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de l'Assemblée des  
Premières Nations  
du Québec  
et du Labrador

Secretariat of the  
Assembly of  
First Nations  
of Quebec  
and Labrador



“To all our relations –  
sharing information and standing together,  
today and for all our tomorrows”

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# Aboriginal Water Rights Primer

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## ABORIGINAL WATER RIGHTS PRIMER

### 1 Some History

The most important truth to remember, one that impacts all discussions about all Aboriginal rights, is that First Nation peoples were here occupying these lands, implementing their laws, governing their territories when Europeans arrived, and were never conquered by settlers or their imported governments. The Supreme Court of Canada (SCC) reminds the government of this fact in almost every Aboriginal rights case because this history places limits on what the government can do. This fundamental point is often overlooked, but should not be, despite government assertions that it may have little relevance to current negotiations. The reason this is so important is that, according to international law, if First Nations were conquered then all laws of the conquering government of England would apply in the new lands. In that case, First Nation rights and laws would only be recognised if England (and now Canada) allowed or granted them. However, this is definitely not the case, and the SCC agrees.<sup>i</sup>

Given that Europeans did not conquer First Nations through war or any other means, the only way that they can legitimately exercise power as governments over First Nation territories is if First Nations have given up sovereignty to their territories. According to western law, *sovereignty* is defined as 'supreme dominion, authority or rule'.<sup>ii</sup> This is a difficult concept to marry with indigenous laws, which generally provide that the Creator is the source of authority.<sup>iii</sup> However, First Nations have responsibilities regarding lands and waters, given by the Creator, and they exercised these duties and roles throughout their territories before European contact.

Many First Nations addressed some their concerns regarding sharing their territories with Europeans. They did this through treaties that set out numerous sorts of agreements between First Nations and the government (which at the time was the Queen representing England) ensuring peace and friendship, land cession and sharing, and access to resources. Others have yet to, and may never, do so. First Nations that did not sign treaties indicate that they still possess all their original powers related to land, water and governance. Even those First Nation that did resolve certain matters relating to the sharing of land and resources (and are still waiting for those promises to be fulfilled) assert that they did not surrender all their powers and land, water and resource rights. This assertion is strongly supported by a brief review of the treaties: no treaties indicate that the signatory First Nations released all their governance powers and all their land, water and resource rights.

So, even though it is not clear exactly if or how Canada came to legitimately have sovereign authority, the reality is the SCC agrees that Canada is sovereign, and Canada certainly exercises its powers constantly. However, the court has stated that regarding First Nations rights, the honour of the Crown requires that these rights be determined, recognized and respected.

## 2 Rights that May Exist Today

*Indigenous Rights to, and in, water flow from the relationship of Indigenous Peoples to our traditional territories. Our right to water is an inherent right arising from our existence as Peoples and includes a right of self-determination with the power to make decisions, based upon our laws, customs, and traditional knowledge to sustain our waters, for all life and future generations. Indigenous Peoples continue to take action to implement our inherent rights and responsibility to protect water for all life and future generations.*<sup>iv</sup>

This paper reviews three types of water-related rights: water rights, self-government rights, and rights to adequate levels of environmental protection.

### 2.1 Water Rights

No cases have specifically considered the existence of any Aboriginal water rights, although it is clear from the *Van der Peet* case that the present Chief Justice of the SCC (although in dissent in that case, but not on this point), 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.*<sup>v</sup> [emphasis added]

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

*...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]<sup>vi</sup>

This is the law in Canada. The challenge facing First Nations is that they must prove that their rights exist.

#### 2.1.1 Possible Aboriginal Water Rights

The main reason behind the protection of Aboriginal rights is so that Aboriginal people can make a moderate living, to be able remain in their traditional communities and preserve indigenous cultures (both traditional and contemporary). While the SCC recognises that section 35(1) protects treaty and Aboriginal rights, and water rights are within this category, First Nations still have to meet what is called 'the distinctive culture test': in order for rights to be held to exist today, they must be shown to have existed, and be central to the distinctive culture of the First Nation at the time of European contact.

Many consider this test to be overly difficult, and there has never been an Aboriginal water rights case (based upon Aboriginal

rights, treaty rights, or riparian rights) that has answered this question. However, 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.

<sup>vii</sup> The Piikani relied generally upon the Winter's Doctrine in asserting that their rights included the amount of water needed to fulfil these 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. 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.

Water rights 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. As water certainly 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.

The SCC has made it challenging for First Nations to meet the test to prove the existence of Aboriginal rights, however, there are numerous water-related activities that could meet this test. For example, you likely have a strong case to prove the existence of Aboriginal rights to water if at the time of European contact your First Nation:

- used water for extensive domestic purposes;
- used the river for food (for example, for fish, clams, mussels, eels and water plants);
- used waterways to travel (to find food, or trade, or meet with other First Nations for governance purposes, both in the waterway and on land);
- conducted ceremonies 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 your culture.<sup>viii</sup>

If so, you may be able to demonstrate that your First Nation's use of a particular water body, such as river, was central to your distinctive culture, and therefore are protected Aboriginal rights related to:

- Domestic Use: all uses that are required for domestic purposes and to maintain the First Nation.
- 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, see section 2.1.4 below). 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.

- 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.
- Environmental Protection Rights: these are rights to protect both water quality and quantity, on behalf of both humans and the ecosystem. This category of rights is explained in greater detail in section 2.23 below.

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. If a moderate living was historically achieved by using the river resources (both its products and the water itself), other related activities could evolve and change over time to become a current modern practice. A modern practice of the right to use a water body could involve these current Aboriginal rights to:

- to create a reservoir (through damming) to provide access to or storage of fish;
- to dam a river to create hydro-electricity and revenue from the sale of hydro-electricity;
- to remove or divert of water for agricultural purposes; and,
- to remove water for sale (on a small or large scale).

All of these activities would be legitimate modern means by which to use a water body to provide for a moderate living for First Nations.<sup>ix</sup> These activities could then also be protected Aboriginal rights.

#### *2.1.2 Other Water Rights (Those Reasonably Incidental to Existing Aboriginal Rights)*

The Supreme Court of Canada held in *R. v. Simon*<sup>x</sup>, *R. v. Cote*<sup>xi</sup>, *R. v. Sundown*<sup>xii</sup> that certain activities may be included within the activities encompassing a protected treaty right.<sup>xiii</sup> 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 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. Incidental activities are not only those which are essential, or integral, but include, more broadly, activities which are meaningfully related or linked.

*Claxton v. Saanichton Marina Ltd*<sup>xiv</sup> held that not only the fishing right, but also the fishery itself (meaning the fish and fish 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 the First Nation formerly had been able;
- Loss of an important ecosystem component (i.e. 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.<sup>xv</sup>

This decision was 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 activities that are "reasonably incidental" to existing treaty and Aboriginal rights to fish or harvest, 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 fulfilment 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 and sale of electricity.

### *2.1.3 Title to Water*

Under western law, water cannot be individually owned because it is seen a resource that is 'owned by everyone', and because due to its nature (the individual molecules move, evaporate, change form, etc.) it is physically impossible to own. Therefore, rights to water generally arise as control or use rights that are either granted or that arise through owning the land under (waterbeds) or beside (river or lake shorelines) a water body.

One of the main challenges First Nations face today is trying to demonstrate and assert that they have title, rights, responsibilities, and roles that they did not surrender at any point in the past. Aboriginal title, which is based on occupancy of the land at the time of European sovereignty, is a type of Aboriginal right.<sup>xvi</sup> Therefore, where title to lands formerly occupied by a First Nation has not been surrendered (for example, through treaty or land claims processes), a claim for Aboriginal title to the land may exist. If a First Nation can demonstrate that they had exclusive pre-sovereignty occupation of the waters,

then they will have a legitimate strong claim of aboriginal title to the waters and the land under the waters (the waterbed).<sup>xvii</sup>

As stated above, 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: First Nations must show long-term use and occupation. 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. Despite this, there remain certain limitations on the uses of Aboriginal title lands, namely 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."*

The SCC 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 includes the rights to:

- 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.

Based upon this reasoning, if First Nations have not specifically given up Aboriginal title to both land and water through treaties and self-government agreements Aboriginal title could include at least the following water-related rights:

- To use or not use water (for almost any purpose, as long as it didn't 'destroy' your First Nations bond with the water);
- To regulate all uses of the water, including denying some or all uses by others;
- To consume water, for domestic, manufacturing, industrial, irrigation and other purposes;
- To protect the quality and quantity of water;
- To maintain, protect, and prevent the misuse of indigenous knowledge related to water;
- To protect First Nation cultural sites in, or dependent upon water;
- To engage in spiritual practices which use water;
- To engage in recreational pursuits involving water;
- To divert or impound water for agricultural and other purposes;

- To pollute (within reasonable limits) or prevent the pollution of a water body;
- To remove or take fish and other resources from the water;
- To travel in or on the water or prohibit the travel of others;
- To generate revenue, for example through hydro-electric power;
- To sell or trade water, or limit or prevent the sale of water by others.

#### *2.1.4 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 the *Winters v. United States* case, affirmed in *Arizona v. California*, and again in *United States v. Adair*.<sup>xviii</sup> 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 being first in line for this water, Aboriginal peoples would be unable to accomplish the major purpose for which the reservation was created (i.e. 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.* 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.

However, the provinces of Manitoba, Saskatchewan, Alberta and British Columbia approach the allocation of water rights through the doctrine of prior allocation (meaning whoever was first in line and got a license has first priority to use the water). These provinces tend not to recognize First Nations as being the 'first in line' user, however, the Alberta government's willingness to negotiate a settlement in the Piikani case mentioned earlier indicates that governments may understand that their prior allocation policies are not legally acceptable and would not survive serious court challenges by First Nations.

#### *2.1.5 Treaty Rights to Water*

A full review of treaties is beyond the scope of this paper, however a few key points can be made. First, the SCC, through 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 preserve this right in so far as possible as well as to supplement it to make up for the territories ceded to settlement. [emphasis added]*

*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. [emphasis added].<sup>xix</sup>*

Second, there are strict rules of treaty interpretation, set out in *R. v. Badger*<sup>xx</sup> and numerous other cases that protect First Nation interests. It must be proven that either First Nations intended to relinquish their rights, or that the Crown expressed clear and plain intent to extinguish rights. The Crown must prove that this extinguishment occurred (rather than First Nations having to prove that their rights were not extinguished). Treaties must be read in favour of First Nations, given liberal interpretations (especially where the wording is not clear), and agreements or promises made outside the agreement text are to be considered. First Nations perspectives on the scope of the agreements are very important, given that the treaties were not recorded in the language of the First Nation signatory, and were only translated verbally to them. Only with this method of treaty interpretation can the Crown uphold its honour when dealing with First Nation concerns. So, even a cursory review of the numbered treaties (which are the historic treaties focussed upon land cession), based on the principles of treaty interpretation set out by the SCC, shows that no treaties specifically extinguish Aboriginal rights to water in their text,

Third, most land cession treaties refer to ceding all rights to the territories themselves. An argument can be made that even if all rights to the land and waters were surrendered, this is only referring to the land and waters themselves, not governance (controlling the management and use) over the land and water. This is an important distinction. To give an example, the federal government has no rights to the lands and waters of a province, yet it has extensive jurisdiction to govern (even govern exclusively) numerous activities, uses, etc. on those lands (in fact, everything within federal jurisdiction). There is strong evidence that First Nations can assert that they intended to maintain either exclusive jurisdiction or shared jurisdiction regarding their management (governance) role (given to them by the Creator and impossible to discard to relinquish).

Fourth, often, the treaties make little or no reference to water directly, except in descriptions of the lands being given up by the First Nations (such as the tract that was surrendered was bordered by a certain river). However, the Crown did not always deal fairly with the First Nations with whom they were negotiating, and often outside agreements were used to reach immediate agreement without there being the true intent by the Crown to fulfil or acknowledge these agreements. This is likely what led to the SCC setting the principles of treaty interpretation to be as liberal as they are. Interestingly, information outside the text of Treaty 9<sup>xxi</sup> indicates that the

Crown signatories intended to exclude all potential waterpower sites from the reserve allotments, although the text of the treaty does not refer to the Crown wishing to engage in that activity on the ceded territory (recall that it does reference other activities such as mining, lumbering, etc.). Given that the Crown understood the potential of these lands for waterpower, but appears to have excluded direct reference to this in the treaty, it supports arguments that First Nations never relinquished these, and other, water rights.

Fifth, each treaty addresses rights that it directly protected, impliedly protected, extinguished, modified, or new rights that it gave. Note that the first four types of rights are those that First Nations already possessed, and that may continue to this day. Therefore, each treaty (and corresponding letters, documents, understandings, and traditional knowledge) must be reviewed to determine the First Nation position regarding the detailed status of water rights that remain. For example, Treaty #5 contemplated the creation of an addition to two reserves, whereby the Crown found it necessary to specifically maintain their access and navigation rights:

*...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. However, 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.<sup>xxii</sup>*

Therefore, it certainly could be argued that the First Nations of Treaty #10 intended to maintain governance over the fisheries and hunting grounds in order to protect the resources.

This analysis should be done for all treaties as soon as possible, if it has not yet been done (from the perspective of determining the scope of water rights that continue to exist in First Nation surrendered territories).

The water rights that still exist could be extensive. Bartlett<sup>xxiii</sup> sets out the findings of a 1970 study of the Ontario provincial government regarding headland water rights that First Nations may possess regarding Treaty #3 ceded lands and waters, which reported that First Nations could possess (the report was not conclusive) governance rights including to rights to:

- restrict public access to the waters and through water routes;
- restrict non-Aboriginal fishing and hunting of water-fowl;
- restrict public use of islands within the headwaters;
- restrict or eliminate manufacturing and industrial uses of water;
- restrict impacts to fisheries;
- restrict the creation of hydro-electric power or create First Nation-controlled hydro-power;

- engage in mining activities, which could create water pollution;
- build dams (which could address or create fluctuating water levels).

## **2.2 Inherent Rights to Self-Government (IRSG)**

Inherent rights were not given to First Nations by the Crown; First Nations possessed them before European contact and they continue to this day (unless an Indigenous nation has relinquished them through agreements, treaty etc.). Many First Nations agree that they negotiated treaties that changed or limited their rights to their lands. However, they also assert that they did not, at any time, relinquish their rights to water or their rights to self-government. Given the western law regulatory gap that exists on most First Nation reserve lands regarding the provision of safe drinking water, it is an excellent opportunity to demonstrate that First Nations have had their own water-related jurisdictions that have existed (the gap is western law related, not Indigenous law related).

### *2.2.1 IRSG under 1982 Constitution Act, s.35*

Inherent rights to self-government under s.35 are freestanding rights to manage and control activities that occur within First Nation territories. This approach to defining the inherent right to self-government is the one with which Crown officials will be most familiar, and is supported generally by the Department of Justice and the courts in Canada. However, proving the existence of rights under s.35 is very difficult because two things are required:

- These rights must be defined as specific rights rather than general rights (for example, 'a right to navigate on the Bloodvein River for the purpose of accessing certain fishing grounds' rather than 'a right to use rivers').<sup>xxiv</sup>
- You must be able to show that the specific thing you wish to do now, which in this case is to manage and provide safe drinking water for your members, was an activity you did at the time of European contact, and that this activity was integral to your distinctive culture.<sup>xxv</sup>

You may have a reasonable proof of the existence of s.35 water governance rights (meaning you may meet this test) if you can show that your First Nation (for example):

- Relied upon regular drinking water sources in your territories that were used and protected, and be able to identify those sources;
- Identified people within the community that were responsible for locating or protecting drinking water sources, and the methods or processes that they used to determine whether water was safe to drink or use (cooking, washing/cleaning, medical treatment, birthing);
- Developed and implemented rules (meaning, oral traditions, customs and laws) about appropriate and inappropriate uses of water;
- Engaged in ceremonial activities that involved the use of clean water; or,

- Used specialised equipment or tools that were used to find, access, transport, use or consume drinking water.

If so, you should argue that your First Nation still possesses IRSG regarding water in your territories, and these rights include all planning and management, allocation, protection, monitoring and use aspects of water governance.

### 2.2.2 IRSG Necessary to Implement other Aboriginal and Treaty Rights

The second possible form of inherent rights to self-government is a result of numerous court decisions including *Delgamuukw*, *Sparrow*, *Marshall* [#2], *Haida* and *Campbell*. The Supreme Court of Canada has said that all Aboriginal and treaty rights (including Aboriginal title) are communal,<sup>xxvi</sup> (meaning they are rights that are possessed by nations rather than individuals). The SCC and British Columbia Supreme Court have stated that First Nations also have decision-making power over these rights.<sup>xxvii</sup> Further, governments must consult with indigenous governments not individual persons.<sup>xxviii</sup>

The result of these cases is that the courts have said that all Aboriginal and treaty rights that have a reasonable chance of existing today will have self-government rights attached (which govern their use). In fact, the SCC has stated that activities that are 'necessarily incidental' to the exercise of Aboriginal and treaty rights are also protected under s.35 of the Constitution Act, 1982.<sup>xxix</sup> This is the case even regarding unproven rights, as long as the First Nation can demonstrate that there is a *prima facie* case (a reasonable chance) that these rights still exist. Nations are able to insist that activities which they previously engaged in, related to their Aboriginal rights, are protected. The IRSG is one of those rights at very minimum, but so are numerous other rights, including the right to protect the environment and its various components, to ensure that Aboriginal and treaty rights are able to be implemented.

As with all Aboriginal and treaty rights, protection of these rights demands that consultation and all other aspects of the justifiable infringement test<sup>xxx</sup> be satisfied. Therefore, it is very important that First Nations identify their Aboriginal and treaty rights, and the elements of those rights that require First Nations to make environment or water-related decisions (water-related self-government decisions).

Regarding Aboriginal title (which is a type of Aboriginal right), First Nations can certainly argue they have jurisdiction over all aspects of water management on their territories, including source water protection, allocation of rights (permission) to access and use water on or in their lands, and implementation and enforcement of water laws, rules, and customs. All of these self-government rights are necessary in order to protect and implement a First Nation's Aboriginal and treaty rights. When a First Nation takes these sorts of actions and decisions, it indicates its right to govern and provide safe drinking water to its members.

The following table provides some examples. Regarding the following Aboriginal rights and treaty rights, First Nations could argue that they have numerous water-related self-government. It is important for First Nations to identify the

specific Aboriginal and treaty rights they possess (whether or not they has been proven in court) and then set out the corresponding water-related self-government right. Each of the below actions or activities can be argued to be an Aboriginal or treaty right to self-government that could be impacted by the Crown's proposed decision to legislate regarding safe drinking water on First Nation reserve lands.

**Table 1: Examples of IRSG Attached to Other Rights**

Aboriginal or Treaty Right	Water-related Self-government Right
Hunting Fishing Harvesting Gathering	<p><b>Right to manage</b> (develop plans, enact and enforce laws, give permissions, engage in research, adapt, set policies, etc.) <b>to ensure each of the following:</b></p> <ul style="list-style-type: none"> <li>• clean water for use by wildlife and fish</li> <li>• water quality is sufficient to ensure livelihoods</li> <li>• adequate flow exists to support wildlife and fish</li> <li>• ecosystem is able to perform water system functions (such as wetland discharge and recharge, groundwater recharge, spring cleansing through flooding and run-off)</li> <li>• adequate quantity of water exists for wildlife and fish</li> <li>• entire food chain is supported with clean, healthy water</li> <li>• plants and animals have access to sufficient clean, healthy water</li> <li>• ecosystems have enough water to provide food for plants and animals</li> <li>• ecosystem can perform the water-related functions necessary to support life (such as habitat generation, regeneration of forests, temperature control, water storage)</li> </ul>

*2.2.3 Residual Jurisdiction: Environmental Self-Governance Rights*

This approach to self-government rights is the least familiar and accepted by the Crown, and they tend to disregard it in negotiations or consultations. However, it strongly supported by Aboriginal and non-Aboriginal legal academics as being the interpretation of Aboriginal peoples rights that is the most honest and reflective of the true history of Canada and Aboriginal views on the source of their own jurisdictions.<sup>xxx1</sup> Further, the SCC in Haida and numerous other cases has acknowledged that Aboriginal peoples lived in organized societies and exercised political authority as nations before European colonisation. As recognised political authorities, they possessed

a full suite of jurisdictions over their lands, waters and their peoples at the time of European contact.

To possess residual jurisdiction, First Nations may argue that they still possess all those original jurisdictions, unless it can be specifically shown by the Crown that they have been extinguished (for example through treaty or legislation enacted prior to 1982).

Treaties must be interpreted in favour of Aboriginal peoples,<sup>xxxii</sup> liberally and generously, and oral understandings must be considered along with written terms.<sup>xxxiii</sup> First Nations probably did not intend to surrender their governance rights to the federal Crown through the treaties, although they may have agreed to share their jurisdictions. It is important that all First Nations be clear about this, and indicate that they never intended to relinquish their water-related governance rights when negotiating treaties and so those rights still exist.

Although a comprehensive review of treaties was not conducted as part of this research, a preliminary review of the text of Treaties 1 and 2, by way of example, provides no indication of any intent whatsoever regarding governance related to waters, other than to indicate that the First Nation signatories agreed that the listed lands were surrendered to the Crown. In fact, the preambles to the two treaties indicate that the Crown wished to negotiate the treaty and arrange with the First Nations to ensure peace and good will in the territories. Ensuring peace and good will between the parties is dependent upon the exercise of governmental powers over their respective citizens by each the parties. This *affirms* First Nation governance rights, rather than infringes or extinguishes them.

Regarding the enactment of legislation that infringes Aboriginal governance rights, it would be a very difficult for the Crown to show that it had properly extinguished water-related governance rights. Before 1982, only the federal government could infringe Aboriginal governance rights. The SCC has held that there is a very high standard to prove that a right has been extinguished: the legislation must show a 'clear and plain intent' to extinguish the Aboriginal governance rights. After 1982, both the federal and provincial government can infringe Aboriginal governance rights, but these infringements are subject to the justification test set out in Sparrow (which includes consultation).

Regarding all water laws in Canada, the intent of the laws has been to regulate human activities that may impact water quality or quantity. These laws accomplish this through setting standards, determining allocations, indicating acceptable uses, etc. These laws do not express any intent whatsoever to extinguish Aboriginal water governance rights, let alone a 'clear and plain' intent. Further, there has probably not been any enactment since 1982 of federal or provincial water laws that have involved adequate consultation with First Nations. Therefore, assertions by any government that a water law that they created either before or after 1982 has taken away First Nation rights to govern regarding water are likely incorrect.

Two types of inherent residual rights that are of note and are particularly relevant for this paper are the rights to manage the lands and waters at a watershed level, and the rights to engage in environmental protection.

In the recent Klahoose case, the court held that the Klahoose First Nation was 'entirely within its rights to deny access to the watershed' through its reserve lands.<sup>xxxiv</sup> What is very important about this case is that the court defines and affirms the First Nations territory on a watershed basis, that is, based on use of waterways and the lands in between those waterways (rather than focussing first and primarily on the land). Further, this speaks to the First Nations rights not only to govern, but to do so at a watershed level, meaning at the level that considers the headlands of waters (their source) all the way through to their end points (their entry into a final large body of water such as a large lake, sea, or ocean). This includes rights to travel on waterways for trade, and to engage in activities through waterways to defend their territories. It is critical to be able to demonstrate that your First Nation made ongoing decisions regarding use of waters, such as harvesting products of the waters, navigation by waterways, choice of cultural sites along the shores of waterways, and protection of rivers, creeks, streams, lakes, shorelines, beds inlets within watersheds from damaging human activities and overuse. Further, being able to demonstrate that your First Nation considered decisions, actions, impacts etc. at a level that was wide-ranging (such as a watershed level) would significantly strengthen your case.

Regarding environmental protection, there are numerous environmental protection rights (meaning rights that First Nations possess to protect their lands and waters), a number of which are listed above in Table 1. Others that exist but that are not directly relevant to this paper include the right to govern to protect habitat, to ensure clean air, to ensure sustainable and healthy food sources, to protect all aspects of the environment for spiritual, cultural, or ceremonial purposes, to deny degrading uses of lands, waters, plants, animals and resources.

### **2.3 Rights to Adequate Levels of Environmental Protection**

First Nations should be able to expect that the federal government will protect First Nation lands and waters to an adequate level of protection. While all Canadians should be able to expect this, First Nations have even stronger rights in this regard a result of s.91(24) of the Constitution Act, 1867 and the fiduciary obligation of the federal government.

The ability to provide safe drinking water depends upon a healthy environment and clean sources of water, even if water treatment processes are used given that no practically available, widespread water treatment processes eliminate all sources of contaminants. Therefore, rights to a certain level of environmental protection are very closely linked to the ability to provide safe drinking water to First Nations.

The existence of these rights means that First Nations can expect the federal government to, at minimum:

- Limit pollution that might impact First Nation lands and waters
- Limit the ability of all people to take or use quantities of water that might negatively impact ecosystems within First Nations lands and waters

- Set appropriately high standards for water quality to ensure that First Nation lands and waters can sustain wildlife, fish, plants and humans.

As discussed in detail in section 3 below, it is highly likely that the measures being proposed by the federal government will be inadequate and that they will not satisfy First Nations rights to receive adequate levels of environmental protection. Despite the proposed measures, the federal government will continue to be remiss in meeting its responsibilities to First Nations.

#### **2.4 Indigenous Rights Supported by International Measures**

The following sources of international law may assist you in asserting your water rights, although these sources of law are not binding upon Canada in a domestic sense.

##### *2.4.1 Draft Declaration on the Rights of Indigenous Peoples*

Although rejected by Canada on September 13, 2007 and thus not binding on the federal government, Article 26 of the Draft Declaration provides broad recognition that Indigenous peoples have the right to the lands, territories, and which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation or encroachment of these rights. Article 32 requires governments to consult and obtain indigenous peoples full informed consent prior to any project affecting their territories, particularly in connection with development or use of water resources. Article 29 provides for significant environmental rights, including the right to conservation and protection of the environment.

Despite Canada's rejection of the Declaration, it is now considered international law, and as such increases pressure on Canada to comply with its terms.

##### *2.4.2 Convention on Biological Diversity*

Article 8(j) of this Convention, ratified by Canada, addresses indigenous peoples indigenous knowledge and the key role this knowledge plays in conservation. This section can be used to stress that First Nations knowledge should guide decisions related to the use and conservation of water resources.

##### *2.4.3 International Covenant on Economic, Social and Cultural Rights*

Canada has agreed to (ratified) this agreement, which provides in Article 1 that all peoples shall have the right to self-determination.

##### *2.4.4 ILO Convention 169*

The Convention, not ratified by Canada, addresses numerous aspects of indigenous rights and entitlements including the rights of indigenous peoples to own and control their territories (Article 13.2), their rights to decide on the process of development as it affects their lives (Article 7(1)), and the

right to participate in the management of resources, including waters, from those territories (Articles 14, 15, 16).

#### *2.4.5 The Millennium Development Goals (MDG)*

The United Nations General Assembly, which includes Canada, adopted the United Nations Millennium Declaration on September 8, 2000. This Declaration set out eight goals, including the target of reducing the number of people without access to safe drinking water by 50% by the year 2015. Further, the MDGs also focus on protecting the environment, including the resolution 'to stop the unsustainable exploitation of water resources by developing water management supplies at the regional, national, and local levels, which promote both equitable access and adequate supplies'. While Canada does not tend to apply these goals within its borders, they should be reminded of the need to do so.

#### *2.4.6 UN Water as a Human Right Discussions*

There are numerous statements regarding the status of water as a human right. However, Canada is not in support of categorizing water in this way, likely as a result of concerns related to bulk water exports, trade agreements, development assistance, jurisdictional obligations, and indigenous rights issues. In this circumstance, it is likely preferable to focus upon asserting water as an indigenous right (through presentation of arguments provided above) rather than relying upon water as a human right.

### **3 Protection of Rights**

The Crown has two sources of obligation to First Nations regarding the proposed decision to legislate by incorporation of provincial drinking water laws by reference into new federal legislation to address First Nations safe drinking water: the fiduciary obligation and their responsibilities under s.91(24) of the Constitution Act, 1867, and obligations stemming from s.35 of the Constitution Act, 1982.

#### **3.1 The Fiduciary Obligation**

First, the federal government is a fiduciary regarding all uses of First Nation federal lands and waters. This obligation stems from the jurisdiction that the federal government has over 'Indians and lands reserved for Indians' under s.91(24) of the Constitution Act, 1867. This obligation includes ensuring that lands and waters are adequately protected as to do is in the best interests of First Nations people. The critical question regarding this first source of obligation is this: *in proposing their decision, is the Crown adequately discharging their fiduciary obligations to make this decision in the best interests of First Nations regarding the affected First Nations lands and waters?* This obligation also contains the duty to consult and accommodate as the Crown makes its decisions regarding First Nation lands. The fiduciary obligation requires that the Crown demonstrate loyalty, good faith, and provide full disclosure appropriate to matter at hand. Further, it must act in what it reasonably and with diligence regards as the best interests of the beneficiary.<sup>xxxv</sup> Fiduciary includes ordinary administrative control over reserve and band assets so decisions regarding the provision of safe drinking water (which touches upon decision

regarding natural resource assets such as land and water and also infrastructure assets such as water treatment plants) certainly invoke the Crown's fiduciary obligation.

### **3.2 The Constitution Act, 1982**

The second obligation stems from the obligations imposed by the recognition and affirmation of Aboriginal and treaty rights under s.35 of the Constitution Act, 1982 (and the protection of these rights by the courts in Canada). These obligations require the Crown to reconcile its interests (as a sovereign entity and on behalf of society generally) with those of all First Nations. Reconciliation is the goal when ensuring that First Nation's rights and interests are infringed as minimally as possible in the face of proposed Crown decisions. The question here is: *is the Crown ensuring that their decision to legislate, and to do so in this way, impacts First Nation rights as minimally as possible, and is reconciliation being achieved?* Once again, the duty to consult and accommodate is a part of this obligation.

The potential rights embedded in First Nation claims to lands and waters are protected by s. 35 of the Constitution Act, 1982. The honour of the Crown requires that these rights be determined, recognized and respected.

### **4 The Infringement Justification Test**

When the government wishes to make a decision that might impact First Nation rights and interests, the SCC in the Sparrow case stated that the government must first justify that potential decision (in this case, the decision regarding, and method of, creating legislation). This Sparrow requirement is known as the 'infringement justification test'.

Frequently in discussions about Aboriginal rights, very important aspects of the justification test are omitted or forgotten. The tendency seems to be to focus upon the requirement that the Crown engage in adequate consultation with First Nations, but this is only one aspect of the justification test. In order to show the full importance and scope of this test, the text of the Sparrow case is reproduced in the table below, accompanied by a plain-language version, and an assessment as to whether the Crown here has met each element of the test.

As the table below indicates, it is unlikely that the Crown would be able to meet all elements of the test to ensure that its proposed decision is justifiable given its likely impact on Aboriginal rights.

First Nations should present the Crown with their views about whether the Crown had met all elements of the justification test, not only the consultation aspect.

**Table 1: The Justification Test**

Sparrow Test	Plain Language Translation	Assessment
<p>The test for justification requires that a legislative objective must be attained in such a way as to uphold the honour of the Crown and be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples.</p>	<p>Honour of the Crown must be shown.</p>	<p>The Crown has a valid objective in trying to provide First Nation safe drinking water.</p>
	<p>Legislative objective must be in keeping with Crown policy.</p>	<p>The method the Crown (legislation rather than supporting First Nations inherent jurisdictions to manage water) is using probably contradicts its own Inherent Right Policy.</p>
<p>The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation.</p>	<p>Crown must identify potential impacts on First Nation rights.</p>	<p>The Crown has not identified impacts on First Nation rights.</p>
	<p>The Crown should recognize and affirm, not infringe, Aboriginal rights.</p>	<p>Crown approach appears to infringe rights.</p>
<p>The first question to be asked is whether the legislation in question has the effect of interfering with an existing aboriginal right. The inquiry begins with a reference to the characteristics or incidents of the right at stake.</p>	<p>Will the drinking water legislation interfere with First Nation rights?</p>	<p>First Nation rights have been identified, so there is a strong likelihood of impact. However, the legislation has not been drafted so it is impossible to determine.</p>
<p>To determine whether ... rights have been interfered with such as to constitute a prima facie infringement of s. 35(1), certain questions must be asked.</p> <ul style="list-style-type: none"> <li>• Is the limitation unreasonable?</li> <li>• Does the regulation impose undue hardship?</li> <li>• Does the regulation deny to the holders of the right their preferred means of exercising that right?</li> </ul> <p>The onus of proving a prima facie infringement lies on the individual or group challenging the legislation.</p>	<p>Is it reasonable to limit First Nation water rights, self-government rights, and rights to environmental protection?</p>	<p>No.</p>
	<p>Does the proposed legislation and regulations create excessive hardship on First Nations?</p>	<p>Yes, given the financial concerns noted by First Nations, the Expert Panel, and the Senate.</p>
	<p>Does governments proposed approach go against First Nations wish to exercise their water rights, self-government rights, and environmental protection rights?</p>	<p>Yes, First Nations have generally stated that they wish to exercise their inherent jurisdictions while being properly financed.</p>
<p>If a prima facie interference is found, the analysis moves to the issue of justification. This test involves two steps.</p> <ul style="list-style-type: none"> <li>• First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations ... is valid. The objective of the department in setting out the particular regulations would also be scrutinized.</li> <li>• If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue: the honour of the Crown in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginal people must be the first consideration in determining whether the legislation or action in question can be justified.</li> </ul>	<p>Is the intention or objective of the Crown valid?</p>	<p>The objective to provide safe drinking water appears to be valid. There appears to be other objectives (as suggested in section 5.1.1 below), but these have not been clearly presented in INAC documentation.</p>
	<p>Has the fiduciary obligation been upheld through this Crown action?</p>	<p>The approach of adopting provincial standards, given the well-known and well-studied gaps and inadequacies, cannot be seen as meeting the fiduciary obligation to act in the best interests of First Nations.</p>
<p>Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include:</p> <ul style="list-style-type: none"> <li>• whether there has been as little infringement as possible in order to effect the desired result;</li> </ul>	<p>Is the infringement as small as possible?          Has there been compensation for the water rights that may be infringed or extinguished?          Was there consultation?          Have other considerations been addressed?</p>	<p>No, but it is difficult to assess given that no other options to meeting the objective have been discussed. No discussion has occurred. No, only limited engagement sessions. The critical issues of financing and</p>

<ul style="list-style-type: none"><li>• whether, in a situation of expropriation, fair compensation is available; and</li><li>• whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented.</li></ul> <p>This list is not exhaustive.</p>		liability have not been addressed.
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## 5 The Crown Decision

The government appears to be arguing either of two things during the current 'engagement process':

1. That this situation does not require consultation (because the Crown is not making the type of decision that requires consultation, and even if it was, there are no First Nation rights that might be impacted by the decision). Therefore, while this is not consultation but only 'engagement', it is sufficient.

-or-

2. This situation requires consultation (because it is the type of decision that might impact First Nation rights, but there are no First Nation rights that the decision might impact, so the type of consultation required is very minimal) but the current consultation process is adequate.

Justification is required if a government decision may impact Aboriginal or Aboriginal rights. The SCC in the Sparrow case stated that the decision to regulate a resource by creating legislation is exactly the kind of decision that might impact First Nations rights. The Crown decision in our current situation is the decision to create legislation (that sets out rules, and also allows for the creation of regulations that set out standards and numerous other elements related to the management of water to ensure safe drinking water for First Nations). Clearly, this is the type of Crown decision that requires justification.

INAC may argue that this process does not require consultation as it is merely the 'framework development' stage of development. Even though the current consultation process is an interim step in a series of steps comprising a broader process (as the government has indicated in the Engagement Sessions Discussion Document) it doesn't eliminate the requirement to fully consult at this time: the decisions being taken now set into play a series of events that can impact rights.<sup>xxxvi</sup>

The Haida case stated that even decisions made before the development of legislation can require consultation (if they might impact an Aboriginal or treaty right). The Haida and Taku River cases made clear that strategic planning decisions are subject to consultation (again, if they might impact an Aboriginal or treaty right). Developing legislation regarding water quality on First Nation reserve lands (and by extension protection of the plants, wildlife and land that the water supports) is certainly a strategic level of planning regarding use of the water resource.

The reason for requiring consultation at this stage, before strategic decisions are made is that unilaterally exploiting or making decisions that can alter a resource (such as water) that has First Nation claims on it (even through unproven, but claimed Aboriginal or treaty rights) may deprive the First Nation of the benefit of the resource.<sup>xxxvii</sup> The Crown cannot deprive First Nations the benefit of the resource (in this case, the benefit of a certain level of water quality and related environmental protection) without justification. Regarding self-government rights, strategic planning decisions that may deprive First

Nations of the benefit or ability to implement their own laws, rules and customs in order to use and protect the water resource also require the Crown to meet the justification test.

The SCC in Haida included strategic planning as one of the types of decisions that the Crown might make that could infringe First Nation rights. Strategic planning decisions<sup>xxxviii</sup> are being made when the following types of plans are being developed:

- Watershed management plans
- Source water protection plans
- Forestry management plans (and all other forms of natural resources development planning)
- Capital plans and corresponding budget allocations regarding water infrastructure
- Strategic environmental assessments (environmental assessments of government policies, plans, and programs)

In addition to strategic planning types of decisions, the following decisions made by the Crown through its officials may require the justification test to be met if the decision might impact Aboriginal and treaty rights:

- All license decisions (licenses granted by either federal or provincial governments regarding management or use of any living or non-living thing on First Nation reserve lands or traditional territories) including those related to forestry, mineral mining, oil and gas mining, harvesting, pulp and paper mills, agriculture and aquaculture, and water use and diversion for electricity generation, manufacturing, flood control, etc.
- Operational decisions (for example, decisions with respect to statutory approvals of plans or policies)
- Administrative decisions (for example, decisions regarding the need for and scope of engagement and consultation processes)

By creating this legislation, the Crown may impact First Nations very seriously by depriving them of:

- An adequate level of water quality protection [which the Crown must provide as a result of s.91(24) and fiduciary obligations];
- Exercise of water rights (inherent, Aboriginal, or treaty);
- Exercise of rights to govern the management of water (self-government).

This Crown, due the potentially grave impacts on First Nations rights of its decision, must justify these impacts, before they occur, through the infringement justification process set out in Sparrow (discussed above in section 4).<sup>xxxix</sup>

### **5.1 A Word about Incorporation by Reference**

'Incorporation by reference' is a perfectly valid and legal method of drafting legislation. Government can use this technique when it wishes to include certain wording in its new legislation that is already included in some other document (including another piece of legislation). It is often easier just to mention the other document, section of document, or passage rather than

reproduce the entire other text, word for word, in the new legislation.

In this situation, it appears that the government wants to create a new piece of federal legislation where it brings in most or all of the wording (as appropriate) contained within the drinking water legislation of every province and territory. Instead of creating an enormous federal law that restates many of the provisions of existing provincial and territorial laws that relate to safe drinking water (which is approximately 80 different pieces of legislation across the country, not including Nunavut or any federal water-related laws) the new legislation would just refer the reader to the existing laws or provisions that are found in each province or territory.

Despite the apparent sensibility of this approach, there are three arguments against the use of this technique.

#### *5.1.1 It's Not the Technique That's the Issue, It's the Standards (or, the Patchwork Argument)*

Government documents confuse the real issue. It is not the legislative drafting technique that should be of concern to First Nations, it is the adoption of provincial standards that should be of concern. It is not the method they use to adopt provincial standards; it is the fact that they want to adopt provincial standards.

An example will illustrate the issue. The federal government's decision could be that in order to best fulfil its responsibilities as a fiduciary and under s.91(24) it needs, for example, to:

1. set First Nation water quality standards at specific certain levels that it had assessed and determined based upon the needs of First Nations and taking into account the close relationship of water quality to the exercise of indigenous rights that depend upon clean, healthy water;
2. determine the specific approaches to water quality monitoring that make the most sense on First Nation lands (given - for example - the desire to incorporate indigenous knowledge techniques and information into water quality monitoring);
3. assess and determine certification processes and standards that are most appropriate in the First Nation context, given the indigenous knowledge systems and capacity needs currently existing.

Determining the specific needs and requirements of first Nations, and then creating legislation to address those needs would be a valid way to approach the decision it needs and wants to make. Instead, the federal government has determined that just adopting provincial standards is 'a more straightforward operating environment', that allows for 'collaboration between First Nations and municipalities' and creates a 'common base to evaluate the effectiveness' of the systems.<sup>x1</sup> INAC states that this approach is 'fair' as it provides the same level of protection to First Nations as other Canadians.<sup>x1i</sup> However, the idea of fairness regarding this issue is not a relevant consideration: achieving fairness between First Nations and non-First Nations should not be accomplished by:

- infringing constitutionally-protected rights

- lowering the standards of water protection First Nations deserve (flowing from s.91(24) and the fiduciary) in order to achieve fairness with non-Aboriginal people.

Would non-Aboriginal peoples find it acceptable to diminish their constitutional rights in order to achieve fairness regarding First Nations?

According to INAC, the Standing Senate Committee on Aboriginal Peoples expressed concern in its report that INAC's approach could create a 'patchwork of regulations and standards across the country (meaning regulatory regimes may end up differing from province-to-province and territory-to-territory)'.<sup>xlii</sup> In reality, the Senate Committee Report made no comments whatsoever related to the need to ensure that INAC was not creating a patchwork of standards and regimes.<sup>xliii</sup> The Senate Committee was concerned with three things: resources for the regime, adequacy of the regime, and full involvement of First Nations in development of the regime.

Regarding the adequacy of the proposed option of adopting provincial regimes, the Senate Committee stated:

*The Committee is left to wonder at the Department's intention to proceed with a legislative scheme that is not only incomplete, but that may also find little support among those who must apply, and comply with, the legislation. Based upon the evidence - including the Expert Panel's assessment of this legislative approach as the "weaker option" - we are, quite frankly, mystified by the Department's chosen approach. Nor do we feel that First Nations will be (or have been) properly consulted on the matter. The Committee would have hoped that the Department had learned by now that imposing legislation on First Nations without their meaningful input - particularly when the option contemplated appears problematic from the start - will meet with resistance.*

Once again, the problem is with the proposed approach of adopting inadequate and incomplete provincial standards (regardless of method by which it is accomplished - incorporation by reference or whatever). INAC's approach likely reflects only the federal governments desire to avoid addressing the unique standards and needs of First Nations (for whatever reason). INAC appears to prefer First Nations to receive the same standards and regimes as all other Canadians (even if those standards have been shown to be inadequate, incomplete and inconsiderate of the unique needs and rights of First Nations).

When Aboriginal rights may be infringed, sometimes the courts require the Crown to balance the needs of various parties, all of whom may have an interest in the resource. However, in this circumstance, whether or not the regime being proposed for First Nations is 'fair' to 'neighbouring jurisdictions' should be irrelevant. The issue at hand is not whether or not 'neighbouring jurisdictions' adequately address the drinking water needs of their citizens. The issue is whether that approach makes sense for First Nations given their needs and rights. This reason for adopting provincial approaches and standards should be challenged vigorously.

### 5.1.2 Straightforwardness: It's not that Straightforward (or, the Complexity Argument)

The federal government is of the view that just adopting provincial standards is 'a more straightforward operating environment', creates a 'common base to evaluate the effectiveness' of the systems. However, doing this will not ensure safe drinking water for First Nations as provincial regimes contain numerous gaps, inadequacies, and variability. For example:<sup>xliiv</sup>

- Only two provinces fully adopt the federal government's Guidelines for Drinking Water Quality (Nova Scotia and Alberta, although Yukon references them)
- Only four provinces require water suppliers to make annual reports available to the public (Newfoundland and Labrador, Ontario, Saskatchewan, Alberta).
- There is no standard list or requirement that certain contaminants in drinking water be monitored. Numbers of substances monitored can be as low as 28 (in Newfoundland and Labrador) to as high as 77 (Quebec).
- Only two provinces require water supplies to be filtered at all times (Nova Scotia, Ontario).
- Only five provinces have legislation or regulations that address source water protection at all - although no jurisdictions do so comprehensively (Newfoundland and Labrador, New Brunswick, Ontario, Manitoba, and British Columbia).

Further, as Ecojustice has reported regarding drinking water in Canada:<sup>xlv</sup>

*Health Canada estimates unsafe drinking water causes 90,000 illnesses and 90 deaths every year, the equivalent to 13 Walkerton tragedies. Ongoing studies will almost certainly conclude that these estimates understate the extent of the problem.<sup>xlvi</sup> The sheer number of boil water advisories is another indication that our system is in trouble. The number of boil-water advisory days in municipalities across Canada increased 24 percent between 1993 and 1998.<sup>xlvii</sup> Dozens of communities are under "standing" boil water alerts that have remained in place year after year. It is not possible to gauge the full extent of the problem because our federal government does not compile nationwide data on boil water advisories.<sup>xlviii</sup> However, in April 2008 the Canadian Medical Association reported that more than 1,700 drinking water advisories are in effect across Canada.<sup>xlix</sup>*

Clearly, the provincial standards and systems are in crisis. The adoption of these regimes will not address safe drinking water needs for First Nations.

Further, addressing these gaps, and meeting the needs of First Nation communities will only make the situation more complex if INAC tries to fit all those concerns into the various differing provincial regimes. In avoiding a 'patchwork', INAC will likely create a tangled web of varying approaches, processes, and standards. First Nations would be better served by one piece of legislation that sets out uniform requirements, and that allows for minor local or even regional variation but only where

absolutely necessary (this would need careful consideration and definition in order to ensure safe drinking water is always provided).

### *5.1.3 You Can't Give What You Can't Give (or, the Delegation Argument)*

A technical legal argument<sup>1</sup> can be made that, unless properly constructed, the technique of incorporation by reference may lead to improper delegation to provincial bodies, particularly in the case of the creation of federal regulations that incorporate provincial regulations 'as amended from time to time' (as opposed to provincial regulations that may exist as of an exact date such as January 1, 2009, for example).

The argument is based upon two related but separate legal principles. The first is that while it is legal for Parliament to delegate its law-making powers to a federal Minister, it is not legal for a Minister to further delegate his/her powers (for example, his/her regulation-making powers) to another body, such as a province (this is the rule against sub-delegation). This is because, if the incorporation by reference brings in provincial regulations that may be 'amended from time to time' by the province, then the federal government is essentially allowing the province to make the decision as to the appropriate standards on an ongoing basis. This would be a sub-delegation of the federal government's law-making powers to the province and is not allowed. Second, the federal government cannot give powers to the province that are within federal jurisdiction (for example, management of water on federal First Nation reserve lands). Even where delegations are allowed, they must relate to a power that the province currently has. If the provincial regulations 'as amended from time to time' (and the federal government is essentially allowing the province to make the decision as to the appropriate standards on an ongoing basis) govern the provision of safe drinking water on reserve, it can be argued that this is illegal as the province has no jurisdiction under the Constitution Act 1876 to regulate matters regarding 'Indians and lands reserved for Indians', particularly if those matters relate to the elements that are related to the core of First Nations rights (such as self-government and water rights).

We cannot know if either of these situations are the case, as we have not seen a copy of the proposed legislation. However, to avoid this problem, the federal government would likely need to review every proposed change in every provincial regulation every time they occur in the future. This would be a very challenging task, and it would also make it very difficult for First Nations to be aware of the exact current state of the text of the laws. As noted above, it can be argued that it is much simpler and straightforward to create one piece of legislation that sets out uniform requirements, and that allows for minor local or even regional variation but only where absolutely necessary.

## **5.2 Basic Requirements of a Consultation Process**

The Crown must consult when it has 'real or constructive knowledge of potential existence of a right or title and contemplates conduct that might adversely impact it'.<sup>14</sup> This paper will not present a detailed review of the law of consultation as

it is beyond the scope of the time and resources allotted. However, key points will be reviewed.

A proper consultation process involves preparatory steps and then consultation itself. The consultation should not formally begin until the preparatory steps are completed. The following elements are included:<sup>111</sup>

**Preparation Steps**

- Step 1: Acquire necessary information
- Step 2: Analyse the information
- Step 3: Develop a consultation approach or agreement
- Step 4: Identify your concerns and formulate your position

**Consultation Steps**

- Step 1: Discuss all concerns
- Step 3: Negotiate accommodations (discuss all options)
- Step 3: Implement accommodations
- Step 4: Monitor accommodations and modify (as needed)

The most important question in all situations that might impact Aboriginal rights is "*what is required to maintain the honour of the Crown and to effect a reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake?*" The Crown is bound by its honour to balance the exercise of its power with the rights of Aboriginal peoples (which it also must consider and protect) when making decisions that may affect Aboriginal claims.<sup>111ii</sup> The strength of the claimed right impacts the scope of consultation required: the stronger the right, the greater the depth of consultation required.<sup>11iv</sup> The adequacy of the consultation process is governed by a standard of reasonableness that is applied against the two elements of consultation: the adequacy of the process of consultation (administrative or process aspect) and the adequacy of any resulting accommodations (substantive or outcome aspect).<sup>1v</sup> When assessing if a consultation process has been adequate, it is critical to identify ways that both elements of consultation have been (in)adequate.

Accommodation is achieved through consultation, as this Court recognized in *R. v. Marshall*, [1999] 3 S.C.R. at para. 22: "... the process of accommodation of the treaty right may best be resolved by consultation and negotiation". Often the negotiation requirement is overlooked, and therefore it is critical that First Nations assert their right, as part of consultation, to engage in *negotiations* (meaning moving beyond mere discussion, to a stage where parties try to agreement through negotiation and compromise).

At all stages, good faith on both sides is required.<sup>1vi</sup>

### 5.3 Deficiencies of This Consultation Process

From the documentation provided, numerous deficiencies are apparent regarding both the process and outcome requirements of adequate consultation.

#### 5.3.1 Process Deficiencies

##### 5.3.1.1 Time

The notice given was short, frequently changing, and then shortened again in the final instance. Originally, First Nations were given the following timeframes, which were reduced as indicated:

	Original Time Period (August 12, 2008 TOR)	Revised Time Period (January 13, 2009 TOR)
Time to do Regional Impact Analysis	20 weeks	9.5 - 12.5 weeks
Synthesis Report by IOG	5 weeks	1.5 weeks
Total Time Given	25 weeks	11-14 weeks

The time given for regional organizations to complete the critical Regional Impact Analyses was very short in the first instance, and was reduced by over 50% in the majority of regions. Given the likelihood of impact on First Nations rights, and the fact that the exercise of INAC's decision will have serious impacts on all Aboriginal and treaty rights discussed earlier, this timeframe cannot be seen as reasonable nor adequate. Further, the courts have been clear that the Crown must not impose unreasonable conditions before the consultation,<sup>lvii</sup> however it certainly did so in this case regarding the preparation of the Regional Impact Analyses in that it failed to provide:

- enough information regarding the details of the proposed legislation;
- enough financial support to properly assess impacts;
- enough time to properly assess impacts.

##### 5.3.1.2 Timing

Consultation must occur before the decision has been made. However, the decision appears to have been already made, as indicated in transcripts of the hearings of the Standing Senate Committee on Aboriginal Peoples and INAC discussion documents indicating that the Minister has decided that he has a 'preferred' option.<sup>lviii</sup> Further, there has been no explanation nor information provided regarding the details of other possible options.

##### 5.3.1.3 Information

The Crown is under a positive duty to provide the First Nation government with all necessary information in a timely way so that the First Nation has the opportunity to assess and present their concerns and interests.<sup>lix</sup> This is also important because, the level of consultation required may change as the process goes on

and as new information comes to light.<sup>1x</sup> Consultation always requires meaningful, good faith discussions and willingness on the part of the Crown to make changes based on information that emerges during the process.<sup>1xi</sup> Therefore, it is imperative that First Nations insist on full information being provided and demand a revised consultation process that addresses all the issues at stake. This is not only possible but also critically important:

*Where the duty to consult is deep, it is not an answer to say that there will be further opportunities for consultation when the process that may lead to harm is further advanced, or that the information sought, while important, is not part of the process at this stage.*<sup>1xii</sup>

There has been inadequate information provide regarding the following:

- Clarity regarding purpose or objective of Crown decision. While statements are made regarding the need to address the regulatory gap, INAC discussion documents appear to present numerous other objectives, including engagement of provinces in addressing First Nation drinking water needs, minimizing costs of providing these services, ensuring First Nations have the same level of health protection as other Canadians (even if that level is inadequate);
- Crown has positive duty to research the nature and scope of rights at stake, as well as impact of regulated activity in question. They gave no indication of having done this in this consultation process;<sup>1xiii</sup>
- The Crown is obliged to make an assessment concerning the scope of its duty to consult beyond just acknowledging that it has such a duty.<sup>1xiv</sup> Scope of consultation required is based upon strength of Aboriginal rights (or the claim to Aboriginal rights) that may exist. No assessment of this nature has been presented to First Nations;
- Clarity regarding 'consultation versus engagement sessions' is required as documents indicate contrary perspectives and there never appears to be an opportunity for First Nations to engage in consultation regarding impacts on rights, should these types of impacts be identified in the current discussions;
- There is currently no public explanation regarding how the First Nation regional impact analysis results relate to engagement sessions, nor how INAC will address the impacts identified, particularly where those impacts are related to First Nation rights;
- Full information regarding all reasonable options to meet INAC's objective (as opposed to information just related to preferred option);
- Draft legislation and regulations for review, including plan to address elements of provincial legislation that are weak or that do not exist (meaning what will be the solution, and will First Nations have to wait until the provinces solve their own massive problems);
- Information related to costs and resources available to implement the legislation. This was seen as the most important issue according to the Senate Standing Committee on

Aboriginal Peoples, which strongly did not agree with INAC that the legislation should be in place before resources are allocated;

- Information related to liability, that is the roles and responsibilities of the federal government and First Nations, and now presumably the provincial governments, regarding water treatment infrastructure, services, etc. Provincial legislation certainly does not address the ownership and responsibility for treatment facilities, and yet no information was provided regarding how INAC is proposing to address the matter.

#### 5.3.1.4 Resources

First Nations must have adequate resources in order to be able to properly assess impacts of a proposed Crown decision. The sum of \$22,000 per nation is likely inadequate given the seriousness of the potential impact, the broad scope of the proposed decision and its potential to impact many elements of First Nation rights. A court in Ontario determined that a level of appropriate funding is essential to fair and balanced consultation (to create a 'level playing field' between the First Nation and the Crown) and can include: administrative costs, honoraria for participants, fees for technical and professional assistance, travel and accommodation costs, expenses regarding the internal consultations with community.<sup>lxv</sup> Although it is not a SCC decision, First Nations should argue that the principles of the case stand.

#### 5.3.1.5 Parties to Consultation

Consultation cannot be with First Nations generally, or individual people, it must be with all of the First Nations that are potentially impacted. It can be argued that it should be with the nations as a whole, not the Bands (which as Indian Act structures operate based upon jurisdictions acquired under that Act - meaning, they probably do not operate based upon inherent jurisdictions).

#### 5.3.1.6 Scope of Consultation

When a First Nation is excluded from discussions and decisions regarding the design of the regulatory and environmental review processes related to the proposed decision, it has been held to be insufficient consultation.<sup>lxvi</sup> Further, the scope of consultation must include Crown addressing what it knew (or ought to have known) were First Nation rights and interests, explaining what might be potential adverse effects on those interests, listening for what First Nations see as their concerns, and then minimising impacts on those rights.<sup>lxvii</sup>

#### 5.3.2 Outcome Deficiencies

The goal of consultation is this:

*[82] In assessing whether the Crown has fulfilled its duty of consultation, the goal of consultation - which is reconciliation - must be firmly kept in mind. The goal of consultation is not to be narrowly interpreted as the mitigation of adverse effects on Aboriginal rights and/or title. Rather, it is to receive a broad interpretation in light of the context of Aboriginal-Crown*

*relationships: the facilitation of reconciliation of the pre-existence of Aboriginal peoples with the present and future sovereignty of the Crown.*<sup>lxviii</sup>

Consultation has not occurred regarding the creation of federal First Nation safe drinking water legislation given that:

- There are numerous serious procedural aspects of consultation that are inadequate or completely absent (as provided above);
- Identification of impacts on First Nation rights and interests have formed no part of any discussions;
- Negotiations to minimize impacts and reconcile interests have not occurred between the Crown and any First Nation governments;
- There is no demonstration that First Nation concerns and interests have been integrated into the Crown's plan of action.<sup>lxix</sup>

Therefore, the ultimate goal of reconciliation has not been achieved, and the Crown will not likely be able to justify potentially serious infringements it will be making to numerous First Nation rights.

## 6 Endnotes

- <sup>i</sup> McLachlin C.J.C. in *Haida Nation v. BC (Minister of Forests)* [2004] 3 S.C.R. 511
- <sup>ii</sup> Black's Law Dictionary.
- <sup>iii</sup> Ardith Macklem and Nicole Schabus, *Indigenous Water Rights: Briefing Paper for Forum Participants at Our Waters, Our Responsibility: Indigenous Water Rights*, May 13-15, 2004
- <sup>iv</sup> Ardith Macklem and Nicole Schabus, *Indigenous Water Rights: Briefing Paper for Forum Participants at Our Waters, Our Responsibility: Indigenous Water Rights*, May 13-15, 2004, page 3.
- <sup>v</sup> *R v. Van der Peet* [1996] 2 S.C.R. 507 at para. 275
- <sup>vi</sup> *Van der Peet*, at para. 269
- <sup>vii</sup> Stuart Rush, Q.C., *Aboriginal Water Rights in Canada*, (unpublished paper presented at "Just Add Water" 2002 conference), in possession of the author.
- <sup>viii</sup> 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).
- <sup>ix</sup> 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 curtailed on the conservation limitation set out by the SCC, 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).
- <sup>x</sup> *R. v. Simon* [1985] 2 S.C.R. 387
- <sup>xi</sup> *R. v. Cote* [1996] 3 S.C.R. 139
- <sup>xii</sup> *R. v. Sundown* [1999] 1 S.C.R. 393.
- <sup>xiii</sup> 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.
- <sup>xiv</sup> *Claxton v. Saanichton Marina Ltd* [1989] 57 D.L.R. 4TH 161 (B.C.C.A.)
- <sup>xv</sup> 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.
- <sup>xvi</sup> *R v. Van der Peet* [1996] 2 S.C.R. 507.
- <sup>xvii</sup> *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, *Marshall-Bernard, R. v. Marshall; R. v. Bernard* [2005] 2 S.C.R. para. 55.
- <sup>xviii</sup> *Winters v. United States*, 207 U.S. 564 (1908) 28 S.Ct. 207, 52 L.Ed. 340., *Arizona v. California*, 373 U.S. 546 (1962) 83 S.Ct. 1468, 10 L.Ed.2d 542., *United States v. Adair*, 723 F.2d 1394 (1983).
- <sup>xix</sup> *Van der Peet*, paras. 271-2.
- <sup>xx</sup> *R. v. Badger* [1996] 1 S.C.R. 771
- <sup>xxi</sup> Letter from Treaty Commissioners Duncan C. Scott, •Samuel Stewart, •Daniel G. Macmartin to the The Honourable Superintendent General of Indian Affairs, dated November 6, 1905.
- <sup>xxii</sup> The Hon. Frank Oliver, Superintendent General of Indian Affairs, "Report of First Commissioner for Treaty No. 10" (Ottawa: January 18, 1907), available as of April 6, 2009 at <http://www.ainc-inac.gc.ca/al/hts/tgu/pubs/t10/trty10-eng.asp>
- <sup>xxiii</sup> 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.
- <sup>xxiv</sup> *R. v. Pamajewon*, [1996] 2 S.C.R. 821
- <sup>xxv</sup> *R. v. Van der Peet*, [1996] 2 S.C.R. 507

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<sup>xxvi</sup> Delgamuukw v. British Columbia [1997] 3 S.C.R. 1010, R. V. Sparrow, [1990] 1 S.C.R. 1075 AT 1112, R. v. Marshall [No.2], [1999] 3 S.C.R. 533 at para. 17.

<sup>xxvii</sup> Delgamuukw at para. 115 and Campbell v. British Columbia, [2000] 4 C.N.L.R. 1 (B.C.S.C.) at paras. 137 - 38.

<sup>xxviii</sup> Haida.

<sup>xxix</sup> R. v. Sundown [1996] 2 C.N.L.R. 289 (S.C.C.), R. v. Simon [1985] 2 S.C.R. 387.

<sup>xxx</sup> This is the requirement, as set out in Sparrow.

<sup>xxxi</sup> For a full discussion on this approach see Kent MacNeil, *The Jurisdiction of Inherent Right Aboriginal Governments*, Research Paper for the National Centre for First Nation Governance, October 11, 2007.

<sup>xxxii</sup> R. v. Morris, [2006] S.C.J. No.59, Simon v. The Queen, [1985] 2 S.C.R. 387, R. v. Badger, [1996] 1 S.C.R. 771.

<sup>xxxiii</sup> R. v. Badger, [1996] 1 S.C.R. 771, R. v. Morris, [2006] S.C.J. No.59, R. v. Marshall [No.1], 1999.

<sup>xxxiv</sup> Klahoose, para. 81.

<sup>xxxv</sup> Wewaykum Indian Band v. Canada [2002] 4 SCR 245

<sup>xxxvi</sup> Klahoose 2008 BSCS 1642, para. 68.

<sup>xxxvii</sup> McLachlin C.J.C. in the Haida case

<sup>xxxviii</sup> Haida, para 76.

<sup>xxxix</sup> R v. Sparrow [1990] 1 SCR 1075

<sup>xl</sup> INAC, *Legislative Framework for Drinking Water and Wastewater in First Nation Communities, Frequently Asked Questions (2009)*

<sup>xli</sup> INAC, *Drinking Water and Wastewater in First Nation Communities, Discussion Paper: Engagement Sessions on the Development of a Proposed Legislative Framework for Drinking Water and Wastewater in First Nation Communities (Winter 2009)*, page 10.

<sup>xlii</sup> *Ibid*, page 7.

<sup>xliii</sup> Final Report of The Standing Committee on Aboriginal Peoples, *Safe Drinking Water for First Nations*, May 2007.

<sup>xliv</sup> Carey Hill, et al. 'Harmonization versus Subsidiarity in Water Governance: A Review of Water Governance and Legislation in the Canadian Provinces and Territories', *Canadian Water Resources Journal*, Vol.33(4): 315-332 (2008) at page 322-23.

<sup>xlv</sup> Ecojustice, *Draft Parliamentary Brief: National Drinking Water Standards* (Vancouver, BC: Ecojustice, April 15, 2008) in possession of the author, at page 3.

<sup>xlvi</sup> Personal communication with Prof. David R. Boyd. Electronic mail of September 14, 2006.

<sup>xlvii</sup> Commissioner of Environment and Sustainable Development. 2005.

"Safety of Drinking Water - Federal Responsibilities," in Report to the House of Commons. Ottawa: CESD.

<sup>xlviii</sup> Environment Canada, *Children's Health and the Environment in North America: A First Report on Available Indicators and Measures* (Gatineau, QC: Environment Canada, 2005) at 47.

<sup>xlix</sup> "1,775 boil water advisories require action: report", CBC News (April 7, 2008), found online at: <http://www.cbc.ca/health/story/2008/04/07/boil-advisory.html> (last accessed April 14, 2008).

<sup>1</sup> The Standing Committee for the Scrutiny of Regulations reviewed this issue in its second report to Parliament during the 39<sup>th</sup> Parliament, Second Session, noting many areas of confusion and contradictory approaches by the Department of Justice on the matter of using the technique of 'incorporation by reference'. It may not be as simple a process as currently indicated in INAC documents provided during the engagement sessions and on their website.

<sup>li</sup> Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) [2005] SCC 69

<sup>lii</sup> These steps are a modified version of a list taken from the Centre for Indigenous Environmental Resources, *Consulting With the Crown: A Guide for First Nations* (Winnipeg: CIER, 2007).

<sup>liii</sup> Haida, para 45.

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- <sup>liv</sup> Delgamuukw v. British Columbia [1997] 3 S.C.R. 1010
- <sup>lv</sup> Wii'litswx v. British Columbia (Minister of Forests), 2008 BCSC 1139 at paras. 16-17
- <sup>lvi</sup> McLachlin C.J.C. in the Haida case
- <sup>lvii</sup> Halfway River First Nation v. BC (1999), 178 DLR (4th) 666
- <sup>lviii</sup> Proceedings of the Senate Standing Committee on Aboriginal Peoples, Issue No.15, Wednesday April 25 and Wednesday May 2, pages 15:55 - 15:59.
- <sup>lix</sup> Halfway River First Nation v. BC (1999), 178 DLR (4th) 666
- <sup>lx</sup> Haida, para 45.
- <sup>lxi</sup> Taku River Tlinglit First Nation v. British Columbia (Project Assessment Director) [2004] 3 S.C.R. 550
- <sup>lxii</sup> Klahoose, para. 129
- <sup>lxiii</sup> Tsilhilgot'in Nation v. British Columbia, 2007 BCSC 1700 (on appeal)
- <sup>lxiv</sup> Wii'litswx v. British Columbia (Minister of Forests), 2008 BCSC 1139
- <sup>lxv</sup> Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation [2007] 3 CNLR 221
- <sup>lxvi</sup> Dene Tha' First Nation V. Minister of Environment *et al*, 2006 FC 1354
- <sup>lxvii</sup> Miksew, para 64.
- <sup>lxviii</sup> Dene Tha' First Nation V. Minister of Environment *et al*, 2006 FC 1354
- <sup>lxix</sup> Halfway River First Nation v. BC (1999), 178 DLR (4th) 666 requires the Crown to demonstrate that it has taken the First Nations concerns into account when engaging in consultation to achieve reconciliation.