)
Senior Management and Boards of Directors (Article 1107)

Description: ***Cross-Border Services and Investment***

Canada reserves the right to adopt or maintain any measure denying the investors of another Party and their investments, or service providers of another Party, any rights or preferences provided to aboriginal peoples.

Existing Measures:

Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c.11

These reservations allow Canada to continue to grant rights or privileges to Aboriginal peoples in Canada, despite the fact that these measures would violate NAFTA.[63] For example, in the absence of this provision, Canada would be required, by virtue of the national treatment provisions of the NAFTA, to accord the same treatment to all investors that it provides to Aboriginal peoples. This would mean that the Crown would have to treat both foreign and domestic investors the same regarding Aboriginal peoples, that is, special requirements or obligations imposed upon domestic investors would have to be applied upon foreign investors. Similarly, exemptions granted to foreign investors would have to be available regarding domestic investors. Alternatively, all investors in Canada (whether domestic Aboriginal, domestic non-Aboriginal, or foreign) would be subject to the same treatment. Given that Aboriginal peoples have special rights that are guaranteed, this

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[63] Barry Appleton, *Navigating NAFTA*, (Carswell: Scarborough, Ontario, 1994) at 161 – 162.

reservation was necessary in order to continue to provide those special "rights and privileges" to Aboriginal peoples without having to provide them for all investors.

Further, this provision includes an "existing measure" exemption. In the absence of this exemption, NAFTA would apply to, and likely be in conflict with, the Aboriginal rights provisions of the *Constitution Act, 1982*. As the NAFTA requires that each Party make all of their existing and future laws consistent with NAFTA, this provision exempts Canada from that requirement as regards the *Constitution Act, 1982*. While this exemption allows Aboriginal constitutional provisions to continue, numerous serious shortcomings remain in Canada's ability to protect Aboriginal rights from the application of the NAFTA.

3.2.1 Extent of Reservation

The reservation allows Canada to deny others (investors, investments, or service providers of another Party) any rights or privileges that it provides to Aboriginal peoples. The "existing measure" upon which Canada relied was the *Constitution Act, 1982*; the constitutional document that recognised and affirmed Aboriginal and treaty rights. There are two points to consider regarding this reservation: first, despite Canada's reliance upon the *Constitution Act, 1982*, Aboriginal rights are not "provided" by Canada to Aboriginal peoples; as discussed at length in previous chapters, these rights are considered by the courts to have pre-existed colonisation. Similarly, treaty rights are interpreted as guarantees or acknowledgements of the retention by Aboriginal peoples of certain rights (as indicated in the treaty, or as considered necessarily incidental to the exercise of rights guaranteed by treaty). Therefore, it may be argued that this reservation is referring only to rights and preferences that are not Aboriginal or treaty right-related (such as merely purchasing or procurement preferences), and as such, is ineffectual in purporting to allow Canada to avoid extending treaty and Aboriginal rights to all investors or to protect treaty or Aboriginal rights.

Second, even if this reservation applies to treaty and Aboriginal rights, it does not ensure that treaty and Aboriginal rights are protected from attack by investors, investments, or service providers of another Party. An example may assist understanding of the potential for the NAFTA provisions to supplant domestic constitutional protections.

In general, when faced with an assertion of unequal or unfair treatment, Canada could either eliminate the alleged unfairness in order to comply with NAFTA, or could maintain the unfairness (for some reason), thereby violating NAFTA.[64] When one of the parties at interest is an Aboriginal rights-holder, the resolution of the alleged discriminatory treatment becomes highly problematic.

For example, assume a situation where an Aboriginal sole proprietorship and a foreign company both intend to establish a water bottling and export business in Canada (likely operating on federal reserve land).[65] Unlike the foreign (or, indeed, any other domestic) company, the Aboriginal person would likely not be subject to the same, if any, regulatory review of her/his proposed commercial activities as would be applied to the proposal by the foreign investor (likely operating on

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[64] It is essentially the existence of these two choices that underlies all Crown assertions to date that the NAFTA (and all other trade agreements) does not threaten Canadian sovereignty in any way; governments remain free to violate NAFTA, they just have to pay for the right to do so. In reality, the possibility of large compensatory awards or retaliatory measures by other Parties tends to ensure Party compliance, and has been argued to have a chilling effect on government decision-making. On the chilling effect, see Howard Mann, *Private Rights, Public Problems: A guide to NAFTA's controversial chapter on investment rights* (Winnipeg: International Institute for Sustainable Development, 2001), at pages 30-33. Also, Mann and Konrad von Moltke, "Protecting Investor Rights and the Public Good: Assessing NAFTA's Chapter 11", Background Paper to the ILSD Tri-National Policy Workshops Mexico City: 13 March; Ottawa, 18 March; Washington: 11 April (all 2002) available as of February 19, 2004 at http://www.iisd.org/trade/ILSDWorkshop, at page 8.

[65] The Aboriginal person does so on the basis of their Aboriginal water rights.

provincial land).[66] In fact, the regulatory regimes facing each is so different that essentially identical businesses may be allowed to operate on reserve, but disallowed off-reserve.[67] In this situation, facing an accusation of violation of the national treatment provisions of the NAFTA by the foreign investor, Canada's only apparent available option would be to limit the Aboriginal water business; exempting the foreign business from provincial water-licensing regimes is beyond the scope of federal jurisdiction, and forcing the province to change its laws to allow lower, or virtually non-existent, water licensing standards (in order to comply with NAFTA) would be politically impossible. Limiting the Aboriginal business, however, would be limiting the exercise of an Aboriginal right, and in addition to the numerous other elements of the *Sparrow* test, would have to be for a justifiable reason. Given that the courts are either undecided as to whether domestic economic interests take precedence over Aboriginal rights, or they have decided that they do not, it is unlikely that the interests of a foreign investor could take precedence in this way. As such, in order to fulfill constitutional obligations to Aboriginal peoples, the Crown must violate the NAFTA.

As this example illustrates, the extent of this reservation is very limited, and may not allow the Crown to fulfill its obligations to Aboriginal peoples in the face of a NAFTA challenge.[68] As Phillips notes:

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[66] Although there are many other possible differences in treatment between the two businesses, this example is one of the most illustrative of the differences in treatment that may exist.

[67] This is primarily due to the existence of water rights licensing regimes off-reserve, and the virtual absence of such regimes on reserve.

[68] This issue is but one in a long list of concerns of some regarding the NAFTA and, in particular, Chapter 11. For example, see Hart and Dymond:

> Notwithstanding these advantages, the potential negative effects on the economy of the receiving country have been vigorously debated. These include: the capacity of TNCs [Trans-National Corporations] to overwhelm the interests, customs, and values of a host country; the concentration of TNCs in the commanding heights of an economy; the subordination of the host economy, and even country, to the interests and values of the home

> The reference to these rights in Annex II places no positive obligation on the governments to actively support aboriginal issues. At most, these references protect the right of governments to promote aboriginal rights and business interests, without rendering them vulnerable to investor-state challenges through the arbitration provisions contained in NAFTA Chapter 11. In this context, the inclusion of these rights does not appear to protect aboriginal rights at all, but is merely intended to insulate governments from collateral attack.[69]

It is important to note that this provision allows governments to undertake projects that they feel may be of benefit to indigenous peoples in Canada, but this is very different than allowing government to fulfill their extensive obligations to Aboriginal peoples based upon their treaty and Aboriginal rights (particularly when viewed from the perspectives of regulatory requirements, compensation, consultation, etc., all of which impose unique and extensive burdens on the Crown). As to other reservations considered in trade agreements, Gastle notes:

> The *General Agreement on Tariffs and Trade* ("GATT") and the *World Trade Organization Agreements* "*WTO Agreements*" also have not dealt with the question of aboriginal rights.... The extent to which aboriginal rights were not on the negotiating agenda at the time of the negotiation of the *WTO Agreements*, is reflected in the fact that financial support for aboriginal groups was not included in the "green light" subsidy category that established permissible subsidies that could be granted by government without the risk of the imposition of countervailing duties by foreign governments. If government should choose to provide financial support for First Nations initiatives, such financial support might be actionable as a countervailable subsidy under the *World Trade Organization Agreement on Subsidies and Countervailing Measures* (*ASCM Agreement*).[70]

3.2.2 Limited Application to NAFTA Provisions

An additional limitation of the Annex II reservation is that it applies only to those listed articles, that is, only certain articles in Chapters 11 Investment and Chapter 12 Services. In those two chapters, only the national treatment, most-

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> country; the capacity of TNCs to organize their affairs in such a manner as to avoid the perceived inconveniences of local laws, policies, needs and values; and, the distorting effect that a large, foreign-controlled subsidiary can have on local wage, skill, investment, design, distribution, and other patterns.

69 Phillips, *supra,* note 13 at 49.

70 Gastle, *supra,* note 13 at 15.

favoured-nation provisions are exempted. In addition the local presence requirement regarding the provision of services, performance requirements, and senior management of boards of directors requirements regarding the investment chapter are exempted.

There are two highly notable omissions: this reservation does not apply to the highly controversial expropriation provision in the investment chapter (Article 1110), nor does it apply to any part of NAFTA that deals with trade in goods (Chapter 3).

3.2.2.1 Article 1102 National Treatment

The national treatment provision generally requires investments, investors, and goods "in like circumstances" to be treated the same. The exemption in Annex II does not apply to the national treatment requirement regarding goods; rather it applies only to investors, their investments, and services. Further, this reservation ensures only that Canada can continue to grant rights and preferences to Aboriginal peoples, without having to grant these rights and privileges to investors or their investments. The Annex II reservation does not appear allow Canada to enact measures that specifically protect those rights and privileges, particularly if they were directed at foreign investments or investors. The question is, does a measure designed to protect Aboriginal rights fall within the scope of Canada's right to "adopt or maintain any measure denying investors...any rights or preferences provided to Aboriginal peoples"? It is unlikely that this is the case; it is more likely that measures designed to protect Aboriginal rights would have to be in accord with the NAFTA in order to be valid.

Foreign goods must be treated the same as goods made by Aboriginal peoples and goods made on Aboriginal reserves, if they are "in like circumstances". If an Aboriginal firm has different opportunities or benefits than a foreign firm, a comparison must be made regarding the scope of the "circumstances" of those two firms, goods, or investments. Should this comparison focus upon the circumstances

of the foreign firm as compared to other Canadian firms (which would include Aboriginal firms), or just upon the foreign firm and the Aboriginal firm? That is, are foreign firms disadvantaged as regards Aboriginal competitors in Canada, or are foreign firms disadvantaged *any more than* non-Aboriginal firms in Canada vis-à-vis Aboriginal firms in Canada? This distinction is important, given that the situations of non-Aboriginal and Aboriginal firms in Canada may be vastly different. While *Pope and Talbot*, and *Myers,*[71] held that the foreign investments should be compared with domestic investments in the same business or economic sector, and must not discriminate facially or *de facto,* these decisions do not resolve the questions posed above.[72]

3.2.2.2 Article 1110 Expropriation

Article 1110 prohibits expropriation (direct expropriation, indirect expropriation, and measures tantamount to expropriation[73]) except where it occurs on a non-discriminatory basis, is for a public purpose, and is still in accordance with due process of law and minimum international standards of treatment. Further, in the event that an expropriation occurs, compensation must be paid.

This provision has met with intense public scrutiny and criticism, due mainly to the broad approach taken by the tribunals in *Metalclad*, *Pope and Talbot*, and *S.D. Myers* when dealing with limitations to the inherent jurisdiction of government to enact measures in the best interests of the public or environment (i.e. "police powers"). These decisions:

> ...Turn to the scale of impact as the critical test of whether a government action amounts to an expropriation. This approach not only limits the scope of the police powers rule, but would effectively eliminate this traditional

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71 *S.D. Myers, Inc.* v. *Canada*, Final Award on Merits, November 13, 2000 available as of January 27, 2004 at www.naftalaw.org.

72 *Pope and Talbot, Inc.* v. *Canada*, Final Merits Award, April 10, 2001, available as of January 27, 2004 at www.naftalaw.org at para. 78.

73 Cases such as *Pope and Talbot* and *Metalclad* have equated indirect expropriation with tantamount to expropriation.

> international law test from consideration in the review of an expropriation claim. Following this reasoning, regardless of the purpose, compensation must be paid if there is significant impact. This is alarming since *any environmental law worth adopting* will affect business operations and may often end the use of, or trade in, certain products, and therefore will have a significant impact on the business in question. This would reverse a well-accepted tenet of environmental policy: that polluters should bear the cost of their pollution, rather than enjoy a right to be paid not to pollute.[74]

In the context of Aboriginal rights, a similar argument can readily be made. As Aboriginal rights are not exempted from the application of this provision, a government provision aimed at protecting Aboriginal rights would likely be considered to violate the expropriation article. In particular, this action to protect Aboriginal or treaty rights may not be seen as being for a genuine "public purpose", but rather as a provision that services the needs of the Aboriginal minority of the public. Further, numerous circumstances exist where the legal requirements associated with protection of Aboriginal rights could arise and be seen as "indirect expropriation" or "tantamount to expropriation": eg.

- Consultation requirements, particularly those that may be imposed on third parties[75], can result in project delays, added costs, modifications to projects, or the creation of unexpected project joint-ventures or other forms of partnership with attendant and unexpected revenue-sharing agreements;
- Inadequate consultations can render void otherwise duly considered and validly issued project licenses or approvals;
- Projects can be subjected to subsequent litigation arising from approvals granted without sufficient or appropriate reference to and consideration of outstanding land claims.

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74 Howard Mann, *Private Rights, Public Problems, supra*, note 63 at 33.

75 The third party requirement to consult with First Nations that was outlined in *Haida Nation, supra,* note 31 and *Taku River, supra,* note 31 is currently being considered by the Supreme Court of Canada in the appeal on the *Haida Nation* case, and will hopefully clarify whether this is an issue of constructive trust or some other form of obligation, if any.

There is a great potential of Article 1110 and Aboriginal rights to impact one another. If this is the case, governments could be required to pay compensation to investors in order to fulfil their obligations regarding Aboriginal rights.

3.2.2.3 Article 1106 Performance Requirements

Article 1106 Performance Requirements states that a Party cannot impose special measures or confer benefits on investors or their investments. Annex II allows Parties to continue to grant rights or preferences to Aboriginal peoples. The interplay between these two provisions means that Canada could exempt Aboriginal peoples from a requirement (i.e. a benefit) that investors must continue to fulfil. In the absence of this reservation, an investor could argue that its continuing requirement is an illegal performance requirement.

A limitation of this provision is that Canada still cannot require investors or their investments to fulfil a positive requirement to Aboriginal peoples; it merely allows Canada to continue to grant benefits. This is problematic, given that many opportunities for Aboriginal community development arise from employment or profit-sharing requirements imposed (directly or indirectly) upon them by governments. This would likely be considered to be a violation of this provision.

3.2.2.4 Article 1114 Environmental Measures

This article allows Parties to invoke environmental measures, even if they are directed at investments and investors, in order to protect the environment, as long as these provisions do not violate any other part of Chapter 11. This section essentially states "You can do what you want, even try to protect the environment, as long as it doesn't violate Chapter 11." Because this section merely states the obvious, it serves no useful purpose.

As a mechanism to protect Aboriginal rights, however, particularly those rights related directly to environmental protection, this provision may be of

assistance because aspects of the national treatment and most-favoured-nation requirements have been reserved by Canada in Annex II. Depending upon the interpretation of those provisions vis-à-vis Aboriginal peoples, Canada may be able to adopt environmental laws that impose an environmental benefit on Aboriginal peoples (i.e. through environmental protection), without violating national treatment. For the reason given above though, they also could do this without Article 1114.

3.2.2.5 Article 1105 Minimum International Standard of Treatment

This standard requires that an investor (or its investment) be treated according to the minimum international standards of law. This standard simply means in accordance with international law, including fair and equitable treatment and full protection and security.[76] Annex II does not exempt a Party from upholding the minimum international standards required by Article 1105 of the NAFTA; these standards still bind the Parties. Currently, however, specification of the international laws included in this standard has been the subject of some debate, and the issue remains somewhat unclear.

The original negotiating texts included a reference to the word "customary", as in "customary international law minimum standards of treatment", but this was deleted from the final agreement with the full awareness of the three Parties that this deletion would increase the standard of treatment to include other legal obligations, including independent treaty obligations.[77] Despite this, and part way through the progress of the *Pope and Talbot* case, the three Parties issued an "interpretive statement" which purported to clarify that Article 1105 actually included the less onerous requirement to meet only standards of customary international law, that is,

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[76] NAFTA, Article 1105(1).

[77] Correspondence between Lord Dervaird, Presiding Arbitrator, and the Government of Canada dated March 21, 2002, *Decision and Order Concerning Negotiating Texts Relating to the Drafting of NAFTA Article 1105,* available as of January 27, 2004 at www.naftalaw.org.

those standards that have been in existence and generally accepted in the international forum. Appleton argues that the interpretive statement does not actually modify NAFTA as it appears from the wording of the statement. This is so because an interpretation of this extent, which actually changes the meaning of the article, is actually an amendment (which in this case would be illegal, because the amending procedure of the NAFTA was not followed).[78] The issue remains unresolved.[79]

Even if the standard of treatment includes only customary international law, it is arguable that agreements, treaties, and other evidence of standards regarding indigenous peoples would form part of the international standard of treatment, and as such, are binding upon the Parties:

> An aboriginal group from one NAFTA country investing in another could advance an argument that aboriginal rights/issues have entered into customary international law and has become part of the minimum international standard of treatment of a foreign investor.[80]

While this provision is usually interpreted as the minimum standard of treatment *of investors,* the argument can be made that this includes other rights *and obligations* that comprise international law. It is logical to argue that in order to maintain this standard, the Parties must require investors to operate in a fashion that respects the rights of indigenous peoples. Article 31(3)(c) of the *Vienna Convention*,

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[78] Correspondence from B. Appleton to NAFTA tribunal, *Investors First Submission re: the NAFTA FTC Statement*, dated September 10, 2001, available at www.naftalaw.org as of January 27, 2004.

[79] For example, *Pope and Talbot, supra* note 71, held that the Article 1105 elements were additive, that is, that covered investments and investors were entitled to receive fair and equitable treatment and full protection and security, in addition to receiving treatment in accordance with international law. This approach was later contradicted by the Parties in an interpretive statement (see "Notes of Interpretation of Certain Chapter 11 Provisions" NAFTA Free Trade Commission, July 31, 2001, available as of January 28, 2004 at http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp) and not followed as being incorrect by the British Columbia Supreme Court in the appellate review of *United Mexican States* v. *Metalclad* (2001) BCSC 664 at para.65.

[80] Gastle, *supra,* note 13 at 60.

which states that any relevant rules of international law applicable in the relations between the parties shall be taken into account when interpreting treaties, supports this interpretation.[81]

The tribunal in *Metalclad* held that Article 1105 required at least the following as the minimum standard of treatment:

- Investors should be able to rely upon assurances made by one level of government about other levels of government;
- A transparent predictable framework for business planning and investment, including the requirements for an orderly process and timely disposition of matters;
- Clear indications of the legal requirements facing investors and their investments;
- Transparency regarding licensing procedures and the related requirements faced by these investors and their investments;
- Notification of meetings in which investors and investments have a direct interest;
- Governments will follow their own laws (a breach of these laws being determined by the tribunal).[82]

These findings are consistent with the NAFTA Chapter 18 provisions promoting transparency. In particular, Article 1802 requires each Party to ensure that its laws, regulations, procedures and administrative rulings of general application are published or otherwise made available so that interested or relevant parties can be aware of them and be acquainted with their provisions. Further, Article 1803 requires that each Party notify any other interested Party of a proposed or actual measure that might affect their interests under the NAFTA.

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[81] The tribunal in *Pope and Talbot, supra,* note 71 at para. 115, relied upon this interpretation as well.

[82] In addition, the tribunal in *Pope and Talbot, supra,* note 71 at para. 118 held that violations of the minimum standard of treatment need not be egregious.

The British Columbia Supreme Court in *Metalclad* held that the Chapter 18 provisions do not apply to all of NAFTA, but did not give clear reasons for this finding. Nonetheless, Professor Schwartz in *S.D. Myers, Inc. and Canada*, Concurring Final Merits Award, argued at paragraph 68 that the customary international law standard required under Article 1105 includes the concepts of regulatory fairness and transparency. Contrary to the court in *Metalclad,* the Federal Court of Canada in *Myers* stated that: "...different chapters of NAFTA overlap, and that NAFTA rights are cumulative, unless there is a direct conflict." Given this reasoning, an argument may be made that the requirements of transparency and fairness, either through Chapter 18, or standards of conventional international law, are included in the interpretation of Article 1105, although there has not been a consistent direction indicated in the NAFTA decisions to date.

3.2.2.6 Cultural Industries

The cultural industries of Aboriginal peoples are not specifically protected, even within the limited protections provided by the cultural industries exemption provided by the NAFTA Annex 2106.[83] The cultural industries provisions exempt printed publications, film and video, music recording, music publishing, and broadcasting but do not include cultural objects or traditional activities involving the use of water. Further, even this provision is seen as very weak:

> While the NAFTA contains a cultural industries exemption, its effect may be seen to be more diplomatic in nature than legal. Since the exemption does not protect a Party from retaliation for relying upon it, it provides little actual protection for a Party's cultural industries.[84]

In the negotiations of the FTAA, Canada has suggested a cultural industries exemption:

> "RECOGNIZING that countries must maintain the ability to preserve, develop and implement their cultural policies for the purpose of strengthening cultural

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[83] This article does not reference cultural industries *per se*, but incorporates the provisions of the Canada-U.S. Free Trade Agreement on this matter.

[84] Appleton, *supra* note 62 at 191.

> diversity, given the essential role that cultural goods and services play in the identity and diversity of society and the lives of individuals." (FTAA.tci/w/04) Pending the development of a new binding instrument on cultural diversity, and the determination of its linkages with the disciplines of trade agreements, Canada believes the most effective way to reflect those concerns is through a cultural exemption for the FTAA. [85]

3.2.2.7 Conflict Between "Existing Measures" and "Description" Provisions

As described in the above sections, the scope of the existing measures and description provisions are different. The existing measures reservation, being based upon the constitution, would reserve all aspects of relevant constitutional provisions, such as section 35, and would also include all related "laws, regulations, procedures, requirements or practices".[86] Yet, as discussed above, the description provision is quite limited in its application, and much narrower than the scope implied in the existing measures reservation. In the case of a conflict or ambiguity such as this, the NAFTA directs that the description element prevails.[87] As such, the very limited protections provided in the description are the only protections in NAFTA for Aboriginal rights.

3.3 Lack of Assessment of the Long-Term Impacts of Trade

The NAFTA contains no prescriptions for, and creates no penalties for the lack of, assessment of the long-term impacts of trade on First Nations in Canada. While the federal government (and others) have undertaken trade-impact assessment, very little of it relates to First Nations, and none of the following work examined by the author assesses impacts of the NAFTA on First Nation lands or communities. Some of the key needs in this area or shortcomings of existing tools are detailed below.

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[85] Department of Foreign Affairs and International Trade, "*Paper on Cultural Diversity in the FTAA Negotiations*", April 4, 2003, available as of January 30, 2004 at http://www.ftaa-alca.org/TNC/tnw195_e.asp.

[86] NAFTA, Article 201.

[87] NAFTA, Annex II(3).

3.3.1 Framework for Conducting the EAs of Trade Negotiations

The primary domestic policy instrument for assessing impacts of trade negotiations is the Framework for Conducting Environmental Assessment of Trade Negotiations (the Framework). The Department of Foreign Affairs and International Trade (DFAIT) has prepared a background document that sets out its commitment to conducting these strategic environmental assessments of trade negotiations that it is intending to undertake or is in the process of negotiating.[88] The document explains that there are two key objectives that DFAIT has established for conducting environmental assessments of trade negotiations[89]:

- To assist Canadian negotiators to integrate environmental considerations into their negotiating processes by providing information on the environmental impacts of the proposed trade agreement; and
- To address public concerns by documenting how environmental factors are being considered in the course of trade negotiations.

The assessment framework has a number of deficiencies, in particular, that it is merely a non-binding tool for negotiators to consider in the trade negotiations. As such, the protection of the environmental concerns of the public, experts, and Aboriginal peoples (irrespective of whether they are involved) expressed in the assessment consultations are merely one factor to be considered and traded-off against other factors, such as economic growth.

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[88] Department of Foreign Affairs and International Trade, *Framework for Conducting Environmental Assessments of Trade Negotiations*, February 2001 available as of February 19, 2004 at http://www.dfait-maeci.gc.ca/tna-nac/backgrounder-en.asp.

[89] This appears to be a misnomer, despite the title. An environmental assessment of a trade agreement can occur, but the framework is directed at environmental assessment of "trade negotiations". It is not the negotiations themselves that are being assessed, however, but rather the impact of the proposed trade agreement provisions. The focus on "negotiations" is likely due to the fact that the assessment occurs as negotiations proceed, at which time there is no actual

A second deficiency of the framework is that, unlike most progressive environmental frameworks or procedures, this assessment tool does not contemplate a situation where the negative impacts of the negotiation of a trade agreement are so great that not having a trade agreement is the best course of action.[90] While some may argue that a limited-focus trade agreement that has at least minimal benefit can always be negotiated, this may not be the case regarding trade-related impacts to Aboriginal and treaty rights. In situations where government decisions may extinguish an Aboriginal or treaty right, and therefore consent of the First Nation is required, the only option may be to avoid the intended trade activity. As the objectives of the framework indicate, this does not appear to be an option.

A third deficiency is that the framework makes no reference to the need assess the impacts of trade negotiations on the environment and rights of First Nation peoples. While the DFAIT public information states that Aboriginal people were involved in the development of the framework, the actual level and extent of involvement is not stated, presumably because it was of such minor magnitude that the government could derive no credit for it.

It is clear that neither Aboriginal peoples nor their representatives were not included in the membership of the Sectoral Advisory Groups on International Trade (SAGITs), the expert groups that advise the Minister of International trade on trade-related issues.[91] Because of this omission, the Minister may have received general information about the environmental or other concerns of Aboriginal peoples through general consultations with them as members of the public, but the expert advice

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"trade agreement", merely a proposed, evolving agreement text, and negotiating instructions.

[90] In project-related environmental assessment language this is commonly referred to as the "go-no go" decision or "no development option".

[91] *Ibid.*, note 87 "Section 2: Framework for Conducting Environmental Assessment of Trade Negotiations" at para. 3. As well, "List of Participants"

needed to understand and develop policy regarding possible limitations on Aboriginal rights that may be occasioned through trade negotiations is likely absent.[92] As Gastle points out, in recommending another approach, the creation of a separate Aboriginal SAGIT is appropriate and necessary:

> A separate aboriginal SAGIT might help to ensure that trade issues involving aboriginal rights are discussed at the policy formation stage. The members of a SAGIT might help the government discharge its fiduciary obligation to consider the manner in which proposed free trade agreement provisions might impact on aboriginal rights and issues. It would also help in facilitating the consultations that would have to occur in respect of any potential infringement of such rights and issues.[93]

This leads to consideration of the requirements to ensure adequacy of consultation regarding policy decisions of government. While policy decisions of the executive branch of government are not subject to judicial review, the courts have made clear that these types of decisions are subject to review if they limit treaty and Aboriginal rights.[94] It remains uncertain how the Crown would satisfy its obligations to Aboriginal peoples (such as the need to consult) in the situation where the both the decision is not project-specific (such as the negotiation of an international trade agreement), and the treaty or Aboriginal rights limitation is potentially broad (that is, not directly attributable to a specific First Nation person or community).

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provided by Department of Foreign Affairs and International Trade on January 22, 2004 (possession of the author).

92 Note the comments of Curtis, *supra,* note 17 at 311, regarding this public expertise issue: "Many CSOs represent the self-organization of individuals with keen interests in particular areas; they possess, therefore, a reservoir of knowledge, skills and perspective that could be deployed to great advantage for policy development. This includes information that bears on the gamut of trade policy issues, from negotiations to administration of the multilateral system to the effective disposition of trade disputes."

93 Gastle, supra, note 13. He bases this upon an interesting comparison to the direct participation of Aboriginal peoples in the amendment of the *Migratory Birds Convention* process. In that case, Gastle argues "the federal government was legally required to provide a seat at the negotiating table, due to the importance of the aboriginal right and the degree of interference therewith".

94 See Chapter 2 of this thesis.

A fourth deficiency is that framework makes it clear that only the SAGITs are privy to any information in the final stage of negotiations; the general public (even if integrally involved in earlier stages of the DFAIT consultation) is not.[95] Because deviation from the assessment findings and recommendations is most likely to occur during the final stage of negotiations, this is the most critical period for ensuring long-term protection of environmental and other concerns. Even if the SAGITs and negotiators were fully appraised of the Aboriginal rights implicated by trade negotiations, and of the associated concerns, the lack of Aboriginal participation in that process would violate most requirements for "meaningful consultation" that have been set out in the Aboriginal rights jurisprudence to date. Most limitations to Aboriginal and treaty rights require the direct participation of and negotiation with the Aboriginal peoples affected.

Lastly, the framework does not direct that the assessment consider any particular economic, environmental or social impacts dealing specifically with Aboriginal peoples or their rights.[96] While DFAIT public information indicates that it will consult with Aboriginal groups, there is no indication that that this has happened.[97]

Given the foregoing, it is clear that any decisions that will be made regarding the negotiation of trade agreements that will, or will not, limit Aboriginal rights will most likely be made without fully and adequately consulting with Aboriginal peoples about potential limitations on their rights.

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95 *Ibid.*, note 87, *section 2.3: Public Participation* at para. 2.

96 *Ibid.*, note 87, *section 2.4: Analytical Framework to Conduct and Environmental Assessment of Trade Negotiations.*

97 Department of Foreign Affairs and International Trade website regarding *Canada's Environmental Assessment Framework for Trade Negotiations*, which mentions the involvement of Aboriginal peoples at *http://www.dfait-maeci.gc.ca/tna-nac/backgrounder-en.asp* (as of January 30, 2004)

3.3.2 *Cabinet Directive on EA of Policy, Plan and Program Proposals*

The *1999 Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals* underpins DFAIT's decision to develop the framework.[98] While the *Directive* sets out the need for all federal departments to conduct environmental assessments of programs, plans and policies, DFAIT has not dealt with the Aboriginal rights elements of its own international trade program (among other deficiencies).

3.3.3 *No Monitoring of the NAFTA's Unique Impacts on Aboriginal Rights or Peoples*

According to a Department of Foreign Affairs and International Trade employee consulted during the research for this thesis,[99] there is no monitoring by DFAIT of any impacts of trade agreements on Aboriginal peoples, their industries, or their rights. Consequently, Aboriginal peoples level of access to the benefits of trade liberalisation are not known, nor is the existence of any ongoing violation of their rights.[100]

3.3.4 *The North American Agreement on Environmental Cooperation*

The North American Agreement on Environmental Cooperation (NAAEC) was created to address environmental concerns surrounding trade liberalization; it contains no provisions regarding the special vulnerability of indigenous peoples resulting from their particular relationship to and reliance upon the land and

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98 Government of Canada, *1999 Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals*, available as of February 19, 2004 at http://www.ceaa-acee.gc.ca/016/directive_e.htm.

99 This person did not give permission to the author to be identified.

100 As an example, there are a number of special barriers or impacts that may be experienced by Aboriginal peoples such as special impacts due to the Article 2103 Taxation provision of the NAFTA. The impacts of the provision have not been analysed to the knowledge of the author.

environment. Nonetheless, the Commission for Environmental Cooperation (CEC)[101] has attempted to include indigenous concerns and participation into its research. In particular, it has had a number of indigenous peoples on its public advisory body, the Joint Public Advisory Committee. As well, it recently included the assessment of trade impacts on indigenous peoples in the CEC symposium, "*Assessing the Environmental Effects of Trade*", in March 2003. Much more can be done on this front, as the effects of the NAFTA on indigenous groups remains largely unstudied.

Section 10(6) of the NAAEC mandates the creation of an agreement on trans-boundary environmental impact assessment (TEIA), but the Parties to NAFTA have yet to develop this agreement. This is highly regrettable, as TEIA could serve as a tool by which indigenous issues could be monitored and assessed, if only on a project-specific basis. This is particularly the case regarding the relationship between continental water use, and impacts on indigenous peoples, which could be a component of a TEIA framework.

3.3.5 Other Considerations

There has been no assessment to date of the effect of liberalised trade on the ability of governments to fulfill other responsibilities they have under other international agreements (such as the *Convention on Biological Diversity*).[102] Given that a number of these other agreements contain provisions that deal specifically with indigenous peoples, the relationship and impacts the agreements have on one another and the issues they are meant to address requires integrated consideration and greater analysis, especially insofar as these relationships hinder or constrain Aboriginal rights.

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[101] Created under Part 3 Articles 8 – 19 of the *North American Agreement on Environmental Cooperation* available as of February 19, 2004 at http://www.cec.org/pubs_info_resources/law_treat_agree/naaec/index.cfm?varlan=english

3.4 Access to DR Mechanisms and Institutions of the NAFTA

One of the most troubling issues that arises in the circumstance of an apparent limitation to Aboriginal or treaty rights is that while these rights have unique, constitutional protection, First Nations lack have access to dispute-resolution mechanisms that may make determinations that impact or limit these rights.

Chapter 20 of the NAFTA provides the mechanism for the resolution of any matter between NAFTA parties arising under the NAFTA or the GATT.[103] This provision makes clear that the standard application of international law is once again applicable. This rule states that international law is the purview of state actors, and that non-state actors do not have a direct role.[104] In this case, First Nations and other Aboriginal groups must look to the government of their country to assert their interests, many of which interests would likely be held as beyond the jurisdictional capacity of trade tribunals. Given the history of exclusion that Aboriginal peoples have experienced regarding the negotiation of trade agreements, it is unlikely that their perspectives would be considered or included in dispute-resolution hearings.

Further, governments may be in an untenable conflict of interest. In particular, tension exists in domestic situations where both the federal and provincial Crowns are balancing the various competing Aboriginal and non-Aboriginal interests *and* seeking to discharge their fiduciary and other responsibilities to Aboriginal peoples. The usual safeguard for ensuring such balancing is appropriately performed is that all parties have theoretical access to domestic courts to have their complaint heard.

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[102] Convention on Biological Diversity, June 5, 1992, available as of January 30, 2004 at http://www.biodiv.org/convention/articles.asp.

[103] NAFTA, Articles 2004 and 2005.

[104] It has long been the case that industry, non-governmental organisations, and other interests have been able to influence or lobby their government to take a particular position in a dispute settlement procedure or process. As international agreements dealing with complex environment and social problems continue to be studied and negotiated, the role of science and other technical disciplines is increasing in importance. See Harten, *supra,* note 5.

This remedy has not been available to Aboriginal peoples concerned with international-level activities and decisions of the Department of Foreign Affairs and International Trade, even if those decisions implicate Aboriginal rights and interests; this governmental accountability issue has not yet been tested in domestic courts.

Chapter 11 of the NAFTA provides an additional mechanism for dispute resolution that is available not only to Parties to the NAFTA, but also to investors. Article 1116 indicates that a national of one country may invoke the international legal commitments enshrined in Chapter 11 against another Party, on its own behalf, within three years from the date of the breach.[105] In this situation, even when there may a potential infringement to an Aboriginal or treaty right, Aboriginal peoples are not granted the same standing accorded to governments to argue their rights; the process is available to Parties and investors only. This is the case despite a vast body of international law providing that indigenous peoples, as land-holders with unique rights, are entitled, and must be allowed, to engage in decision-making that affects their lands, resources, rights, including economic development.[106]

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[105] Further to this, NAFTA Article 1117 allows a national of one country, through a foreign corporation that owns or controls it directly or indirectly, to hold its own country accountable for NAFTA breaches. Appleton, *supra* note 62 at 150, warns that this allows a national to do what it could not do any other way: hold its own government responsible for violations of an international agreement.

[106] See for example S. James Anaya, *Indigenous Peoples in International Law,* (New York: Oxford University Press, 1996) in the Appendix, which provides the following list: *Convention (No.169) Concerning Indigenous and Tribal Peoples in Independent Countries*, Adopted by the General Conference of the International Labour Organisation, Geneva, June 27, 1989, entered into force September 5, 1991; *Draft of the Inter-American Declaration on the Rights of Indigenous Peoples,* approved by the Inter-American Commission on Human Rights at the 1278th session held on September 18, 1995. O.A.S. Doc. OEA/Ser/L/V/II.90, Doc.9 rev.1 (1995); *Draft United Nations Declaration on the Rights of Indigenous Peoples,* as agreed upon by the members of the U.N. Working Group on Indigenous Populations at its eleventh session, Geneva, July 1993, adopted by the U.N. Subcommission on Prevention of Discrimination and Protection of Minorities by its resolution 1994/45, August 26,1994. U.N.Doc.E/CN.4/1995/2, E/CN.4/Sub.2/1994/56, at 105 (1994); *Resolution on Action required Internationally to Provide Effective Protection for Indigenous Peoples,* Adopted by the European Parliament in its plenary session,

No Chapter 11 or Chapter 20 case has dealt with, or mentioned even in a cursory fashion, the rights and interests of indigenous peoples, until very recently, in *Softwood Lumber*, involving the Cree of northern Quebec and the Interior Alliance:

> NAFTA and the WTO are currently being tested as a potential forum for aboriginal rights. The current iteration of the *Softwood Lumber* dispute from Canada has seen the intervention of aboriginal groups on both sides of the issue before all tribunals that have considered the issue as to whether Canada is providing a "financial contribution" through "the provision of goods or services"[76] such that "a benefit is thereby conferred"[77] on Canadian softwood lumber producers.[107]

In this case, the forestry management practices evident in British Columbia and Quebec were alleged to impose a cost on First Nations peoples who had been denied the right to participate in the forestry industry, or receive payment for the exploitation of timber on their traditional lands. The Cree/Interior Alliance submission stated that this cost should have been considered a subsidy. The tribunal refused to deal with the matter, considering it a matter of domestic law.

The refusal of the tribunal to deal with the Aboriginal rights issue before it was not due to the issue being unrelated. A quick review of the NAFTA cases indicates that an apparent component of some of them, particularly natural resources-related disputes, could include the possibility that Aboriginal interests were impacted in some fashion, but that the impact was overlooked or omitted from consideration. As one author points out:

> Firstly, it is very important that First Nations recognize that their interests are at stake in trade disputes within the NAFTA system and to establish precedence of standing to be there to present their side of the story. This is a

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Strasbourg, February 9, 1994. Eur. Parl. Doc. PV 58(II)(1994); *Convention on Biological Diversity; Draft Declaration of the Principles for the Defense of the Indigenous Nations and Peoples of the Western Hemisphere,* reprinted in U.N.Doc.E/CN.4/Sub.2/476/Add.5, Annex 4 (1981); *Declaration on Principles of Indigenous Rights,* reprinted in U.N.Doc.E/CN.4/1985/22, Annex 2 (1985); *Declaration of Principles on the Rights of Indigenous Peoples*, reprinted in U.N.Doc.E./CN.4/Sub.2/1987/22, Annex 5 (1987); *Agenda 21: Chapter 26,* adopted by the U.N. Conference on Environment and Development, Rio de Janeiro, June 13, 1992. U.N.Doc.A/CONF.151/26(vol.3), at 16, Annex 2 (1992);

[107] Gastle, *supra,* note 13 at 31.

> case where it is absolutely fundamental that First Nations in B.C., that have problems with the B.C. stumpage system, and First Nations here, or example, in Saskatchewan, that are independent entrepreneurial timber processors, be there to say "Pay attention to our specific circumstances, we're not necessarily the same as everyone else, listen to us." I think this is an extremely good opportunity to make that point and establish that precedent. And, secondly, I think the broader principle, as I suggested earlier today, is very important, that if there is a reasonable suspicion that a government is disguising an export subsidy in some form, disguising it behind a land rights issue, and that what we're seeing is that tampering with indigenous people's ownership and occupation and use of their ancestral territories, is being used as a way of making other people rich, I think we should establish a precedent that it is a trade problem and it's appropriate for trade bodies in a dispute to raise that issue and to accept evidence on it.[108]

Canada has stated that it will formally request public access to NAFTA Chapter 11 disputes:

> Having reviewed the operation of arbitration proceedings conducted under Chapter Eleven of the North American Free Trade Agreement, Canada affirms that it will consent, and will request the consent of disputing investors and, as applicable, tribunals, that hearings in Chapter Eleven disputes to which it is a party be open to the public, except to ensure the protection of confidential information, including business confidential information. Canada recommends that tribunal determine the appropriate logistical arrangements for open hearings in consultation with disputing parties. These arrangements may include, for example, use of closed-circuit television systems, Internet webcasting, or other forms of access.[109]

While this is a dramatic improvement in transparency in that interested spectators now have at least potential access to watch or review tribunal proceedings, this will not likely address the needs of First Nations. In the scenarios explored in this thesis rights may be violated, and this elevates First Nation above the role of mere spectator. Further, the Canadian proposition above contemplates *viewing* by the public, rather than *participation* in the substance of the hearing (if not in the actual hearing). Canadian law states that the Crown cannot violate those rights without at least a minimum standard of involvement of the rights-holder. Therefore, much more extensive and substantive access to tribunals may be

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108 Barsh, *supra* note 13 at 36.

required. Finally, this proposition deals only with Chapter 11 disputes, whereas the scope of the potential impact of the NAFTA extends far beyond that chapter and even the entire agreement. All aspects of trade agreement development, from research and formulating positions and policies through to negotiating and final implementation of enabling domestic legislation, have the potential to limit Aboriginal and treaty rights. Aboriginal peoples must have substantive involvement in each of these aspects.

3.5 Access to Benefits of Free Trade

Aboriginal leaders have advocated strongly for improved access by Aboriginal peoples to the benefits of liberalised trade. At a roundtable session organised by the Canadian Centre for Policy Alternatives, regarding indigenous participation in international trade activities, National Chief Phil Fontaine stated the protection of Aboriginal interests in free trade is paramount:

> The first objective was to ensure that the interests and rights of Indigenous peoples are protected and that Indigenous peoples play a large part in this process. The second element was to elevate Indigenous Peoples from the poverty and misery they face in their every day lives.[110]

Paul Chartrand, a Commissioner who served on the Royal Commission on Aboriginal Peoples, has commented on the need for a sensitive and culturally appropriate focus on equitable sharing of trade benefits by Aboriginal and non-Aboriginal peoples in Canada:

> Today, governments have become more sensitive to human rights. Other changes have also occurred, including the expansion of free markets. As a result, businesses have become increasingly influential. It remains critical to Canadians and the Canadian government how money and corporate power is used. Canada should be the champion of mutually beneficial trade. "The most significant contribution that Canada can make to the security and

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109 Government of Canada, "*Statement of Canada on Open Hearings in NAFTA Chapter Eleven Arbitrations*", available as of January 28, 2004 at http://www.dfait-maeci.gc.ca/nafta-alena/open-hearing-en.asp.

110 National Chief Phil Fontaine, in *Report from the Roundtable: Canada, Indigenous Peoples and the Hemisphere*, Winnipeg, March 22 - 23, 2000 at 2 – 3 (possession of the author).

> development of indigenous peoples is to manage Canadian investments in a way that ensures a positive net impact on the indigenous communities which host Canadian resource companies". There has been some indication that the private sector is increasingly aware of the need to recognise indigenous peoples rights.
>
> The business link between investment and economic development does not square with the indigenous peoples concerns about their environment (example natural environment, culture, "a way of life" etc). A way of life is an end in itself, and must come before calculating investment results. While indigenous peoples are not afraid of investment, there must be clear guarantees that history is not repeated. The environment indigenous peoples occupy should not be destroyed and that they should not become marginalised and impoverished as a result of outside investment. The indigenous community must have the right to refuse access to its land and resources. Structural mechanisms have to be found to prevent entry in such cases.[111]

In 2003, Fred Caron, Q.C., the Assistant Deputy Minister in the Aboriginal Affairs Secretariat of the Privy Council Office made the following commitment, whereby he reaffirmed the indigenous right to development, and pledged the necessary resources to ensure its implementation:

> Canada has unequivocally and repeatedly stated its support for the promotion and protection of the right to development as outlined in the Declaration on the Right to Development. (para. 4)
>
> Benefits from economic, social and cultural development are unlikely to be achieved is issues of civil and political rights, such as those of equal participation in decision-making, freedom of association and freedom of expression, are not respected. (para. 6)
>
> To be clear, what this means is that Government of Canada has recommitted itself to providing Aboriginal people and northerners, many of whom are Aboriginal, with the tools, resources, powers and authorities to participate in the development process, to protect and advance their interests and to obtain benefit from these developments. (para. 16)[112]

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111 *Ibid.*, at 5.

112 Fred Caron, Q.C., Assistant Deputy Minister, Aboriginal Affairs Secretariat, Privy Council Office, *Statement by the Observer Delegation of Canada: On the Theme of "Indigenous Peoples and their Right to Development, Including Their Right to Participate in Development Affecting Them"*, United Nations Working Group on Indigenous Populations, Nineteenth Session, July 24, 2001 (possession of the author).

The need for improved access to trade benefits having been stated, the government can create special preferences or provisions under NAFTA for promoting Aboriginal business interests and aspirations:

> I said earlier that there were no specific provisions in the NAFTA regarding aboriginal business, and that's true, but there are provisions which allow governments to take domestic policy decisions in certain areas to promote certain businesses or groups of businesses. For example, in the area of government procurement, we negotiated a reservation to our obligation that would allow the government to maintain certain preference programs to favour small business and minority businesses, similar to those in the United States, which has allowed the government to introduce preferences in government procurement for aboriginal businesses, while meeting its obligations under NAFTA. So while the agreement may not have a specific provision in one area, the idea is to maximize the freedom of the government to continue to legislate or regulate in areas that it considers important.[113]

DFAIT public information provides a number of objectives contained within its first *Sustainable Development Strategy (Agenda 2000)*, including supporting international market expansion opportunities for Canada's Aboriginal peoples:

> Objective three: Canadian Values and Culture
> 3A.2- through the CIBS (Canada's International Business Strategy) framework and activities such as trade fairs and missions; organize a follow-up meeting to the first Aboriginal Economic Round Table; finalize work on the UN draft Declaration of Indigenous Peoples; complete work on a draft Inter-American Declaration on the Rights of Indigenous Peoples; and contribute to activities and initiatives in the International Decade of the World's Indigenous Peoples (1994-2004).[114]

In 2003, DFAIT modified their *Sustainable Development Strategy* to focus on concrete projects and approaches to increase indigenous involvement in trade and economic development:

> Promoting SD through the pursuit of economic development and trade opportunities across the circumpolar region, while ensuring that the fragile Arctic environment is not compromised. Canada supports the study and pursuit of economic activity in areas such as: ecotourism, the sustainable use

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[113] Claude Carriere, *Impact of NAFTA on Aboriginal Business in North America: Papers, Presentations and Proceedings of the Conference*, Saskatoon, May 28-29, 2001 at 7.

[114] Department of Foreign Affairs and International Trade, *Agenda 2000: DFAIT's Sustainable Development Strategy,* available as of February 19, 2004 at http://www.dfait-maeci.gc.ca/sustain/sustaindev/agenda2k/progrdecmay98/progress3-en.asp.

> of renewable resources, and the development of new markets for indigenous products. Canada also promotes the sharing of best practices among circumpolar countries with regard to sustainable economic activity.[115]

This movement towards distinct goals and targets is certainly a step in the right direction. However the concern remains regarding southern indigenous peoples, predominantly First Nation and Métis, who comprise the vast majority of the indigenous population in Canada. These peoples remain excluded from the projects listed above.

Finally, work must be done in order to better understand and reduce the unique barriers that face Aboriginal peoples and businesses (such as mortgaging/financing challenges, *Indian Act* requirements, taxation issues, regulatory gaps on reserves, etc.) as they attempt to participate in the benefits of liberalised trade.

4 CONCLUSION: CANADIAN SCENARIOS REVISITED

The above-described scenario wherein a First Nation chooses to exercise its water rights is not only plausible, it is entirely likely and legally justifiable. Aboriginal nations may have extensive rights to water, ranging from full use and exploitation that cannot be removed without full compensation to rights that are similar to those rights granted to Non-Aboriginal water users (such as removal, diversion, impoundment for purposes of irrigation, effluent assimilation, hydroelectric development, manufacturing, industrial). While it is true that provincial laws of general application apply on reserve, these laws may not affect the "core of Indianness", therefore, measures enacted to restrict the use of water cannot legally limit treaty and Aboriginal rights to water (subject only to conservation needs, which would presumably apply equally to all non-Aboriginal uses listed above). This issue

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[115] Department of Foreign Affairs and International Trade, *Agenda 2003: DFAIT's 2nd Sustainable Development Strategy,* available as of February 19, 2004 at

has not come before the courts, but it is clear that none of the requirements to validly limit treaty and Aboriginal water rights have been met by either level of government in Canada.

Given that Canada has no currently valid measures to legally prohibit Aboriginal exports of water without limiting Aboriginal and treaty rights to water, and given the application of the NAFTA to water in any event, it appears highly likely that Canada may not be able to prohibit other NAFTA investors from exporting Canadian water. If the Crown cannot currently limit Aboriginal water-rights-based exports, it has no legal justification for prohibiting water exports by a U.S. or Mexican investor. To do so would violate the "national treatment" provisions of Chapter 11 of the NAFTA. Should the Crown wish to prohibit water export, it would be in the untenable position of having to either discriminate against foreign investors (and thereby violate the NAFTA), or unjustifiably (that is, without proper reason or process) infringe upon Aboriginal and treaty rights.

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http://www.dfait-maeci.gc.ca/sustain/SustainDev/a2003-en.asp.

CHAPTER 5 A PROPOSED AGENDA FORWARD

This chapter will present a proposed agenda to begin addressing, and hopefully resolve, the concerns raised in the previous chapters.

1 RECOGNITION OF ABORIGINAL WATER RIGHTS

1.1 Fulfilment of Commitments in the *Federal Water Policy*

1.1.1 "Indian Water Rights"

The most important statement by the Canadian government regarding indigenous water rights was made in 1987, as part of the *Federal Water Policy*. Due to its significance, it is reproduced here in its entirety:

> Water is of special value as a sustaining force for the essentials of life for Canada's native people.
>
> In recent years, native people have demonstrated they are prepared to assert their interest in, as well as participate in, managing water resources. In this way, they are taking steps to protect their distinctive way of life and to determine their own destiny.
>
> Native people stress their traditional close relationship with nature and their determination to preserve their aboriginal claims related to water. They emphasize their vulnerability to externally imposed changes in the water regime on which their communities depend.
>
> For these reasons, water and water management are important issues in negotiations of land claims between the federal government and native groups.
>
> One native land claim in the western Arctic has been negotiated; in this case, the federal government has explicitly recognized the native peoples' aboriginal interest in water but regards the water itself as part of the public domain. Aboriginal and treaty water rights and participation in water management have also been raised by native people as important concerns in many areas of the country, in particular, Ontario, the Prairie Provinces and British Columbia.
>
> Native land claims in the territories may have to be resolved in a different way from that used to settle native water rights issues "south of 60." The federal government administers the resources in the former, whereas provinces are the principal administrators in the latter.
>
> In its sphere of influence, the federal government is striving to balance the goal of maintaining natural conditions for streams (and protecting traditional

uses) with the endeavours of others whose goals are directed to resource or economic development.

In recognition of native people's special interests in water, the federal government will:

- Negotiate land claims settlements that define use and management powers for waters within claimed areas;
- Review and clarify with native people their water-related issues and interests with respect to their treaty areas as well as to lands subject to land claims;
- Improve understanding of native needs and commitments associated with water;
- Determine, in consultation with native people, how they will participate in resource management programs affecting water resources of interest to them; and
- Encourage greater native participation in water allocation and management decisions involving instream and traditional uses.[1] (emphasis added)

Regrettably, as with the rest of the *Federal Water Policy*, little has been done to further the above agenda, notwithstanding a sufficiency of cogent legal arguments and expositions on the subject.

In response to this situation, a number of actions are proposed:

- The existence of Aboriginal water rights must be recognised by all governments in Canada;
- Canada and the provinces must fulfill their constitutional, fiduciary, and statutory obligations to indigenous peoples regarding the protection of indigenous water rights;
- Federal commitments regarding indigenous water rights as expressed in the *Federal Water Policy*, which have been ignored but remain active to this day, must be revisited, addressed and fulfilled by Canada;
- Governments must commit to renewing their efforts to protect Canada's water, and in particular, the water rights of indigenousd peoples.

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[1] Environment Canada, *Federal Water Policy*, available as of January 31, 2004 at http://www.ec.gc.ca/water/en/info/pubs/fedpol/e_fedpol.htm#7.15.

1.1.2 Involvement in Water-Related Decision-Making

Given the significance of water rights to indigenous peoples in Canada, Aboriginal peoples must be meaningfully involved in planning and decision-making at both the federal and provincial levels. As decision-making regarding actual water use occurs most frequently at the provincial level, cooperation between federal, provincial, and indigenous governments is needed to ensure that all governments, but particularly provincial governments protect, and specifically do not limit, Aboriginal water rights in their water-related decision-making. This cooperative relationship must include Aboriginal governments, given that they also can make water-use decisions, based upon their treaty and Aboriginal water rights, which may impact users and ecosystems beyond their community boundaries.[2]

In addition:

- All governmental decision-making processes that may limit indigenous water rights must be aimed at avoiding these limitations to the greatest extent possible;
- Boundaries and criteria to guide the discretionary decisions of government officials (for example, in regulatory licensing processes) that may limit indigenous water rights must be clearly delineated;
- A permanent national forum involving indigenous peoples must be created to explore options and create a strategy for the protection of water in Canada, in particular water that is subject to Aboriginal and treaty rights.

Finally, the *Federal Water Policy* states:

> The federal government advocates exercising caution in considering the need for major interbasin transfers and endorses other less disruptive alternatives

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[2] Stephen Owen, in *Toward an Inclusive Paradigm in Policy-Making* (Oxford University Press: 1998) pages 81 – 95 argues that these this shared decision-making approach provides participants with the opportunity to experience irreversible mutual learning, overcome historic distrust, engage in shared regional (or broad area) planning, and increase the number and effectiveness of public participation mechanisms.

such as demand management and water conservation to satisfy societal needs without sacrificing water related values to irreversible actions. In support of this view, the federal government will:

- Draft guidelines and criteria for assessing interbasin transfers within Canada in cooperation with the provinces/territories;
- Develop with concerned provincial governments a mutually acceptable referral system to ensure that provincial licensing of small-scale transfers of water (local arrangements between communities, or containerized transfers) between jurisdictions take into account federal interests respecting navigation, fisheries, environmental protection, **Indian Treaties and trade considerations**. (emphasis and double emphasis added)

At a minimum, the federal (and provincial) governments must fulfill the above commitments, and ensure that indigenous interests and rights regarding water transfers are protected. The linkages between trade considerations and considerations (at the local, regional, national, and international levels) must be explored and clarified through a process that identifies areas of ambiguity, ambivalence, overlap, or concern, and then begins to address these issues.

1.2 International Joint Commission (IJC)

The International Joint Commission engages in six main activities in its role of preventing and resolving disputes between Canada and the United States (the Parties to the *International Boundary Waters Treaty*[3]) relating to transboundary waters: consultation and consensus-building; providing a forum for public participation; engagement of local governments; joint fact-finding; objectivity and independence; and flexibility.[4] Being primarily concerned with water levels and quality of all boundary waters along the United States - Canada border, the IJC has reviewed the issue of bulk water exports in the past, and has received representations by Aboriginal peoples in this regard:

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[3] *International Boundary Waters Treaty*, S.C., c.40, s.16.

[4] International Joint Commission, "The IJC and the 21st Century" October 21, 1997, available as of February 19, 2004 at http://www.ijc.org/php/publications/libraryReturn.php?language=english&start=T.

> Aboriginal peoples and Indian tribes opposed water exports and were concerned that removals or diversions could affect their treaty rights.[5]

As well, the *International Boundary Waters Treaty Implementation Act*[6] was amended in 2002 to prohibit bulk water removal, but this only applies to removals from boundary waters.[7]

Given this, there may be a role for the IJC in coming to a more complete understanding of Aboriginal water rights in the context of water exports and diversions. In particular, the IJC could maintain a permanent forum to allow for the ongoing exploration of issues of particular import to indigenous peoples, with a view to domestic and international policy development, in particular, the protection of Aboriginal rights and the avoidance of Aboriginal rights-based disputes.[8] An immediate need is the development of a trans-boundary environmental assessment regime that takes into account Aboriginal water rights as part of the assessment, in both countries.[9]

As well, the IJC could engage in a comprehensive investigation into the impacts on Aboriginal water rights in Canada and the United States from existing and planned diversions, water exports, inter-basin transfers, etc. In a report

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5 International Joint Commission, "Protection of the Waters of the Great Lakes: Final Report to the Governments of Canada and The United States" February 2, 2000, available as of May 15, 2002 at http://www.ijc.org/php/publications/html/finalreport.html at 4.

6 This issue was discussed in greater detail in Chapter 4.

7 As discussed in Chapter 2 regarding provincial laws the purport to extinguish Aboriginal water rights, this law is an example of a federal law that would not be successful if it were cited as a law purporting to restrict Aboriginal rights to water. If a First Nation asserted and Aboriginal right to *trade* water (that is, the characterisation of the right was focussed upon the trade rather than the water itself), this legislation would be within federal competency to enact, but still would not meet the "clear and plain intent" test established by *Sparrow, supra* note 13, and subsequent cases.

8 For example, in *supra* note 5, the IJC does not appear to have included any Aboriginal organisations in its consultations.

9 The IJC could cooperate with its counterparts on the United States – Mexico border to facilitate the development of some form of continental approach.

commissioned by the Parties, the IJC proposed the establishment of international watershed boards from coast-to-coast which would responsible for:

> ...monitoring, alerting, studying, advising, facilitating and reporting on a wide range of transboundary environmental and water-related issues. They could also serve an ombudsman-like role by receiving, considering and investigating comments and complaints from the public about transboundary watershed environmental issues.[10]

If these roles include water issues related specifically to Aboriginal peoples, the IJC could play a very important role in increasing Aboriginal peoples' access to international water-related dispute-resolution mechanisms.[11]

2 WATER AND TRADE POLICY DEVELOPMENT

2.1 Water Policy

As of 1987, the policy of the federal government was based upon the following concerns:

> About 60% of Canada's freshwater drains north, while 90% of our population lives within 300 kilometres of our southern border. In other words, to the extent that we Canadians have lots of water, most of it is not where it is needed, in the populated areas of the country. In those populated areas where it is plentiful, water is fast becoming polluted and unusable. The overall problem in the country is compounded by drought in certain regions. Put simply, Canada is not a water-rich country.
>
> That is why the Government of Canada emphatically opposes large-scale exports of our water. We have another reason for our opposition; the inter-basin diversions necessary for such exports would inflict enormous harm on

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10 *Supra* note 5 at 2.

11 This is a critical need, as recently evidenced in Manitoba by the lack of access of First Nations to any dispute body regarding water rights that will be impacted by the most recent developments in the Garrison Diversion Project, the first stage of which is currently being resurrected as the "Northwest Area Supply Project" in North Dakota. North Dakota is currently being sued in American federal court by Manitoba for failure to conduct a sufficiently comprehensive environmental assessment of the impacts of this first stage of the diversion on the water resources of Manitoba. The rights and interests of downstream First Nations in Manitoba should be, but are not currently a component of the litigation, despite the potential for their rights to be impacted.

> both the environment and society, especially in the North, where the ecology is delicate and where the effects on Native cultures would be devastating.[12]

All of the issues raised above remain of great, and increasing, concern. It is astonishing that so little has changed for the better, and that there has been very serious and dramatic evidence of decreases in Canadian water management capability[13]. Further, Canada has not updated its water policy in 17 years, as evidenced by the following disclaimer at the top of the *Federal Water Policy* page of the Environment Canada website:

> Note: What follows is the text of the 1987 Federal Water Policy. Despite the date of publication, many of the issues and strategies outlined in the 1987 Policy remain valid today. Since no more recent published policy can be offered at this time, the text of the 1987 Policy is offered for information purposes only.[14]

There is no indication given of any progress or actions that are underway, nor is any reference made to current policy, policy development initiatives, or programs. To remedy this:

- Canada must develop a revised, updated national water policy, in partnership with provincial and indigenous governments. It should be accompanied by a clear plan of action, measurable performance targets and predicted outcomes, and be linked to existing strategies such as those related to ecosystem and human health;[15]

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12 Environment Canada, *Federal Water Policy*, available as of January 31, 2004 at http://www.ec.gc.ca/water/en/info/pubs/fedpol/e_fedpol.htm

13 Such as but not limited to the water quality incidents of Walkerton, Ontario, and North Battleford, Saskatchewan.

14 *Supra* note 1.

15 Recently, the federal government committed $600 million to a *First Nation Water Management Strategy*, but this program appears to be targeted only at the improvement of water and sewer infrastructure, and does not address the broader legal and policy issues that are the subject of this thesis. (news release available as of March 26, 2004 at http://www.ainc-inac.gc.ca/nr/prs/m-a2003/2-02304_e.html)

- Canada must commit to a perspective that recognises that water is a vital common heritage to all Canadians, and adopt the objective of integrated sustainable water management;[16]
- Policy development in the area of water must focus on defining the most effective ways to protect indigenous water rights while meeting ecosystem requirements and the needs of other water users, including through:
  - Transparent and documented application of the "precautionary principle" to decisions regarding water bodies that are subject to Aboriginal water rights of any kind;
  - Adoption of broad area planning approaches that ensure that the needs of all users are addressed in water allocation and licensing decision-making, and that these decisions do not limit the prior water rights of indigenous peoples;
  - Transparent and documented clarification of the role of Aboriginal rights and entitlements to water in environmental assessment processes:
  - Systematic use of traditional knowledge to guide the decision-making regarding use of water resources.

2.2 Discretionary Decision-Making Criteria

Canada requires the development of criteria to govern discretionary decision-making in trade and water areas that is clearly and specifically focussed upon avoiding limitations to Aboriginal and treaty water rights. In particular, the limits of discretion and criteria that must guide trade negotiators, DFAIT officials, Ministers, and anyone else with the authority to make decisions that may limit the Aboriginal and treaty rights of indigenous peoples in Canada, including Aboriginal water rights,

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[16] Riccardo Petrella, in *The Water Manifesto: Arguments for a World Water Contract* (Halifax, Nova Scotia: Fernwood Publishing Ltd., 2001) at 111 provides that the objective of integrated sustainable water management must be based upon the following "principles of solidarity": the duty of individual and collective responsibility to other human communities and the world's population, to future generations, and to the ecosystem Earth; principle of sharing, and conservation / protection.

must be clearly and specifically detailed, documented, and made transparent to indigenous peoples and the public.[17]

3 IMPROVEMENT OF TRADE REGIME

3.1 International

There are a number of ways in which the current international trade system, and the domestic systems that create and support it, must be changed to reflect a more respectful, and legal, approach to the rights and interests of Aboriginal peoples regarding water:

- The government must commit to ensuring (for example, through amendment or clarification to the NAFTA, and through specific exclusions or reservations to this effect in all future trade agreements) that Aboriginal and treaty water rights will not be limited by current and future international trade agreements;
- Canada must develop and implement measures that manifestly protect Aboriginal rights and interests that may be limited by liberalised trade;[18]
- The government must demonstrate that it intends to uphold its fiduciary and other responsibilities to Aboriginal peoples when these rights may be impacted by international-level actions of its international trade department. Greater definition of the scope of

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[17] Paul Chartrand in *Report from the Roundtable: Canada, Indigenous Peoples and the Hemisphere*, Winnipeg, March 22 - 23, 2000 (in possession of the author) at 4, has suggested a related recommendation that the first steps toward developing a Canadian policy on indigenous peoples in the trade should make clear commitments to the adoption of a screening mechanism governing DFAIT's participation and promotion of Canadian investments abroad.

[18] In terms of protection of Aboriginal and treaty rights, greater definition of the scope or application of the infringement/ justification analysis set out in *Sparrow* (and numerous other cases) when applied to all stages of development and implementation of international trade agreements is required. It must be noted however that this analysis or approach is generally undertaken by governments for the purpose of limiting rights; an objective expressly not supported in this thesis. Instead, the goal must be to protect Aboriginal water rights in the context of sharing, and according to principles such as those previously presented in *supra* note 16.

the fiduciary responsibilities, and the accountability and transparency requirements of the government in this situation, is required;

- All current and future trade negotiations must be conducted according to specific, publicly accessible and transparent instructions that address those aspects that require special treatment, such as water and Aboriginal rights and interests. This applies not only to trade negotiations, but also to all water-related negotiations, including all phases of water management that may be discussed internationally;
- International trade agreements must be developed and negotiated only with the meaningful input and involvement of indigenous peoples, and only after a clear definition and documented understanding of the impacts and benefits that may accrue to indigenous peoples has been determined. For example, the Parties to the NAFTA should issue an interpretive statement clarifying the meaning and scope of the Annex II provisions regarding Aboriginal peoples, and in particular, agreeing that nothing in the NAFTA applies to, or can limit, the rights of Aboriginal peoples;
- It must be clarified that the extensive rights of third parties under trade agreements (that is, investors and investments) are subordinate to the governmental rights and responsibilities regarding the protection of Aboriginal rights and treaty rights;[19]

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[19] Further analysis is required into the implications of the inclusion of Aboriginal issues within trade agreements. Currently, they are already included by virtue of the reference to them in Annex II. This has opened the door to further inclusion if that is beneficial. Currently, Annex II provisions of the NAFTA are inadequate to protect Aboriginal or treaty rights in any way; they serve only to protect the government from a NAFTA claim should they government wish to provide rights and preferences to Aboriginal peoples. Annex II provisions do not ensure that Aboriginal rights are not limited by the NAFTA, nor do they provide any mechanism for redress should limitations occur. Indeed, DFAIT has no transparent mechanism or framework to guide its actions or decision-making in this area, and therefore Aboriginal peoples and their rights are at the mercy of internal government processes that may or may not act in their best interests, or in accordance with or even with reference to Crown fiduciary obligations.

- Analysis of the implications of trade institutions, and in particular, trade-dispute mechanisms, deliberating upon Aboriginal issues needs to be analysed;[20]
- Gastle has suggested that further research is necessary to understand the degree to which Aboriginal rights/issues have been integrated into customary international law.[21] This is critical given the earlier discussion of the evolving discussion on the scope of Article 1105.

3.2 Domestic

It is critical that inadequacies in domestic law be rectified prior to the negotiation and implementation of trade and investment agreements. Regarding water, Howard Mann suggests that it is critical to avoid creating the combination of trade or investment agreements and the commodification of water and the privatization of water rights, that allows foreign investors to protect all the benefits that accrue to them under these agreements.[22] He states:

> Thus, clear and committed national, state and provincial, and local laws and regulations must be developed to clarify community water needs, for all the people in the community, and ensure respect for them. Sound administration must be put in place to back this up. It is here that domestic interests and the rights of foreign investors must first be balanced, prior to the combination of investment agreements and privatization coming into effect and limiting possible options in this regard.

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[20] The *Softwood Lumber* tribunal refused to deal with these issues saying they were a matter of domestic law, but a First Nation disagreed. The issue was not resolved. It may be that Aboriginal interests are not served by allowing tribunal panels (comprised typically of trade lawyers with no expertise in Aboriginal law matters) to deliberate upon these issues, and in particular, weigh them against continental trade goals and interests. Yet, tribunals may be making decisions that are impacting or involving Aboriginal rights and interests, as in the *Softwood Lumber.* While appeal from tribunal decisions to a domestic court is available, it is unlikely that a government will appeal to protect a right that it did not initially ensure was protected.

[21] *Ibid.*

[22] Howard Mann, "*Who Owns "Your" Water: Reclaiming Water as a Public Good Under International Trade and Investment Law*" August 2003, available as of February 18, 2004 at http://www.iisd.org/publications/Publication.asp?pno=563 at 5.

In addition to the needs of the non-Aboriginal community regarding water laws and regulations, there are numerous gaps that have been identified in this thesis regarding Aboriginal water rights, consultations requirements, and the relationship of these issues to international trade, to name a few. These issues, and others, must be identified and clarified.

Finally, greatly increased openness, clarity, and specificity is necessary in all domestic water-related negotiations, including all phases of water management. At the municipal and provincial levels, the administration of all aspects of water allocation and licensing, protection, conservation, and all distribution and infrastructure allocations and decisions must be fully documented and transparent to the public at all times.

3.3 Substantive Involvement of Aboriginal Peoples

In order that Aboriginal water rights are not jeopardised, a strategy must be developed with Aboriginal peoples, which is designed to ensure the meaningful involvement of Aboriginal peoples in all aspects of international trade matters (particularly those matters that may result in decisions that may limit their water, and other, rights)., a framework is required for the involvement of indigenous peoples in all aspects of international trade: all stages of development, negotiation, implementation, subsequent review, interpretation, and amendment to trade agreements of international trade agreements.[23]

This framework should include at least the following components:

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[23] This framework must distinguish between the level of involvement required, and the nature of the issue requiring involvement. For example, Aboriginal companies, some of which are Aboriginal-government held, are involved in trade that may impact Aboriginal and treaty rights. A range of approaches is necessary, from general Aboriginal public involvement to the involvement of directly-affected parties in the resolution of disputes which involve impacts upon Aboriginal and treaty rights.

3.3.1 *Recognition of Role of Aboriginal Governments in Trade Processes*

It is important for the Government of Canada to recognise the necessary and important role that Aboriginal governments and representative bodies can and must play in the development and discharge of Canada's international trade mandate. Through this involvement, there will be a lessened chance for Aboriginal and treaty rights and interests in water to be jeopardized. National Chief Phil Fontaine has stated, regarding indigenous participation in international trade:

> Indigenous peoples and their issues must be integral to the process. Indigenous peoples want to have a seat at the table. Their aim is to contribute to the discussion/process conducted exclusively until now by states. If issues of trade, human rights, and land ownership are not addressed within the Indigenous Peoples framework, states' efforts will not be effective. If countries want to be seen as fair, they are compelled to interact with Indigenous Peoples in a fair and just way. Mass poverty experienced by most Indigenous Peoples in Canada and abroad must be eradicated. There is no reason for Indigenous Peoples to be poor, since it is their lands and resources that have been disposed or unfairly exploited. An equitable system that allows for sharing of land and resources has to be found.[24]

There are numerous ways through which Aboriginal governments could discharge their own responsibilities to their peoples, work to ensure that Aboriginal and treaty water rights are not limited by trade liberalization, while contributing to the sound evolution of the international trade liberalisation agenda of Canada. For example:

- The Cabinet Committee on Global Affairs,[25] chaired by the Prime Minister, could structure a permanent and regular meeting forum with Aboriginal leaders, developing and implementing an agenda of common concern regarding international trade;[26]

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[6] National Chief Phil Fontaine, in *Report from the Roundtable: Canada, Indigenous Peoples and the Hemisphere*, Winnipeg, March 22 - 23, 2000 at 2 – 3 (in possession of the author).

[25] Office of the Prime Minister, *Cabinet Committees Mandates and Memberships*, available as of January 30, 2004 at http://www1.pm.gc.ca/eng/new_team.asp.

[26] It is interesting (and regrettable) that the Indian Affairs and Northern Development Minister is not on the Cabinet Committee on Global Affairs, and that

- The Cabinet Committee on Aboriginal Affairs could establish a similar structure, expanding their Aboriginal agenda beyond the traditional domestic concerns, particularly in the areas of economic development and eradication of poverty through access to international trade;[27]
- Presentations by Aboriginal leadership on approaches for developing (in collaboration with Aboriginal peoples) an integrated, multi-departmental action plan dealing with protection of Aboriginal rights and Aboriginal peoples access to the benefits of trade, could be invited by two House of Commons Standing Committees: Aboriginal Affairs, Northern Development, and Natural Resources; and Foreign Affairs and International Trade, and the Senate Committees on Aboriginal Affairs, Foreign Affairs, and Energy, the Environment, and Natural Resources. A longer-term agenda of common concern integrating the participation of Aboriginal political leadership and representatives of governments in the committee work could be developed and adopted by these committees;
- A permanent and transparent program focus dealing with international trade and Aboriginal peoples and their rights and interests should be created within the Department of Foreign Affairs and International Trade, and a formalized and systematic working relationship between Aboriginal organisations and political and government representatives and senior departmental staff in Department of Foreign Affairs and International Trade developed.

3.3.2 Access to Dispute Resolution Mechanisms

There are at least four needs for access by Aboriginal peoples to international trade institutions, depending upon the circumstances:

- Involvement by Aboriginal governments as a legal representatives of the community;

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the Minister for International Affairs is not on the Cabinet Committee on Aboriginal Affairs.

[27] As an example, the ongoing involvement of Aboriginal governments or representatives should occur in the development and delivery of government-resourced programs to assess the long-term impacts of trade on indigenous peoples in Canada and their rights.

- Involvement of Aboriginal rights-holders (usually individuals or groups of individuals whose rights may be impacted by a decision);
- Involvement of Aboriginal businesses involved in trade; and,
- Ongoing participation of the interested Aboriginal public (including Aboriginal individuals, Aboriginal non-governmental organisations and interest groups, etc.).

These needs may be met through:

- Formalized involvement of Aboriginal representatives in the structures[28] and programs of the institutions that deal with trade, and the linkages between trade and environment or trade and human rights, such the Free Trade Commission[29], the Free Trade Commission Secretariats,[30] the Commission for Environmental Cooperation (CEC), the CEC Secretariat, and the World Trade Organisation;
- Aboriginal governments and political representatives should participate as members of Canadian delegations in for example,

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[28] For example, First Nations may wish to assert their rights to participate in tribunal hearings that have a direct or indirect effect on their rights, even if this effect is perceived as a matter of domestic interest only. The International Institute for Sustainable development has recently been successful in their request to submit the first ever *amicus curiae* brief to a NAFTA tribunal, in the case of Methanex Corp. v. the United States (documents on their submission are available as of March 26, 2004 at http://www.iisd.org/publications/publication.asp?pno=608) and this may be an appropriate strategy for First Nations to utilize in certain circumstances. As governments, though, First Nations will need to weigh carefully the merits of this approach when their rights are being potentially limited; more direct, and substantive involvement is certainly required.

[29] While the FTC is comprised of the international trade ministers of the three countries, there is no reason why the there ministers could not structure a permanent forum for meetings with indigenous government leaders.

[30] The Canadian Section of the FTC Secretariat has the following mission:

> "The Canadian Section of the NAFTA Secretariat has one primary objective: to maintain a high level of impartial and independent service in the administration of the dispute settlement provisions of the North American Free Trade Agreement, pursuant to Article 2002, in order to help preserve the benefits of free trade for all stakeholders."

new negotiating rounds of the WTO, or in ongoing FTAA negotiations.[31]

3.3.3 Creation of Aboriginal Trade Ministerial Advisory Committee

A multistakeholder[32] Aboriginal committee should be created with the mandate to provide their advice to the Minister of International Trade on all matters relating to international trade.

3.3.4 Reinstatement of International Indigenous Issues Counsellor

The DFAIT website reported in 2000 that then-Foreign Affairs Minister Lloyd Axworthy had appointed Mr. Blaine Favel as part of a strategy on indigenous economic and cultural development undertaken by the government in cooperation with the Canadian Aboriginal community. This position does not currently exist, and should be reinstated.

3.3.5 Membership on Academic Advisory Committee and all SAGITS

Aboriginal peoples expert in fields relating to water and Aboriginal rights should be represented on the Academic Advisory Committee. Aboriginal sectoral interests must be represented on all SAGITS.

3.3.6 Communication with Aboriginal Peoples regarding Water and Trade

A comprehensive and inclusive strategy to include the meaningful participation of indigenous peoples in both domestic and international water-related and trade-related decisions, discussions, negotiations, must be developed.

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[31] Although the constraints of having to adopt the position of the Canadian delegation may not be desirable to Aboriginal governments, and an independent role in the federal negotiating team may therefore be more appropriate.

[32] "Multistakeholder" in this context means composed of a cross-section or variety of the perspectives that comprise Aboriginal society.

4 A FINAL THOUGHT

The Canadian perception of water is linked to our national identity, cultural and artistic institutions, sense of security, and in many ways, our sovereignty. Maintenance of control over Canadian inland water resources is of fundamental and profound importance, and in all likelihood, this need will only increase in the future. Despite this, our waters are at risk because the NAFTA prevents Canada from reducing or preventing the already gravely extensive commodification of Canadian waters in their natural state.

At the same time, many Aboriginal peoples rely directly upon freshwater sources and their products for their livelihood and sustenance. As well, Aboriginal peoples have constitutionally-protected water rights, which Canada and the provinces have done little to protect, despite their fiduciary duties to do so. Aboriginal peoples may choose to exploit this resource, based on their Aboriginal or treaty rights entitlements. There are few limitations on the uses to which they may put their water rights.

This thesis has explored the challenge associated with protecting Aboriginal water rights in the context of international trade. The converse of this perspective, however, is that long-term protection of Canada's freshwater resources may depend upon the thorough, consistent, documented and transparent discharge of governmental fiduciary obligations to Aboriginal peoples regarding their water rights; although still uncertain, this *may be* one of the few actions that governments in Canada can assert to prevent further water commodification and export. This may be the only legally justifiable way to restrict the trade in and export of Canadian water, without violating numerous NAFTA protections. By respecting their relationship with Aboriginal peoples, while seeking to protect water resources in Canada, governments could control further commodification of our freshwater while upholding the honour of the Crown. This question remains to be resolved fully; it is

mostly dependent upon the willingness of Aboriginal and non-Aboriginal governments, the courts, and the citizens of Canada to forcefully assert the need to protect all rights associated with our common heritage, the freshwater of Canada.

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