

Customary Water Laws and Practices in Canada

1. Introduction

In Canada, the legal landscape of customary water laws has been shifting ever since Aboriginal rights were entrenched in the Constitution in 1982. To clarify the nature and scope of these constitutionally protected rights, a number of significant cases have been decided and continue to be brought before the courts. Customary water laws are also evolving due to the ongoing settlement of land claims. Many cases that have made their way through the courts concentrate on establishing aboriginal title to land (which would include a water component); clarifying aboriginal rights to hunt, fish and trap and engage in other traditional activities; and testing the boundaries of historic and modern treaties. As the strategic importance of water grows and as even a water-rich country such as Canada recognizes that water scarcities will increase, it is likely that this emerging body of law will be the subject of much legal scrutiny in the coming years.

Customary water rights have been referred to as the ‘sleeping giant’ of water law in western and northern Canada as many of the older land claim treaties with native people did not address water rights.¹ There have been very few cases on the topic of customary water rights or their relationship to statutory rights.

This paper describes Canada’s water resources; discusses customary water laws; and sets out the laws used in Canada to manage water. It then describes the legal interface between customary water laws and statutory rights, discussing different sources of Aboriginal rights to water in Canada:

- i. A constitutionally protected aboriginal right to use water and other resources on unceded land
- ii. As included in the property interest recognized in aboriginal title to unceded tribal territory
- iii. As a reasonably incidental right to an existing treaty right to the resources
- iv. As a reserve based right founded on the *Winters* doctrine established by the US Supreme Court in 1908
- v. As a common law right, such as a riparian right
- vi. As a statutory right under applicable provincial legislation

It discusses mechanisms to reconcile conflicts and to resolve disputes between these two bodies of law. It finishes with an agenda for future research.

¹ David Percy, “Security and flexibility in water rights – lessons and pitfalls in modern Canadian legislation” (1999) Paper presented to the Third International Water Law Conference, Dundee Scotland, pg 4, quoted in Stephen Hodgson, “Land and water – the rights interface”, FAO Legal Papers Online, (Rome: FAO), 2004 at 62.

2. Canada's water resources

Canada is a federation of ten provinces and three territories united by a central federal government. The second largest country in the world, Canada has a total area of 9,984,670 km², its total land area is 9,093,507 km² and its freshwater resources amount to 891,163 km². For a country its size, Canada is relatively unpopulated. The latest census data from 2002 records the population at 31 million.²

With about 1/2 of 1% of the world's population, Canada has a disproportionate global share of water. Canada's vast water resources include millions of lakes and hundreds of rivers. The surface area and number of lakes in North America far exceed those of any other continent. Canada has at least 3 million lakes and in some regions, there are as many as 30 lakes for every 100 sq. km.³

But the public perception that Canada has no need for concern over water use is misguided. In fact, while Canada holds 20% of the world's fresh water, as much of this is non-renewable or fossil waters held in lakes, underground aquifers, and glaciers, the correct figure is that only 7% of the world's fresh renewable water is located in Canada.

Many forces cause stress on Canada's water supplies. Most fresh water drains north towards the Arctic Ocean and away from the heavily populated centers clustered close to the US border. In fact, 60 percent of Canada's water flows north while 84% percent of the population lives in the southern part of the country, within 300 kilometers of the US border.⁴

Canadians are profligate water users, among the highest consumers of water in the world in terms of per capita use, a recent Statistics Canada study notes.⁵ Among OECD member countries, Canada ranks second last in terms of per capita water consumption, ahead only of the US. Canada's per capita water consumption is 65 per cent above the OECD average.

The same 2003 Statistics Canada study reports that climate change threatens Canada's fresh water resources, as glaciers are rapidly diminishing, receding in some places to levels not seen for as many as 10 millenniums. Since 1850, some 1,300 glaciers have lost between 25% and 75% of their mass, with most of this reduction occurring in the

² <http://www.statcan.ca/english/Pgdb/phys01.htm>

³ Overview of Canada's Lakes, <http://www.aquatic.uoguelph.ca/lakes/lakeopt.htm>.

⁴ Environment Canada, State of the Environment Indicators, 1988 Urban Water Indicators: Municipal Water Use and Wastewater Treatment, http://www.ec.gc.ca/soer-ree/English/Indicators/Issues/Urb_H2O/Bulletin/uw_iss_e.cfm

⁵ "Fresh water resources in Canada" in 2003 edition of *Human activity and the environment: Annual statistics*, Statistics Canada's latest compilation of annual environmental statistics

last 50 years. Along the eastern slope of the Rocky Mountains, glacier cover is receding rapidly, and total cover is now close to its lowest level in 10,000 years.

The main uses of freshwater in Canada are, in descending order: thermal power generation, manufacturing, municipal, agricultural and mineral extraction, and residential, commercial and public uses. Of the consumptive uses, agriculture is the largest net consumer of water in Canada. Water is withdrawn mainly for irrigation (85%) and livestock watering (15%). Irrigation is needed mainly in the drier parts of Canada, such as the southern regions of Alberta, British Columbia, Saskatchewan, and Manitoba. Since so much of the water intake evaporates, only a small fraction is returned to its source. Other freshwater uses are in stream uses, those that do not remove water from its natural environment. The main in stream uses in Canada are hydroelectric power generation, water transport, fisheries, wildlife, recreation, and waste disposal.

Canada has over 990 registered dams, and many more which are not officially registered.⁶ Fewer than half of the rivers in North America remain “wild,” where water flows in a natural course unaltered by humans. Canada has developed more water diversions than any other country in the world, primarily to generate hydroelectricity⁷. Hydroelectric development has threatened the traditional way of life of Aboriginal communities in the past, and remains a source of conflict in the present.

The seemingly pristine nature of Canada’s water resources can also be misleading. Pollution is a concern. Boil-water orders are not uncommon and agricultural run-off and industrial discharges have regularly contaminated drinking water supplies.⁸ Sewage disposal also remains a problem.⁹

Seven people died and more than 2,000 were sickened by E. coli contamination of Walkerton’s water system in May 2000. After this wake-up call about the safety of Canadian drinking water, most provinces either initiated or sped up reviews of their drinking water legislation.¹⁰ For example, Alberta produced *Water for Life: Alberta’s*

⁶ Canadian Dam Association, <http://www.cda.ca/>

⁷ Jamie Linton 1997, *Beneath the Surface: The State of Water in Canada*, Canadian Wildlife Federation, 1997 quoted in CEC *North American Mosaic – 2002 State of the Environment Report* http://www.cec.org/pubs_docs/documents/index.cfm?varlan=english&ID=629

⁸ Sierra Legal Defence Fund, *Watered Down*, http://www.sierralegal.org/m_archive/2003/pr03_10_10.html reports that on any given day there are between 300 to 350 boil water advisories in BC.

⁹ See Sierra Legal Defence Fund, *The National Sewage Report Card*, 3rd edition, http://www.sierralegal.org/reports/sewage_report_card_III.pdf;

¹⁰ The web sites for all provincial and territorial water agencies are found as links to the Environment Canada Freshwater web sites at http://www.ec.gc.ca/water/en/links.cfm?category_id=8&sub_section_id=41. See also the Canadian Council of Ministers of the Environment Source to Tap web site at <http://www.ccme.ca/sourcetotap/>.

Strategy for Sustainability, British Columbia struck an Independent Drinking Water Protection Panel to advise on its new *Drinking Water Protection Act*; and Nova Scotia produced a Drinking Water Strategy.

Aboriginal peoples and water rights in Canada

‘[T]he survival of all Aboriginal peoples in Canada- has been scarred by injustice. Throughout Canada’s history, governments and courts systematically ignored the spirit and intent of treaties between Aboriginal peoples and the Crown, devalued ancient forms of Aboriginal sovereignty, dispossessed Aboriginal peoples of their ancestral territories, and regarded as inferior the diverse cultures to which Aboriginal people claim allegiance.’¹¹

Aboriginal people, Canada’s original occupants, account for approximately 2.5 % of the country’s population. But as the seminal 1996 *Royal Commission on Aboriginal Peoples* report notes, this general statistic masks the way their numbers are distributed: though most Canadians live in the southern 10% of the country, Aboriginal peoples account for the majority of the far north residents, and between one-third and one half of mid north residents.¹²

Aboriginal peoples overwhelmingly outnumbered the new settlers who came to Canada. In the province of British Columbia, Aboriginal peoples accounted for at least 70 per cent of the population when it entered Confederation. These original inhabitants had no power in the colonial society: an 1872 provincial act had removed their voting rights, an injustice that would not be completely remedied until 1960.

Water rights are essential for contemporary needs and economic development, as well as to preserve traditional ways of life. Whether for settlement, domestic use, agriculture, hunting, fishing, trapping, hydroelectric development, transportation, tourism, or industry, water is the lifeblood of Aboriginal communities.¹³

Settlement and development has deprived Aboriginal peoples of their water rights by changing the quality, quantity, and flow of rivers and lakes in Canada, resulting in

¹¹ Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press) ,2002 at 287.

¹² Report of the Royal Commission on Aboriginal Peoples (“RCAP”), vol 2, chap 4 (Ottawa: Queen’s Printer, 1996) online at http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html.

¹³ EAGLE, *Water: Lifeblood of the Land*, (Vancouver: EAGLE); 2003.

damage to habitat and boat routes, flooding of traditional land and forced relocation, and loss of control over a vital resource.¹⁴

The state of drinking water in Aboriginal communities across Canada is particularly shocking. As recently as the mid-1980s, half the on-reserve homes across the country had no running water, and still fewer had sewers or septic tanks, though conditions have since improved. As of 1996-1997, about 96 percent of dwellings on Indian reserves had some form of potable water supply, and almost 92 percent of dwellings had sewage disposal facilities.¹⁵ The Department of Indian and Northern Affairs confirmed the existence of water problems on reserves in its 2003 *National Assessment of Water and Wastewater Systems in First Nations Communities* which found that a majority of the 740 community water systems that were assessed posed a potential high or medium risk that could negatively impact water quality.¹⁶

Water rights are an essential element of the settlement of land claims, and the establishment of comanagement regimes for natural resources. As economic development is a significant component of contemporary Canadian Aboriginal rights, the availability of sufficient quantities of water for agriculture, fishing, power, and other industrial uses is also a central concern.

3. Customary rights and practices regarding water

“Our traditional laws are not dead. They are bruised and battered but alive within the hearts and minds of the indigenous peoples across our lands. Our elders hold these laws within their hearts for us. We have only to reach out and live the laws. We do not need the sanction of the non-indigenous world to implement our laws. These laws are given to us by the Creator to use. We are going to begin by using them as they were intended. It is our obligation to the children yet unborn.”

Sharon Venne

Saulteau First Nation, Fort St. John, British Columbia, 20 November 1992,¹⁷

Aboriginal people in Canada have often used the phrase ‘from time immemorial’ to describe their occupation of the land. Aboriginal peoples incorporated systems of law recognized by the settlers, though this recognition varied over the years, and was not

¹⁴ Richard Bartlett *Aboriginal Water Rights in Canada* (Calgary: Canadian Institute of Resources Law) 1988 at 2.

¹⁵ Canada and Freshwater - Experience and Practices, Canadian contribution to the freshwater dialogue at the Sixth Session of the United Nations Commission on Sustainable Development (UN CSD), April 20 to May 1, 1998.

¹⁶ INAC, http://www.ainc-inac.gc.ca/ps/hsg/cih/ci/ic/wq/wawa/index_e.html.

¹⁷ Quoted in the Royal Commission on Aboriginal peoples, vol.2, chapter 3, s. 1.2 Traditions of Governance, http://www.ainc-inac.gc.ca/ch/rcap/sg/sh13_e.html#1.2%20Traditions%20of%20Governance

always upheld by the courts or by public opinion. Many Aboriginal peoples in Canada continue to assert sovereignty according to their customary laws..

In 1973, the Supreme Court of Canada issued a historic judgment which quoted with approval passages from an ethnographic treatise:

“It is not correct to say that the Indians did not “own” the land but only roamed over the face of it and “used” it. The patterns of ownership and utilization which they imposed upon the lands and waters were different from those recognized by our system of law, but were nonetheless clearly defined and mutually respected. Even if they didn’t subdivide and cultivate the land, they did recognize ownership of plots used for village sites, fishing places, berry and root patches, and similar purposes. Even if they didn’t subject the forests to wholesale logging, they did establish ownership of tracts used for hunting, trapping, and food gathering. Even if they didn’t sink mine shafts into the mountains, they did own peaks and valleys for mountain goat hunting and as sources of raw materials. Except for barren and inaccessible areas which are not utilized even today, every part of the Province was formerly within the owned and recognized territory of one or other of the Indian tribes.”¹⁸

In the 2001 Supreme Court of Canada case of *Mitchell v. M.N.R.*, the court considered the nature of customary aboriginal rights, and explained the evolution of legal doctrine on this issue since colonial occupation by the British and the French, through the constitutional changes of the 1980s and on to the major court decisions of the 1990s. A passage from this case summarizes the law:

“ Long before Europeans explored and settled North America, aboriginal peoples were occupying and using most of this vast expanse of land in organized, distinctive societies with their own social and political structures.

The part of North America we now call Canada was first settled by the French and the British who, from the first days of exploration, claimed sovereignty over the land on behalf of their nations.

English law, which ultimately came to govern aboriginal rights, accepted that the aboriginal peoples possessed pre-existing laws and interests, and recognized their continuance in the absence of extinguishment, by cession, conquest, or legislation: see, e.g., the Royal Proclamation of 1763, R.S.C. 1985, App. II, No. 1, and R. v. Sparrow, [1990] 1 S.C.R. 1075, at p. 1103.

At the same time, however, the Crown asserted that sovereignty over the land, and ownership of its underlying title, vested in the Crown: Sparrow, supra.

¹⁸ Wilson Duff, *The Indian History of British Columbia*, chapter 8, 1964 quoted in *Calder v. Attorney General of British Columbia*, (1973) SCR 313.

With this assertion arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation, a duty characterized as “fiduciary” in Guerin v. The Queen, [1984] 2 S.C.R. 335.

Accordingly, European settlement did not terminate the interests of aboriginal peoples arising from their historical occupation and use of the land. To the contrary, aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights, unless (1) they were incompatible with the Crown’s assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them: see B. Slattery, “Understanding Aboriginal Rights” (1987), 66 Can. Bar Rev. 727.

Barring one of these exceptions, the practices, customs and traditions that defined the various aboriginal societies as distinctive cultures continued as part of the law of Canada: see Calder v. Attorney-General of British Columbia, [1973] S.C.R. 313, and Mabo v. Queensland (1992), 175 C.L.R. 1, at p. 57 (per Brennan J.), pp. 81-82 (per Deane and Gaudron JJ.), and pp. 182-83 (per Toohey J.). (emphasis added)

The common law status of aboriginal rights rendered them vulnerable to unilateral extinguishment, and thus they were “dependent upon the good will of the Sovereign”: see St. Catherine’s Milling and Lumber Co. v. The Queen (1888), 14 App. Cas. 46 (P.C.), at p. 54.

This situation changed in 1982, when Canada’s constitution was amended to entrench existing aboriginal and treaty rights: Constitution Act, 1982, s. 35(1). The enactment of s. 35(1) elevated existing common law aboriginal rights to constitutional status (although, it is important to note, the protection offered by s. 35(1) also extends beyond the aboriginal rights recognized at common law: Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, at para. 136).

Henceforward, aboriginal rights falling within the constitutional protection of s. 35(1) could not be unilaterally abrogated by the government.

*However, the government retained the jurisdiction to limit aboriginal rights for justifiable reasons, in the pursuit of substantial and compelling public objectives: see R. v. Gladstone, [1996] 2 S.C.R. 723, and Delgamuukw, *supra*.¹⁹*

Aboriginal peoples in Canada are diverse and include Indian, Inuit, and Metis peoples who are as historically, linguistically and culturally different from each other as European

¹⁹ [2001] 1 S.C.R. 911 (SCC). Also see Jack Woodward, *Native Law*, (Toronto: Carswell) at 2.40.

Canadians are from citizens of other nations in the world. Their customary laws also vary widely.”²⁰

The 1996 Royal Commission on Aboriginal Peoples noted that the customary or traditional laws of most Aboriginal peoples share certain characteristics:

- They are usually unwritten, embodied in maxims, oral traditions and daily observances.
- They are transmitted from generation to generation through precept and example,
- The laws are not static but continue to evolve.
- Tribal or band territories — often thousands of square kilometres — were communal property to which every member had unquestioned rights of access.
- In no case were lands or resources considered a commodity that could be alienated to exclusive private possession.
- All Aboriginal peoples had systems of land tenure that involved allocation within the group, rules for conveyance of primary rights (and obligations) between individuals, and the prerogative to grant or deny access to non-members, but not outright alienation.²¹

Canadian courts have applied customary Aboriginal law as part of the common law on repeated occasions. The distinctions between these three key concepts- the existing aboriginal rights recognized by Canadian law, the continuing institutions of aboriginal government and the aboriginal customary laws recognized as effective under Canadian law- are not entirely clear, but together they demonstrate that Canadian law ‘does not ordinarily displace the institutions, laws and properties of the aboriginal peoples.’²²

The difficulty lies in determining the Aboriginal or Indigenous customary law that should be applied in a particular case. The laws are unwritten, and instead often preserved in the oral tradition, and discerned through the ceremonies and stories of respected elders. Consequently oral history is an integral part of aboriginal rights cases.

In *Delgamuukw*, the breakthrough case on aboriginal title, the Supreme Court of Canada accepted the use of oral evidence to prove that the Aboriginal claimants had title to the land expressed in three particular forms unique to that case:

i. adaawk of the Gitksan, and the kungax of the Wet’suwet’en , which are oral histories reciting the important events, migrations, origins, traditions, laws and territory of the houses;

²⁰ John Borrows, *Recovering Canada- The Resurgence of Indigenous Law*, (University of Toronto Press: Toronto), 2002 at 4.

²¹ RCAP vol 2, chap. 4 Lands and resources- property and tenure

²² Woodward, *ibid.*, at 2.50.

- ii. personal recollections of members of the appellant Nations; and,
- iii. territorial affidavits on land ownership.

The Supreme Court of Canada accepted the Aboriginal claimants' oral evidence to prove a pre-sovereignty land-holding system, to demonstrate which lands were actually occupied by the people, and to prove the distinctive nature of their cultures and societies.²³

As the customs and practices vary from group to group there is no comprehensive body of law that defines customary practices. To prove and apply this law, mechanisms such as ethnography, recorded precedent, learned treatises, judicial notice, and expert testimony will be required.²⁴ There are individual treatises on laws of a particular First Nation but no compilation of customary water laws of Aboriginal peoples in Canada.²⁵

Aboriginal Dispute settlement mechanisms relating to water

Research on Aboriginal Canadian water dispute settlement mechanisms is almost non-existent, though the literature on aboriginal dispute resolution systems in general is receiving increasing attention in the context of alternative dispute resolution. The various negotiators, dispute resolution practitioners, lawyers, tribunal members, and others engaged in the design and implementation of joint Aboriginal and non-Aboriginal dispute resolution bodies in Canada have not systematically recorded or shared their experiences, and much of the experience is recent.²⁶

Institutions to administer water rights and settle disputes related to water vary as widely as the customary laws of the multitude of Aboriginal communities in Canada.

While many Aboriginal people may share certain characteristics of a dispute settlement process, such as reliance on the principle of consensus as a fundamental part of their traditions, an emphasis on the communal rather than the individual, and the importance of non-consumptive uses of resources such as water, it is not possible to make sweeping generalizations about these issues in the absence of a more comprehensive analysis of the individual traditions that do exist and are available for research purposes.

²³ Stuart Rush, "Use of oral history evidence in aboriginal rights litigation", 2002, Continuing Legal Education Society of BC, CLE Practice Points, <http://www.cle.bc.ca/Cle/Practice+Desk/Practice+Articles/Collection/02-app-oralhistoryevidence>.

²⁴ Borrows, *op cit.*, at 24.

²⁵ See e.g., ethnographic analysis like that of Wilson Duff in *Histories, Territories and Laws of the Kitwancool* (Victoria, B.C.: Provincial Museum, 1959)

²⁶ Catherine Bell and David Kahane, eds, *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press) 2004 at 2.

4. Statutory water rights in Canada

The number of jurisdictions involved in the regulation of water complicates water rights in Canada.

In addition to the two constitutionally entrenched orders of government: the federal government and the ten provincial governments, Aboriginal self-governments, territorial governments and municipalities also exercise control over different aspects of water.

Aboriginal rights and aboriginal title claims further complicate water rights. Water is primarily regulated at the provincial level, while aboriginal rights cross jurisdictional boundaries. Modern treaties between Aboriginal peoples and the Canadian government will also involve the provincial government as a necessary party.

Jurisdiction over water

The Constitution of Canada²⁷ distributes powers between the federal and provincial governments to make laws and to own and manage property. Water is not a specific head of legislative or proprietary power for either of these levels of government.

The Constitution also gives shared responsibilities over certain subjects to both the federal and provincial governments such as interprovincial water issues; agriculture; and health.

Provinces

Key legislative powers give provinces the primary role in water management. These powers include:

- the power to make laws concerning property and civil rights, which includes regulation of the use of property, and land use;
- the jurisdiction to regulate “local works and undertakings”;
- proprietary powers over Crown land, as the *Constitution Act* provides, with limited exceptions, for provincial ownership of all public lands (including water).
- the ownership of natural resources;
- jurisdiction over municipalities. This power gives the province regulatory authority over all municipalities, which includes the power to authorize and regulate municipal water including water standards and the qualifications for municipal employees engaged in water quality;
- Matters of a “merely local or private nature”;
- Natural resources, forestry and electrical energy.

Territories

²⁷ *Constitution Act, 1867*. Reprinted R.S.C. 1985, Appendix II, No. 5.

Like the municipalities, the three Northern territories- Nunavut, Yukon and Northwest Territories- do not have independent constitutional status. The *Constitution Act, 1871* gives the federal Parliament the power to legislate with respect to any territory in Canada which is not part of any province. Parliament has exercised this power by creating the three territories by means of ordinary federal statutes, and conferring legislative jurisdiction upon them. The legislative powers of the territory are modeled on section 92 of the *Constitution Act, 1867*, meaning that the territories generally have legislative powers analogous to provincial powers. However, the scope of the territorial powers is subject to expansion or contraction by Parliament.

Federal

The main constitutional powers of the federal government related to water are specific legislative powers over:

- sea coast and inland fisheries
- navigation and shipping
- international or interprovincial “works and undertakings” — which the courts have interpreted to cover pipelines
- federal works and undertakings
- canals, harbours, rivers and lake improvements, and .
- Indians and lands reserved for Indians.

Two other broad powers have been interpreted to give Parliament wide powers over the environment.

The first is the ‘POGG’ power which stands for “peace, order and good government of Canada.” This power has been used to justify and uphold federal laws which regulate matters of national importance. In one case the federal government was found to have the power under POGG to make laws concerning ocean dumping, even when dumping occurred in waters under provincial jurisdiction.²⁸

The other major head is the criminal law power, important for environmental protection. A federal law which prohibits an activity, carries a penal sanction and is enacted to protect public safety, health, morals or similar factors is an important way to control pollution.

The federal government also has the power to implement treaties. Numerous important water related treaties fall under this heading such as the *1909 International Boundary Waters Treaty* between Canada and the United States, which led to the creation of the International Joint Commission, an independent binational organization to help prevent and resolve disputes relating to the use and quality of boundary waters and to advise Canada and the United States on related questions.

²⁸ *R v Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401.

Though the federal government has less direct responsibility for water regulation than the provinces overall, on the question of aboriginal water rights, it has considerable power due to section 91(24) of the *Constitution Act, 1867*, which enables the Parliament of Canada to enact laws regarding “Indians and lands reserved for Indians.”

Interaction between federal and provincial areas of jurisdiction

How this federal jurisdiction over Indians, Indian land and certain critical aspects of water management interacts with provincial water laws has not yet been tested by the Courts.

There have been many instances where federal fisheries jurisdiction and provincial water regulation jurisdiction have conflicted. In British Columbia, the issue of determining priority between a BC water licence and the federal *Fisheries Act* has not been directly addressed by the Courts. However, the closest case on point favours giving priority to fish habitat requirements over provincially regulated uses. In that case, the first Court case regarding a massive hydroelectric project, the Kemano Completion Project (KCP), the judge granted an interlocutory injunction to the Attorney General of Canada allowing it to compel Alcan, the project’s sponsor, to comply with the directions of the Department of Fisheries and Oceans to release the quantity of water required to ensure the safety of fish, despite the fact that Alcan had a conditional water licence granting it all rights to water above the site of their dam.²⁹ The ensuing cases and hearings which followed in the complicated history of the KCP did not address the question of conflict between the *Fisheries Act* and provincial water licences.

It is likely that the federal powers related to Aboriginal peoples and Aboriginal rights themselves would prevail over a provincial water licence, should a dispute arise.³⁰

The issue of who owns the water may also arise in future aboriginal water rights cases.³¹ Common law doctrine provided that flowing water could not be owned by an individual, except when the water was captured. Rights to use water were restricted to riparian owners, which meant that farmers requiring water for irrigation whose land did not contain any water bodies faced problems. In 1895, a federal law was passed to remedy this problem, which declared that “the property in and the right to the use” of all water was vested in the Crown. Subsequently, the western provinces passed legislation vesting property in the use and flow of water in the provincial Crown. Though not all provincial

²⁹ *A.G. Canada v. Aluminum Co. of Canada Ltd.*, (1980) 115 D.L.R. (3d) 495 (B.C.S.C). (Appealed on other grounds, *A.G. Canada v. Aluminum Co. of Canada Ltd.*, *A.G. British Columbia and B.C. Wildlife Federation* (1986) 15 C.P.C. 8 (B.C.S.C.), reversed (1987) 10 B.C.L.R. (2d) 371 (C.A.)

³⁰ See Harry Slade et al, op cit. at 11:”Provincial jurisdiction over water rights attaching to Indian reserves and to aboriginal title lands, is vulnerable to challenge based on federal jurisdiction, under s. 91 (24) Constitution Act, 1867, over Indians and lands reserved for the Indians.”

³¹ D.R. Percy, University of Alberta, “Who Owns the Water?” in DR Coote & LJ Gregorich (eds), *The Health of Our Rural Water* (Minister of Public Works and Government Services Canada, Ottawa, 2000) 10.

water laws state outright that the provincial Crown controls the property right in the water the systems of provincial permits and licences currently in place demonstrate that the provinces are in control³². However, some First Nations believe that they have existing and superior rights to water.³³ As well, the federal government may choose to legislate regarding water issues under any of its powers, which could significantly affect provincial water management schemes.

There have been many calls for the federal government to take a stronger role in fresh water management, given all its jurisdictional powers as well as its central coordination role.³⁴

Water management

Water allocation law is also complicated by the welter of different legal doctrines used by different jurisdictions in Canada:

- riparian rights, used in Ontario and eastern Canada,
- prior appropriation- a licensee acquires rights to water from the first time that s/he puts the water to beneficial use,
- or prior allocation - a licensee acquires rights to water from the date of the licence application (both of these systems are also known as FITFIR or ‘first-in-time, first in right’) used in BC, Alberta, Saskatchewan, Manitoba,
- civil code used in Quebec, and
- inland waters used in the Northern Territories.

Comment: Surely this is not a “legal doctrine”.

Environment Canada is the lead federal agency for freshwater and maintains a freshwater web site.³⁵ This federal agency also sponsors research collaborations on water issues of national importance, such as the *Threats to Water Availability in Canada* report.³⁶

³² The water laws of the provinces of British Columbia and Alberta both contain Crown ownership provisions: s. 2 *BC Water Act* “The property in and the right to the use and flow of all the water at any time in a stream in British Columbia are for all purposes vested in the government, except only in so far as private rights have been established under licences issued or approvals given under this or a former Act. s 3(2) *Alberta Water Act*: “The property in and the right to diversion and use of all water in the province is vested in Her Majesty in Right of Alberta except as provided in the regulations.”

³³ D.R. Percy, *Ibid*.

³⁴ The Commissioner of the Environment and Sustainable Development noted the federal government had a “poor understanding of groundwater in the [Great Lakes] basin” (2001 report). The 1987 Federal Water Policy remains unimplemented. See also *Water and the Future of Life on Earth*, Simon Fraser University Think Tank, 2002, <http://www.sfu.ca/cstudies/science/water.htm>, especially Ross Smith, “Canada’s Freshwater Resources: Toward a National Strategy for Freshwater Management”.

³⁵ Environment Canada, <http://www.ec.gc.ca/water/>

³⁶ Environment Canada, *Threats to Water Availability in Canada, 2004* <http://www.nwri.ca/threats2full/toc-e.html>;

Each province has its own administrative structure to manage water resources, which could be part of a Ministry of Environment or Natural Resources, or a separate agency. For example, in British Columbia, water falls under the mandates of ministries for air, land and water protection, sustainable resource management, agriculture and food, health, forests, community, womens' and aboriginal services. The province of Manitoba is trying a more integrated form of water management with the creation of its new Department of Water Stewardship. Links to each provincial agency are contained on the central Environment Canada web site.³⁷

Water rights are obtained by licence or permit in most provinces. In most, but not all, provinces groundwater and surface water are part of the same management regime. In British Columbia, for example, though the *Water Act's* licensing provisions could be extended to include groundwater, the necessary regulations to cause this to occur have never been passed.

As the primary water laws of the provinces and territories vary widely across the country, this report will use the water laws of the province of British Columbia for illustrative purposes.

The issue of how much of BC is subject to aboriginal title has not been finally settled. A large majority, 94%, of land in British Columbia is Provincial Crown Land – land owned by the province. In addition, the beds of lakes and rivers, as well as areas of sea-bed falling within inlets or bays, are owned by the provincial government. As treaty settlements are underway and major Aboriginal rights and title litigation is also proceeding, the full nature of Aboriginal rights has not been settled in BC.

5. Legal status of customary water rights and interface with statutory rights

The literature on Aboriginal or customary water rights is surprisingly sparse. The sole text on the topic is from 1988.³⁸ Aboriginal rights have evolved considerably since that date, due to Supreme Court of Canada rulings on the nature and extent of Aboriginal title and aboriginal rights, and also due to land claims and treaty settlements in the Canadian North and other regions of Canada.

There is no central federal water law, despite the existence of the comprehensive sounding *Canada Water Act* which authorizes agreements with the provinces for the designation of water quality management areas, and for the delineation of flood plains and hazardous shorelines to control flooding and erosion.³⁹ Key federal laws are the

³⁷ http://www.ec.gc.ca/water/en/policy/prov/e_prov.htm

³⁸ Richard Bartlett *Aboriginal Water Rights in Canada* (Calgary: Canadian Institute of Resources Law) 1988.

³⁹ RS 1985, c. C-11.

Fisheries Act, which prohibits damage to fish habitat and the deposit of deleterious substances in fish bearing waters and the *Navigable Waters Protection Act* which prohibits any “work” that is built or placed in, on, over, under, through or across any navigable water unless the work, the site and the plans have been approved by the Minister of Fisheries and Oceans.

None of these federal statutes specifically addresses customary laws or aboriginal rights. The *Indian Act* is the chief federal law regulating the activities of Indians and it has limited provisions regarding the types of water bylaws that bands can pass on reserve land.

5.1. Aboriginal or customary rights

Aboriginal or customary rights to water can arise from one or more of these sources:

- i. A constitutionally protected aboriginal right to use water and other resources on unceded land
- ii. As included in the property interest recognized in aboriginal title to unceded tribal territory
- iii. As a reasonably incidental right to an existing treaty right to the resources
- iv. As a reserve based right founded on the *Winters* doctrine established by the US Supreme Court in 1908
- v. As a common law right, such as a riparian right
- vi. As a statutory right under applicable provincial legislation.⁴⁰

Each of these sources is explored further below.

i. Aboriginal Rights

Aboriginal rights are different from and can exist without Aboriginal title. Contemporary Aboriginal rights arise from the traditional laws and customs of the Aboriginal peoples. They are a form of ‘inter-societal’ law that regulates the relations between aboriginal communities and the other communities that make up Canada and determine the respective ways in which their respective legal institutions interact.⁴¹

The Canadian Constitution defines Aboriginal Peoples in Canada as “Indian, Inuit and Metis”. In 1982, the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada were recognized and affirmed by s.35 (1) of the *Constitution Act, 1982*:

⁴⁰ Stuart Rush, Q.C., “Aboriginal Water Rights in Canada”, presentation to “Just Add Water” 2002 Conference; Harry A. Slade, QC, Sarah Y. Khan and Susan J. Alcott, “First Nations’ Rights to Water”, Water Law Conference, Vancouver, BC, 1999.

⁴¹ Brian Slattery, “Making Sense of Aboriginal and Treaty Rights” (2000) 79 Canadian Bar Review 196.

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit, and Metis peoples of Canada.

(3) For greater certainty, in subsection (1) ‘treaty rights’ includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

The purpose of Section 35(1) of the *Constitution Act, 1982* is to achieve reconciliation between the prior existence of indigenous peoples and the assertion of Crown sovereignty.

Though there has been no specific judicial consideration of an aboriginal right to the use of water, it is reasonable to assume the existence of such a right. “[A]boriginal rights lie in the practices, customs and traditions integral to the distinctive cultures of aboriginal peoples.”⁴² Sustainance rights and traditional practices of hunting, fishing and trapping have been upheld by the courts. And as “it is difficult to imagine a sustainance right more basic than the right to the use of water” an aboriginal right to water likely exists.⁴³

Proving an Aboriginal Right

In the case of *R. v. Vanderpeet*, Fisheries and Oceans Canada charged the appellant, Dorothy Vanderpeet, with the sale of fish contrary to s.27(5) of the *British Columbia Fishery (General) Regulations*, for selling 10 salmon for \$50. She argued that her aboriginal rights to fish allowed her to sell the fish.

The court found that s.35(1) should be given a generous and liberal interpretation in favour of Aboriginal peoples, and that any doubt or ambiguity as to the existence of Aboriginal rights must be resolved in favour of Aboriginal peoples.

The court established a test to identify whether an Aboriginal person has established a constitutionally protected Aboriginal right.:

[I]n order to be an Aboriginal right, an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right.

The court set out 10 factors to be considered in the application of the test:

1. Courts must take into account the perspective of Aboriginal peoples themselves.

⁴² *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

⁴³ Terence P. Douglas. *Sources of Aboriginal Water Rights in Canada*. online at http://www.firstpeoples.org/land_rights/canada/summary_of_land_rights/water_rughts.htm.

2. Courts must identify precisely the nature of the claim being made in determining whether an Aboriginal claimant has demonstrated the existence of an Aboriginal right.
3. In order to be integral, a practice, custom, or tradition must be of central significance to the Aboriginal society in question.
4. The practices, customs, and traditions that constitute Aboriginal rights are those that have continuity with the traditions, customs, and practices that existed prior to contact.
5. Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating Aboriginal claims.
6. Claims to Aboriginal rights must be adjudicated on a specific rather than general basis.
7. For a practice, custom, or tradition to constitute an Aboriginal right, it must be of independent significance to the Aboriginal culture in which it exists.
8. The integral to a distinctive culture test requires that a practice, custom, or tradition be distinctive (that is, it makes the culture what it is); it does not require that the practice, custom, or tradition be distinct (that is, unlike or different in kind or quality from another culture).
9. The influence of European culture will be relevant to the inquiry if it is demonstrated that the practice, custom, or tradition is integral only because of that influence.
10. Courts must take into account both the relationship of Aboriginal peoples to the land and the distinctive societies and cultures of Aboriginal peoples.

In applying the test to Vanderpeet's claim, the court found that before contact, exchanges of fish by the Sto:lo were only incidental to fishing for food purposes, and thus the appellant did not possess an Aboriginal right to sell fish.

Has the Right Been Infringed and Is the Infringement Justified?

An Aboriginal group claiming an Aboriginal right must also show that it has been infringed in order to receive judicial relief. Aboriginal rights are not absolute. The courts have found that governments do have the ability to infringe these rights on justifiable grounds. For example, in the *Sparrow* case, though an infringement of the claimant's aboriginal right to fish was found, the court also found that the government's purpose in

enacting conservation measures for fish was valid. The Court said that: "Any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing."

The government that is seeking to pass a regulation that infringes upon or denies aboriginal rights must justify any infringement of that right. If a prima facie interference is found, the analysis moves to the issue of justification. This is the test that addresses the question of what constitutes legitimate regulation of a constitutional aboriginal right.

The Supreme Court described the two part justification test as follows:

- i. First, is there a valid legislative objective?
- ii. Second, if a valid legislative objective is found, has the government proved that it has fulfilled its special trust relationship vis-à-vis aboriginals ?

To assess whether the Crown is justified in infringing an aboriginal right, these questions should be addressed:

- i. Has there been as little infringement as possible in order to effect the desired result?
- ii. Whether, in a situation of expropriation, fair compensation is available? and,
- iii. Whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented?

The Supreme Court of Canada emphasized that this was not an exhaustive list of the factors to be considered in the assessment of justification. “Suffice it to say that recognition and affirmation requires sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians.”⁴⁴

ii. *Aboriginal Title*

Aboriginal title is a subgroup of aboriginal rights relating to title to land. All of Canada was originally subject to aboriginal title. The Supreme Court of Canada case *Guerin* has described aboriginal title as a legal right which both pre-dated and survived claims to sovereignty in North America by European Nations, and which arises from historic use and occupation of tribal land independent from British and Canadian acts of recognition.⁴⁵

In the case of *R.v.Calder*, the court found that the aboriginal title included the right “to enjoy the fruits of the soil of the forest, and of the rivers and streams within the boundaries of said lands”. Richard Bartlett , in *Aboriginal Water Rights in Canada* quotes this passage from Calder and states:

“A right to water is accordingly an integral part of aboriginal title. It includes and does not distinguish between land and water. Both were

⁴⁴ R. v. Sparrow, [1990] 1 S.C.R.1075 at 1119.

⁴⁵ *Guerin v. The Queen*, [1984] 2 S.C.R. 335; 55 N.R. 161; 13 D.L.R. (4th) 321.

central to traditional aboriginal life”⁴⁶

The landmark ruling in *Delgamuukw v. British Columbia* clarified the law of aboriginal title. In that case, the Supreme Court established that:

- s.35(1) of the Constitution confers the right to use the land for a variety of activities, not all of which need to be aspects of practices, customs and traditions which are integral to the distinctive cultures of Aboriginal societies.
- Aboriginal title is “a legal right derived from the Indians’ historic occupation and possession of their tribal lands,” and is “. . . a right in the land itself.”
- Aboriginal Title continues to exist, competing on par with Crown Title, and incorporating the law-making and jurisdiction of Indigenous Peoples to manage those lands in order to protect and preserve them for future generations.
- Aboriginal title includes the right to choose to what uses these lands can be put. At a minimum, Indigenous Peoples’ own laws should be recognized, incorporated and reflected in land (and water) use decisions.
- Aboriginal Title is not limited and site-specific, but may include the totality of an Indigenous Peoples’ traditional territory.⁴⁷

One of the lead counsel in the *Delgamuukw* case analyzed the reasoning of the Supreme Court in relation to aboriginal title to land and found that the principles would apply with equal force to water on land not subject to treaty: “A title right to water would arise at the point of sovereignty and be in existence today so long as there was no express extinguishment. Water rights would be subject to reconciliation to existing water licences granted by a province. Water claims in a title action would only arise for non-reserve treaty land”⁴⁸.

iii. Treaty Right

Both historic and modern treaties, agreements between the government of Canada and an Indigenous Nation, are relevant to a discussion of customary water law in Canada. Treaty rights are also constitutionally protected by s. 35 of the Canadian Constitution.

Aboriginal peoples signed treaties with British and, later, Canadian governments before and after Confederation in 1867. Most land in Canada is covered by treaty, except for some parts of eastern Ontario, Quebec and lands north of the 60th parallel and large portions of British Columbia. Only two regions of the province of BC are subject to treaties: Treaty No. 8, signed in 1899, covers a large portion of the northeast in the Peace

⁴⁶ R. Bartlett. *Aboriginal Water Rights in Canada*. (Calgary: Canadian Institute of Resources Law) 1988, p. 7.

⁴⁷ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010

⁴⁸ Stuart Rush, Q.C., “Aboriginal Water Rights in Canada”, presentation to “Just Add Water” 2002 Conference.

River area. The Douglas Treaties, 14 land purchases signed between 1850 and 1854, cover approximately 358 square miles around the Victoria, Saanich, Sooke, Nanaimo and Port Hardy.⁴⁹ Historic treaties guaranteed that Aboriginal peoples' traditional way of life would be protected.⁵⁰

Case law in Canada confirms a treaty is an exchange of solemn promises between the Crown and various Indian nations⁵¹ and that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians⁵².

Historic treaties contain express provisions relating to water. However even in the absence of express treaty rights to water, there may exist in Canada a reserve based right to water similar to that found in the United States that stems from interpretation of the treaty that created the reserve.

Bartlett concludes that "Canadian law recognizes a treaty right to water for traditional and contemporary uses by the Indians."⁵³ Treaties referred to activities such as hunting, farming and fishing which would require access to water; and water would have been essential for domestic uses for Aboriginal peoples on a reserve.

In addition, Carol Chandran notes that there has been some judicial recognition of the interconnectedness between land and water under certain contexts: in *Descôteaux c. R. (sub nom. Descôteaux v. Canada)*⁵⁴, the federal court held that for the purposes of sale or alienation of reserve land to the Crown under the *Indian Act*, land included its immovable components, including water and gas pipe systems buried in the land. She concludes that this reasoning supports the view of Aboriginal peoples that treaties are to be construed as

⁴⁹ The BC Treaty Negotiation Office maintains information on all historic and modern treaties in BC: <http://www.prov.gov.bc.ca/tno/>.

⁵⁰ For more information on historic treaties, Indian and Northern Affairs Canada's web site contains historical research reports, images, maps, bibliographies and other resources pertaining to the more than 70 historic treaties negotiated between 1701 and 1923 - http://www.ainc-inac.gc.ca/pr/trts/hti/site/maindex_e.html.

⁵¹ *R. v. Badger*, [1996] 1 S.C.R. 771.

⁵² *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36

⁵³ Bartlett, op cit. at 52.

⁵⁴ (1995), [1996] 1 F.C. 667, 109 F.T.R. 45 1995

including water rights, which are then assumed to be one of the Crown's treaty undertakings.⁵⁵

A modern treaty illustrates how the province of BC, the government of Canada and the Nisga'a Nation have addressed the integration of customary water rights into modern law. As this treaty was concluded only in 2000, there has been little experience with its implementation.

Since the late 1800s, the Nisga'a Nation urged the federal and provincial governments to allow them to resume complete control over their traditional territory. In the early half of the twentieth century, the Nisga'a's goal was frustrated as Canadian laws outlawed the ability of Indians to raise money to advance land claims. In the 1950s after the repeal of these repressive laws, the Nisga'a resumed their fight for control of their land, and in the late 1960's, the Tribal Council began a legal action in the B.C. Supreme Court. However, it was not until 1973 that the Supreme Court of Canada rendered a historic decision recognizing the existence of aboriginal title.⁵⁶

Subsequently, the federal government began treaty negotiations with the Nisga'a in 1976 but negotiations stalled due to the absence of the province of BC at the negotiating table. Finally, provincial policy changed and the B.C. government joined the other two parties in 1990. The Nisga'a Final Agreement came into effect in 2000, transferring 2,000 square kilometres of Crown land to the Nisga'a Nation, creating Bear Glacier Provincial Park, and setting aside a 300,000 cubic decameter water reservation. Prior to the conclusion of negotiations and the subsequent initialling of the Nisga'a Final Agreement in August 1998, more than 400 meetings were held with advisory groups, local government and the public.⁵⁷

In relation to water, the Nisga'a Treaty provides that :

- The Province retains full ownership and regulatory authority over water.
- Existing water licences remain in place.
- The Nisga'a have a water allocation equal to one per cent of the annual average flow from the Nass Valley watershed for their domestic, industrial and agricultural needs.

⁵⁵ . Carol Chandran in collaboration with First Peoples Worldwide, First Nations and Natural Resources - the Canadian Context, online at http://www.firstpeoples.org/land_rights/canada/summary_of_land_rights/fnr.htm#N_73

⁵⁶ *Calder v. Attorney General of British Columbia*, (1973) SCR 313. A conference marking the importance of the Calder decision was held at the University of Victoria Law School in 2003 and a collection of papers from the conference is available online : Let Right be Done - Calder, Aboriginal Rights and the Treaty Process, <http://www.law.uvic.ca/calder/onlinepapers.htm>.

⁵⁷ <http://www.gov.bc.ca/tno/negotiation/nisgaa/default.htm>

- The Nisga'a also have a reservation for the purpose of conducting studies to determine the suitability of streams for hydro power purposes. Any hydro development will be subject to provincial approval and regulation.⁵⁸

The section on water rights in the treaty provides that provincial laws will govern water resources. No mention is made in the treaty of customary Nisga'a water laws or how they will interact with provincial water law.

The section of the Nisga'a treaty concerning water rights is attached as Appendix 1 to this paper.

iv Reserve Based Rights

Historic treaties often set aside reserve land for Indians. But reserves could also be created by unilateral action of the government. While those reserves are not governed by treaty, they are still likely subject to the same inference that when land was set aside for Indians, sufficient quantities of water were similarly reserved to meet the needs of the reserve residents. It is arguable that the *Winters* doctrine of the US would apply to reserve land in Canada, whether created by treaty or other government action.⁵⁹

v. Common Law Right

An Aboriginal community that resides on land that includes water may also have common law riparian rights. Riparian rights stem from ownership or occupation of riparian land by Indian bands or other Aboriginal groups.⁶⁰ In common with all riparian land owners, Aboriginal peoples whose land borders freshwater bodies enjoy riparian rights, to the extent that these rights have not been eliminated by statute.

The English common law first developed the concept of riparian rights for surface water. The word 'riparian' means related to the banks of a river and comes from the Latin word *ripa*, meaning bank of a river. Riparian rights are the legal rights of owners of land bordering on a river or other body of surface water. Riparian rights are not ownership rights but rights of use and access to the water for domestic uses, such as for drinking water, bathing, or irrigation. The rights are not absolute. A landowner exercising riparian rights must not impair the rights of downstream users, either by fouling the water quality or by overly diminishing its quantity.

⁵⁸ <http://www.gov.bc.ca/tno/negotiation/nisgaa/docs/newbrief.htm>

⁵⁹ See section on *Applicability of US Jurisprudence*, in s. 4.5 below.

⁶⁰ Bartlett, *op cit.*, at 53.

The B.C. Court of Appeal upheld an interim injunction on the basis of Indian claims to riparian and fishing rights, by halting plans for twin-tracking railroad tracks in the Fraser Canyon and Thompson Valley.⁶¹

Since riparian rights are a common law rather than an Aboriginal right, an Aboriginal claimant would not need to meet the requirements of infringement or extinguishment set out in the doctrine of Aboriginal rights found within the Canadian jurisprudence. However riparian rights provide only limited rights of use to water.

vi. Statutory Right

Provincial laws establish water rights through systems of licences and permits. Often, domestic uses are exempt from licensing requirements. Aboriginal groups or individuals, like any other Canadian group or individual, may acquire water rights through the operation of these statutes if they meet the necessary criteria.

For example, the BC *Water Act* sets up a system of water rights which are acquired through the issuance of licences.⁶² The rights are allocated on a ‘first come first serve’ basis except where water has been reserved or is subject to the existence of other rights such as aboriginal water rights or the vestiges of riparian rights.⁶³ So, a licence obtained before another will always prevail over the other right. This model of water rights legislation which had historical advantages has obvious defects in today’s world. First, there is the problem of over-allocation. Once all the rights have been distributed to licensees, there is no provision for granting water rights to new users. Secondly, the law does not adequately deal with the need to maintain in stream flows for conservation purposes, rather than dividing up rights to the water amongst residential, agricultural and industrial users. Thirdly, neither the BC *Water Act* nor regulations made under the *Act* deal with the problem of low flow periods, when not enough water is entering the stream or river to satisfy all the users, let alone for conservation purposes. Although the *Act* does make provision for cancellation of water licences, in fact these provisions are rarely if ever used.

Competing resource rights such as protection of fisheries are a “potentially serious qualification” on water licence rights⁶⁴, a statement which could apply equally to protection of Aboriginal rights. On a number of streams and creeks in BC more than

⁶¹ *Pasco v. Canadian National Railway Co., sub nom., Oregon Jack Creek Indian Band v. Canadian National Railway Co.* (1989), 56 D.L.R. (4th) 404 (B.C.C.A.)

⁶² [RSBC 1996] CHAPTER 483.

⁶³ David R. Percy, *The Framework of Water Rights Legislation in Canada* (Calgary, Alberta: Canadian Institute of Resources Law, 1988) at 22.

⁶⁴ Alistair R. Lucas, *Security of Title in Canadian Water Rights* (Calgary, Alberta: Canadian Institute of Resources Law, 1990) at 95.

100% of the flow has been allocated through water licences. For example, on the Tsolum River on Vancouver Island, about 150% of the in stream flow of water has been allocated to water licences primarily for irrigation and other agricultural purposes. Although many of these licences are not being used, the cumulative effect if they were all used at once would be to drastically reduce water levels in the streams and rivers. Section 35 of the federal *Fisheries Act* prohibits disruption, alteration or destruction of fish habitat. The needs of fish that live in these streams and creeks are directly in conflict with the rights exercised or that may be exercised by the water licensees.

Licences for water use for hydroelectricity purposes under the BC *Water Act* have also been criticized for their failure to account for fish needs, which can be relevant for Aboriginal peoples who rely on fish for food.⁶⁵

5.2 Statutory mechanisms to reconcile customary water rights with statutory rights

“Of all the natural resources, water is perhaps the best suited to shared management because, even under western property law, no one can ‘own’ water. Instead, people and jurisdictions have specific rights of use.”
Royal Commission on Aboriginal Peoples

In BC, statutory mechanisms to reconcile customary water rights with statutory rights are limited. Aboriginal individuals or groups may hold water licences, or may appeal licences if they meet the threshold of standing to appeal a licence decision, or if a licensing decision could affect their aboriginal rights to water. These procedures are described in the section on dispute resolution below.

Treaty settlements are the major mechanism for reconciliation of these two systems of rights at present. Many treaties are in the process of negotiation, a slow and complex process. Presumably each treaty that is concluded will contain a provision regarding water management, as does the Nisga’a Treaty.⁶⁶

In addition, in BC, one of the major water uses, the hydroelectricity industry, is reviewing its water use policies and working with the provincial government of BC and other stakeholders to better accommodate a wider range of water needs. Though not a statutory process, the province has initiated “Water Use Planning” (WUP) to review the operating conditions of BC Hydro’s power generation facilities with the goal of finding a better balance between competing uses of water that are socially, environmentally and economically acceptable to British Columbia. The province seeks to achieve consensus

⁶⁵ Dr. Peter Ward, *Water Releases at the Cheakamus Power Plant: A Review of Licensed Diversion Operations*, 1996, at <http://www.watershed-watch.org/wup/publications/GenWUP/WardReportSummary.pdf>.

⁶⁶ See the website of the BC Treaty Commission at <http://www.prov.gov.bc.ca/tno/>.

on a set of operating rules for each facility that satisfies the full range of water use interests at stake, while respecting legislative and other boundaries.

The BC government's Water Use Planning Guidelines devotes a section to constitutionally protected treaty rights and aboriginal title in the context of WUP, stating that: "one of the Province's intentions in developing WUPs is to deal with First Nations issues."⁶⁷ However, for historical grievances, such as the construction of dams that eliminated fisheries, First Nations are directed to resolve claims through negotiation outside the WUP process. First Nations continue to have concerns with the WUP process, including the fact that there is no alternate process to WUP which addresses historical grievances; First Nations unique status was not recognized in the WUP processes; and First Nations did not have the resources to fully participate in the technical aspects of fisheries and water use assessments.⁶⁸

5.3 Mechanisms to settle disputes between customary water rights and statutory rights

Mechanisms to settle disputes between customary water rights and statutory rights include:

- Treaty dispute resolution procedures;
- Administrative appeals of water licensing decisions to an independent tribunal; and
- Judicial review, considered in section 5.5 of the report.

Treaty dispute resolution procedures

The Nisga'a treaty provides an example of dispute resolution procedures embodied in a treaty, given effect by federal and provincial legislation. One author has said that the dispute resolution procedures of this treaty read like a textbook example of the 'interest based negotiations' methods popularized by the book *Getting to Yes*.⁶⁹

The treaty's dispute resolution chapter begins with a statement of four objectives, shared by the three parties:

"a. to cooperate with each other to develop harmonious working

⁶⁷ Water Use Plan Guidelines, (Victoria: Ministry of Land, Air and Water Protection) 1998, online at <http://lwbc.bc.ca/03water/overview/wup/guidelines/wup.pdf>.

⁶⁸ BC Watershed Watch Salmon Society, 2004 *A Preliminary Review of Fisheries Conservation Gains within BC Hydro's Water Use Planning Process*, online at http://www.watershed-watch.org/wup/publications/WW_WUPreport.pdf

⁶⁹ Andrew Pirie, "Commentary: Intercultural Dispute Resolution Initiatives across Canada in Bell and Kahane, eds, *Intercultural Dispute Resolution*, op cit. at 330.

relationships;

- b. to prevent, or, alternatively, to minimize disagreements;
- c. to identify disagreements quickly and resolve them in the most expeditious and cost- effective manner possible;
- d. to resolve disagreements in a non- adversarial, collaborative, and informal atmosphere.”

The parties further acknowledge their desires and expectations that most disagreements will be resolved by “...informal discussions between or among the Parties, without the necessity of invoking” the formal resolution techniques.

Those disagreements not resolved informally will progress through the following three stages:

Stage One - Collaborative Negotiations

Characteristics of this stage are:

- can be initiated by any party following informal negotiations;
- notice given to other parties;
- a party not directly engaged may participate
- parties agree to disclose sufficient information, appoint representatives with sufficient authority and negotiate in good faith

Stage Two- Facilitated Processes

This stage provides that the Parties can agree to use any one of these processes if notice is given: Mediation; Technical Advisory Panel; Neutral Evaluation; Elders Advisory Council; or any other non- binding process.

In this stage:

- the parties must go through collaborative stage first;
- can be initiated by any of the parties;
- a party not directly engaged in the disagreement may participate;
- each process has carefully laid out procedures in its own annex

Stage Three- Adjudication-Binding Arbitration-Judicial Proceedings

At this final stage:

- arbitration can be initiated by one party if specifically called for in the Agreement, otherwise all affected parties must agree;
- the parties must complete stages one or two unless otherwise specified.

The innovative feature of using an Elders Advisory Council, one of the options under Stage Two, allows the Parties to invoke customary wisdom, if not law. The dispute resolution chapter gives some guidance on the appointment of the Elders to hear a dispute:

“Preferably, the elders will be individuals who:

- a. are recognized in their respective communities as wise, tolerant, personable and articulate, and who:
 - i. are often sought out for counsel or advice, or
 - ii. have a record of distinguished public service; and
- b. are available to devote the time and energy as required to provide the assistance described in this Appendix. “

Administrative appeals –Example of Appeal Rights under the Water Act in British Columbia

Most water licensing systems in Canada contain provisions for affected parties to appeal, often in the first instance to an administrative tribunal and then to a court.

Though there are only a few cases where a licence and an aboriginal title or rights claim have been the source of conflict in BC, many commentators believe that it is only a matter of time before many such conflicts emerge.

The appeal of a water permit decision to the Environmental Appeal Board (EAB) in BC follows this procedure:

First, that party must have the legal right under the BC *Water Act* to appeal the licence decision. Only a licensee, riparian owner or applicant for a licence who considers that his or her rights would be prejudiced by the granting of a licence may object to the granting of a licence and the comptroller or regional water manager may decide whether or not to hold a hearing when receiving such an objection.

Second, only a person subject to an order, an owner whose land is or is likely to be physically affected by the order, or a licensee, riparian owner, or applicant for a licence who considers that their rights are or will be affected by the order can appeal an order of the comptroller, regional water manager or an engineer to the Environmental Appeal Board.

Then even if successful at the Environmental Appeal Board, a further review is possible from the Lieutenant Governor in Council (LGIC). There are no procedural safeguards associated with this final review and no appeal from any LGIC decision is available.

The EAB in BC has heard several cases involving conflicts between aboriginal water rights and statutorily granted water licences. The EAB found that it did have jurisdiction to hear these conflicts, and to rule on questions of aboriginal rights. The Board has also

found that the Regional Manager of Water Rights has a duty to consult with First Nations about applications that may infringe aboriginal rights to access and use of water.⁷⁰

5.4. Relevant practice of water resources administration

Water managers in Canada have generally taken two approaches to reconciling customary water rights with statutory rights:

1. To consult with the aboriginal group to ensure their rights are considered in the decision-making process, and if the rights are to be infringed, to ensure that the infringement is justified;
2. To establish comanagement regimes where indigenous peoples participate directly in decisions over resources, such as water.

Consultation

The duty to consult with Aboriginal groups to ensure that their rights are taken into account when the government is making resource allocation decisions has been discussed in a number of recent Canadian court cases and continues to evolve, with a new Supreme Court of Canada ruling expected in 2004.⁷¹

Currently, the law in Canada stands as follows: In *Delgamuukw* the court held: “There is always a duty of consultation” though “The nature and scope of the duty of consultation will vary with the circumstances.” And “In most cases it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.”⁷²

Aboriginal groups should not be treated like other stakeholders and a separate consultation is required for these groups. The duty applies to both the federal and provincial Crowns, and may also extend to third parties, such as resource development corporations. The duty applies when a conservation measure is under consideration that may infringe upon aboriginal rights, and also applies to other approvals that may infringe those rights such as for mines, roads, or tree cutting.

⁷⁰ See *A. M. Anderson, R. J. Anderson, S. G. Anderson and M. P. Edwards v. Assistant Regional Water Manager, (Lower Nicola Indian Band, Highland Valley Copper Corp., Phyllis Leese, Fish and Wildlife Branch, Ministry of Water, Land and Air Protection, Bruce Vichert and Simon Klautt and Fisheries and Oceans Canada, Third Parties)* [1998-] No. 23 ; and *Okanagan Indian Band v. British Columbia (Ministry of Environment, Lands and Parks)* [1998] BCEA No. 52.

⁷¹ *Haida Nation v. British Columbia (Minister of Forests)* (2002), 99 B.C.L.R. (3d) 209, 2002 BCCA 147 (C.A.) (“*Haida 1*”); supplementary reasons (2002), 5 B.C.L.R. (4th) 33, 2002 BCCA 462 (“*Haida 2*”) and *Taku River Tlingit First Nation v. Ringstad*, 2002 BCCA 59, appeal to SCC argued March 2004.

⁷² *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, at para 168.

The purpose of consultation is to seek workable accommodation and to balance competing interests. Accordingly the right to consultation is not equivalent to a right to veto a use of land.

In allocating the resource, whether it be trees, fish, or arguably, water, the Supreme Court of Canada has said:

...the doctrine of priority requires the government to demonstrate that, in allocating the resource, it has taken account of the existence of Aboriginal rights and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users. The right is at once both procedural and substantive; at the stage of justification the government must demonstrate both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interests of the aboriginal rights holders in the fishery.⁷³

Failing to consult can result in constraints on resource activities. Aboriginal groups have succeeded in quashing a cutting permit, a mining project approval, and a road construction permit by proving that the government had failed in its duty to consult and accommodate their interests.⁷⁴

Land and Water BC, the department in British Columbia that administers the issuance of water licences, has developed extensive procedure of consultation to determine if a proposed water licence will affect aboriginal interests, and has set up Protocols for managers to use to fulfill their consultation duties.⁷⁵ The *Aboriginal Interests Consideration Procedures* are intended to provide specific direction in determining whether consultation with First Nations should be carried out and, if so, the extent of consultation required.

The following two figures illustrate how decision makers in the BC water administration reconcile customary Aboriginal water rights with statutory rights:

⁷³ *R. v. Gladstone*, [1996] 2 S.C.R. 723.

⁷⁴ Respectively, *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470, *Taku River Tlingit First Nation v. Ringstad*, 2002 BCCA 59 and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2001 FCT 1426.

⁷⁵ See the Land and Water BC web site page on First Nations interests at <http://www.lwbc.bc.ca/04community/fn/>.

Figure 2: Factors that may indicate whether further consideration may be required ⁷⁶

INDICATORS FOR ABORIGINAL TITLE AND/OR RIGHTS

- Title to the land has been continuously held in the name of the Crown;
- Land or water source near or adjacent to a reserve or former settlement or village site;
- Land or water source in areas of traditional uses or archaeological sites;
- Land or water source used for aboriginal activities;
- Notice of an aboriginal interest from a First Nation, even where made to another Ministry or Crown agency;
- Land is referred to in a federal specific claim process; or
- Undeveloped land such as parcels outside an urban area or close to known fishing, hunting, trapping, gathering or cultural sites.

INDICATORS AGAINST ABORIGINAL TITLE AND/OR RIGHTS

- Little indication of historical aboriginal presence in the area (e.g. land distant from reserves or settlement areas with no known aboriginal interests);
- Land presently alienated in fee simple to third parties;
- Land presently alienated on a long-term lease to third parties (length of occupation and the continuation of that interest may be important);
- Land and/or water source developed in a manner that precludes the exercise of aboriginal rights or land developed in a manner that precludes the enjoyment of aboriginal title as a right of present possession;
- Land within an urban area, or surrounded by lands that have been developed in a manner that precludes the exercise of aboriginal rights or the enjoyment of aboriginal title as a right of present possession;
- No indication that First Nation has maintained, or continued to assert, despite any interference resulting from European settlement, a substantial connection or a special bond with the land since 1846;
- Land was abandoned by First Nations in question prior to 1846;
 - In the case of claimed aboriginal title, competing or conflicting aboriginal title claims to the same area by different First Nations (e.g. mutually exclusive overlapping claims). (Such overlapping claims may point, however to a higher possibility that aboriginal rights may be at issue.)

Comment: Is this one more indicator, to be listed alongside the other in bullet form?

⁷⁶ [Aboriginal Interests Consideration Procedures](http://www.lwbc.bc.ca/04community/fn/docs/aicp.pdf) (Victoria: Land and Water BC)2002 online at <http://www.lwbc.bc.ca/04community/fn/docs/aicp.pdf>.

Figure 3: Factors that may indicate whether infringement is likely**CONSIDER THE FOLLOWING QUESTIONS**

- Does the proposed activity potentially interfere with aboriginal activities?
- Will the activity change or damage the nature of the land or water source or the availability of resources (e.g. fish, or wildlife), and to what extent?
- In the case of asserted aboriginal rights, if there is proposed resource extraction, is the resource renewable or non-renewable and what effect will that have on the ability to continue to exercise the rights?
- Will any of the land be sold to third parties?
- Will long term tenures or water licenses be provided to third parties?
- Are the tenures renewable, and does the renewal involve further changes to the land or water source, or further extraction of resources?

Comanagement Institutions

Comanagement is a term used to describe shared decision making in the planning and administration of natural resources. The *Royal Commission on Aboriginal Peoples* notes that although co-management is essentially a form of power sharing, the relative balance among parties can vary a great deal: “[M]ost examples of co-management to date involve Aboriginal parties in a central role, either sharing power with governments exclusively or in conjunction with other interested parties. However, almost all arrangements envisage provincial, territorial or federal governments having the final say on matters of central concern.”⁷⁷

Land claims settlements in Canada have led to the development of a number of resource management boards. The *James Bay and Northern Quebec Agreement* in 1975 was the first Canadian co-management agreement. Since then more than 15 Boards have been formed to manage and allocate resources in a particular area of Crown lands and waters. The Boards are especially prevalent in Canada’s three Northern Territories: Yukon, Northwest Territory and Nunavut.

Northwest Territories (NWT)

The *Mackenzie Valley Resource Management Act* (MVRMA) established regional boards which issue water licences, among other duties, in 1998. Each of these Boards provides for direct participation by Aboriginal representatives as decision makers. Boards are made up of representatives nominated by Aboriginal people, the Government of Canada,

⁷⁷ RCAP, 1997, vol 2, chapter 7 Securing an Adequate Land and Resource Base for Aboriginal Nations, 7.3, Co-management.

and the Government of the Northwest Territories. The objective of these boards is to “regulate the use of land and waters and the deposit of waste so as to provide for the conservation, development and utilization of land and water resources in a manner that will provide optimum benefit to the residents of the settlement areas and of the Mackenzie Valley and to all Canadians (section 58, MVRMA).”

The 4 Boards responsible for administering water rights through licenses in different areas of the NWT are the:

- Northwest Territories Water Board (for the Inuvialuit Settlement Region)
- Gwich'in Land and Water Board (for the Gwich'in Settlement Area)
- Mackenzie Valley Land and Water Board (for the Unsettled Claim Areas in the NWT, Transboundary Projects with the Gwich'in Land and Water Board and the Sahtu Land and Water Board)
- Sahtu Land and Water Board (for the Sahtu Settlement Area)⁷⁸

Nunavut

The Nunavut Final Agreement establishes a number of co-management boards as well, including the Nunavut Water Board created in 1993.⁷⁹ The Royal Commission on Aboriginal Peoples identified the Nunavut water management board as a useful precedent for Aboriginal involvement in other regions of Canada. This Board takes an integrated approach to water management. In addition to issuing water licences, it helps develop land use plans and environmental assessments pertaining to water. Inuit rights to water use, management and administration have been integrated into the joint management regime. The Board is made up of an equal number of representatives from the territorial government, the federal government and the designated Inuit organization, with the chairperson appointed by the federal government based on consultation with the other members.

Yukon

The Yukon Water Board is an independent administrative tribunal under the *Waters Act*, that was established under the Umbrella Final Agreement Between The Government Of Canada, The Council For Yukon Indians And The Government Of The Yukon finalized in 1990.⁸⁰ It issues water use licences for a variety of undertakings, such as:

- placer and quartz mining,
- municipal use,

⁷⁸ The web sites for these Boards are <http://www.glwb.com/>; <http://216.108.16.195/html/>; <http://www.slwb.com/>. The Northwest Territories Water Board does not currently have a web site.

⁷⁹ The Board's web site is at <http://nwb.nunavut.ca/>.

⁸⁰ The Board's web site is at <http://www.yukonwaterboard.ca/>.

- power generation,
- agricultural use,
- industrial use,
- recreational use,
- conservation and
- miscellaneous.

Other parts of Canada also have aboriginal participation and direction of water law and control over water use, such as in Labrador, pursuant to the *Labrador Inuit Final Agreement*,⁸¹ in northern BC, under the *Nisga'a Final Agreement*, and in Alberta, the Piikani under a negotiated settlement to a lawsuit.

5.5 Judicial cases involving conflict between customary water rights and statutory water rights

Though the state of aboriginal law in Canada is evolving rapidly, courts have not often been called upon to consider aboriginal water rights. However, based on the growing importance of freshwater resources and the extensive jurisprudence on this topic from the United States, it is likely that these issues will come before the courts in the near future.

Applicability of US Jurisprudence

The American jurisprudence on the aboriginal right to water is extensive compared to that in Canada.

The major case in the US is the 1906 *Winters* case establishing the *Winters* Doctrine and the principles of Indian reserved water rights. The Supreme Court of the United States held that a reserve right of a sufficient amount of water necessary to fulfill the purposes of the Indian reservation was implied in the creation of reservations of land. A reserve right to water is a right created by federal law, senior to all future users, and cannot be lost by non-use. The right is created as of the date the reservation was established.⁸²

In reaching this decision, the Court reasoned:

“The Indians had a command of the lands and the waters--command of all their beneficial use, whether kept for hunting, "and stock," or turned to agriculture and the art of civilization. Did they give up all this? Did they reduce the area of their occupation and give up their water which made it valuable or adequate?”

⁸¹ This Agreement has an interesting provision on water: “Any developer in the Settlement Area who proposes to use water in a way that may substantially affect the quantity, quality or rate of flow of water on, or adjacent to, Labrador Inuit Lands will be required to first negotiate a compensation agreement with the Nunatsiavut Government.” See <http://www.nunatsiavut.com/en/sumresource.php>. A similar provision exists in the Nunavut Land Claims Agreement.

⁸² *Winters v. United States* 207 U.S. 564 (1908).

The water rights in issue in the *Winters* case were from the Milk River, which is a transboundary river that originates in Montana, then flows into Alberta before returning to Montana. It provides an interesting contrast in how water rights are addressed on both sides of the Canada-US border. For while on the American side, the Aboriginal peoples enjoy the reserved right to water established by *Winters*, there is no mention of aboriginal water rights at all in the Alberta *Water Act* revised in 1995. The Guide to the Discussion Draft for the revisions to the Act noted that it is the Province's position that aboriginal water rights have been extinguished and that the province has the exclusive jurisdiction over water in the province. One water law expert reviewing this situation argued that "by ignoring the issue in the Bill, the province is losing an opportunity to invite a settlement of claims according to an equitable set of principles. The experience in the United States suggests that if we fail to settle these issues now, they will surely become more bitter and, in the result, will undermine the security of the very rights that the province is trying to protect and assure."⁸³ He noted that the issue could have been addressed as part of an expansion of the objectives of the legislation, namely a recognition of "the importance of working co-operatively with the governments of other jurisdictions with respect to transboundary water management".

Many authors have commented on the likelihood of the *Winters* case and the associated body of law being equally applicable in Canada.⁸⁴ No court has considered the major US Indian water rights cases to date.

There are only a few Canadian reported judicial decisions involving conflicts between customary water rights and statutory water rights.

i. James Bay project

Aboriginal communities have a long history of disputes over hydroelectric developments interfering with their traditional uses of their territory. In Quebec, the Cree and Inuit of James Bay sued to restrain the development of a massive hydroelectric project initiated by the Province of Quebec. At trial, the court found that the project's impact would be immense:

"In view of the dependence of the indigenous population on the animals, fish, and vegetation of the territory, the works will have devastating and far reaching effects on the Cree Indians and the Inuit living in the territory

⁸³ Nigel Bankes, "Water Law Reform in Alberta: paying Obeisance to the "Lords of Yesterday" or Creating a Water Charter for the Future?" Resources: The Newsletter of the Canadian Institute of Resources Law, No. 49 Winter 1995.

⁸⁴ Bartlett op cit, Rush op cit., Slade op cit., EAGLE op cit., Ardith Walkem and Nicole Schabus, Our Waters, Our Responsibility – Indigenous Water Rights, May 13-15, 2004, Briefing Paper for Forum Participants.

and the lands adjacent thereto.”⁸⁵

Though the injunction was issued as the court found the project to be clearly inconsistent with the existence of the aboriginal title of the indigenous population, it was later overturned. The project did eventually proceed, but as a result of the lawsuit some changes were made and the James Bay and Northern Quebec Agreement was concluded between the Cree, Inuit, governments of Quebec and Canada and the hydroelectric companies. This Agreement has been characterized as ‘more a statement of the rights of the James Bay Hydro project than it is of the rights with respect to water of the Cree and Inuit.’⁸⁶

ii. Saanichton Marina case

In *Saanichton Marina Ltd. v. Claxton*⁸⁷ a treaty right to use water to maintain a traditional fishery was upheld by the British Columbia Supreme Court, and the First Nation was granted an injunction to prevent the construction of a marina in an area that they had traditionally used as a fishery.

iii. Heiltsuk Tribal Council

In *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)*,⁸⁸ the Heiltsuk First Nation’s application for judicial review of the issuance of water licences was dismissed. The First Nation had asked the court to set aside a number of licences that had been granted to a commercial aquaculture operator including water licences, on the basis of their claim of aboriginal title and rights to the water in their claimed territory, and on the basis that they were owed a duty of consultation prior to the issuance of the water licences.

The judge found that there was no evidence that the Province had impacted the right of the Heiltsuk to hunt or fish in the area by issuing the four licences which would allow an aquaculture project to proceed. The judge further found that the First Nation sought a veto over the aquaculture project, as they had stated their position as one of zero tolerance to Atlantic salmon aquaculture and had attended meetings at which they stated they did not consider the meeting to be consultation. She found that their position reflected an unwillingness to consult. She refused the application to quash the licenses.

Comment: Something is amiss here.

iv. Piikani case

⁸⁵ *Kanatewat v. James Bay Development Corp.*, [1974] R.P. 38 (Que. S.C.)

⁸⁶ Bartlett, op cit., at 222.

⁸⁷ [1987] 4 C.N.L.R. 48.

⁸⁸ 2003 BCSC 1422

The Piikani Nation was ignored when the province of Alberta decided to construct the Oldman River Dam a scant four kilometers upstream of the boundary of its reserve. The Piikani sued the province, claiming that their aboriginal rights to water superceded the rights of the Province, and that they were entitled to sufficient water to maintain the natural in-stream flow through the reserve to meet their reasonable domestic and economic needs. After twelve years of litigation and negotiations, the case was settled and did not go to trial.

In 2002, a negotiated settlement between the Alberta Government and the Piikani included the following:

- payment of \$64.3 million in settlement funds to be paid into trust
- annual pay-out of \$800,000 (indexed to inflation)
- estimated \$125 million in revenues over next 50 years generated on the trust
- \$3000 per capita distribution to Piikani members
- Lethbridge Northern Irrigation District (LNID) canal lands to be transferred to Alberta
- assured water supply from the Oldman River to meet residential, community, and agricultural needs; and allocation of 37,000 acre feet of water under Alberta Water legislation for the Band's commercial needs
- participation in the Oldman River Dam Hydro Project
- settlement of nine specific claims against Canada (for \$32.17 million)
- discontinuance of water rights litigation by Piikani
- discontinuance of claims in respect of LNID headworks
- Piikani agreement not to bring forward any other litigation for so long as Alberta needs the LNID headworks for diversion of water from Oldman river, and no prior or superior entitlement to water.⁸⁹

Comment: ? The expression "from the instream of" is unclear

v. Cases underway

At least two significant lawsuits regarding aboriginal water rights in Canada are in progress.

In the first, the Haida Nation launched an aboriginal title claim to all of Haida Gwaii, formerly known as the Queen Charlotte Islands, in 2002. The claim includes all of the land mass of the archipelago of hundreds of islands on the northwest coast of British Columbia as well as the seabed resources of over half of Hecate Strait and 320 kilometres out into the Pacific Ocean. The Haida are seeking an order quashing all licenses, leases, permits and tenures that are incompatible with aboriginal title and the exercise of aboriginal rights. The lawsuit also seeks an accounting of all profits, taxes, stumpage dues, royalties and other benefits acquired by the province and Canada and third parties

⁸⁹ Rush, S. 2002. "Aboriginal water rights in Canada". Presented to the Just Add Water 2002 Conference, Saskatoon, Saskatchewan, October 3-4, 2002.

and are further seeking damages and compensation for what the lawsuit alleges is the government's unlawful conduct.

In the second, the Chippewas of Nawash Unceded First Nation and the Saugeen First Nation are pursuing an aboriginal title claim to parts of the lakebed of Lake Huron and Georgian Bay. In September 2004, the governments of Canada and Ontario were unsuccessful in their second attempt to quash this claim. In the governments' view, the title claim to parts of the Great Lakes is incompatible with Crown sovereignty over the same waters.⁹⁰

6. *Issues for Future Research*

Consideration of the topic of customary water rights in Canada reveals a broad agenda for future research. Aboriginal water rights in Canada are a relatively undeveloped area of law. There has been little academic, judicial, or statutory consideration of the nature of these rights in the context of contemporary Aboriginal law.

A starting point would be the collection and analysis of customary water laws. As customary water laws of individual Aboriginal groups have never been assembled, it is impossible to say whether these customary laws contain similar water ownership, allocation or use provisions. The existing information found in individual studies of the laws of particular Aboriginal groups could be compiled, contrasted and analyzed.

Research on Aboriginal Canadian water dispute settlement mechanisms is similarly sparse. Locating customary rules of water allocation, information about dispute settlement mechanisms and traditional institutions for the administration of rights is difficult because the information is preserved in the oral tradition and often not recorded in written form. Learning more about how to locate this information is a necessary first step.

Litigation on aboriginal rights and aboriginal title has focused on land and resources rather than water to date, though more cases are now underway. There has been no thorough consideration of the evolution of aboriginal water rights since the sole text on the topic was published in 1988. Substantial changes in aboriginal case law and constitutional law deserve further analysis to evaluate their impact on water rights. An analysis of the current US jurisprudence on Indian water rights would also be useful in the Canadian context.

The decisions of administrative tribunals across Canada concerning aboriginal water rights and their conflicts with other statutory rights are another area ripe for research. These decisions can be difficult to locate, but would be helpful to compare to see how the issues of provincial statutes conflicting with customary rights have been dealt with in the different provincial and territorial jurisdictions.

⁹⁰ Background and maps on the Saugeen Ojibway Nation claims can be found at www.bmts.com/~dibaudjimoh/page120.html.

The experiences of the various co-management resource boards provide additional fodder for research. A complete analysis of all areas in Canada that have implemented co-management regimes for water was beyond the scope of this overview paper and could be a useful topic for future research. While there has been some examination of this topic, water management and the interaction of customary laws with statutory regimes has not been the primary focus of this research.⁹¹

Conflicts between Aboriginal water rights and other water users will continue to arise in Canada. A clear understanding of the legal nature of these rights and how they interact with other common law and statutory rights can help prevent disputes. Proactive approaches to defining the rights when water laws are amended or developed are another area for policy makers and researchers to investigate.

⁹¹ See Nigel Bankes, “The Dispute Resolution Procedures of Three Northern land Claims Agreements” in Bell and Kahane, *Intercultural Dispute Resolution in Aboriginal Contexts*, op. cit.; National Round Table on the Environment and the Economy *Aboriginal Communities and Non-renewable Resource Development* (Ottawa:NRTEE) 2001; Monique M. Ross, *Aboriginal Peoples and Resource Development in Northern Alberta* (Calgary: CIRL) 2003.

Appendix 1- Excerpt from Nisga'a Treaty - Water

Nisga'a Final Agreement

http://www.gov.bc.ca/tno/negotiation/nisgaa/docs/nisga_agreement.htm

Nisga'a Water Reservation

122. On the effective date, British Columbia will establish a Nisga'a water reservation, in favour of the Nisga'a Nation, of 300,000 cubic decametres of water per year from:
- a. the Nass River; and
 - b. other streams wholly or partially within Nisga'a Lands
- for domestic, industrial, and agricultural purposes.
123. The Nisga'a water reservation will have priority over all water licences other than:
- a. water licences issued before March 22, 1996; and
 - b. water licences issued pursuant to an application made before March 22, 1996.
124. The Nisga'a Nation, a Nisga'a Village, a Nisga'a Corporation, or a Nisga'a citizen may, with the consent of the Nisga'a Nation, apply to British Columbia for water licences for volumes of flow to be applied against the Nisga'a water reservation.
125. The total volume of flow under water licences to be applied against the Nisga'a water reservation of each stream may not exceed:
- a. the percentage of the available flow, specified in Schedule C, of each stream set out in that Schedule; or
 - b. 50% of the available flow of any stream not set out in Schedule C.
126. If the Nisga'a Nation, a Nisga'a Village, a Nisga'a Corporation, or a Nisga'a citizen applies to British Columbia for a water licence for a volume of flow to be applied against the Nisga'a water reservation and:
- a. the Nisga'a Nation has consented to the application;
 - b. the application conforms to provincial regulatory requirements;
 - c. the application is for a volume of flow that, together with the total volume of flow licenced for that stream under this paragraph, does not exceed the percentage of available flow for that stream referred to in paragraph 125; and
 - d. there is a sufficient unlicensed volume of flow in the Nisga'a water reservation

British Columbia will approve the application and issue the water licence. The volume of flow approved in a water licence issued under this paragraph will be deducted from the unlicensed volume of flow in the Nisga'a water reservation.

127. If a water licence issued under paragraph 126 is cancelled, expires, or otherwise terminates, the volume of flow in that licence will be added to the unlicensed volume of flow in the Nisga'a water reservation.
128. A water licence issued under paragraph 126 will not be subject to any rentals, fees, or other charges by British Columbia.
129. If the Nisga'a Nation, a Nisga'a Village, a Nisga'a Corporation, or a Nisga'a citizen applies to British Columbia for a water licence for a volume of flow from a stream wholly or partially within Nisga'a Lands and:
- a. all of the available flow for that stream referred to in paragraph 125 is licensed under paragraph 126;
 - b. the Nisga'a Nation has consented to the application;
 - c. the application conforms to provincial regulatory requirements; and
 - d. the stream contains a sufficient volume of:
 - i. unrecorded water, and
 - ii. flow to ensure conservation of fish and stream habitats, and to continue navigability, as determined by the Minister in accordance with the provisions of this Agreementto meet the volume of flow requested in the application
130. British Columbia will approve the application and issue the water licence. The volume of flow approved in a water licence issued under this paragraph will not be deducted from the unlicensed volume of flow in the Nisga'a water reservation.
131. British Columbia will consult with the Nisga'a Nation about all applications for water licences in respect of streams wholly or partially within Nisga'a Lands.
132. If a person other than the Nisga'a Nation, a Nisga'a Village, a Nisga'a Corporation, or a Nisga'a citizen has a water licence and reasonably requires access across, or an interest in, Nisga'a Lands for the construction, maintenance, improvement, or operation of works authorized under the licence, Nisga'a Government may not unreasonably withhold consent to, and will take reasonable steps to ensure, that access or the granting of that interest, if:
- a. the licence holder offers fair compensation to the owner of the estate or interest affected; and
 - b. the licence holder and the owner of the estate or interest affected agree on the terms of the access or the interest, including the location, size, duration, and nature of the interest.
133. If the Nisga'a Nation, a Nisga'a Village, a Nisga'a Corporation, or a Nisga'a citizen has a water licence approved under paragraph 126 or 129 and reasonably requires access across, or an interest in, Crown land for the construction, maintenance, improvement, or operation of works authorized under the licence, British Columbia will grant the access or interest on reasonable terms.

134. British Columbia or the Nisga'a Nation may refer a dispute arising under paragraph 131 or 132 to be finally determined by arbitration under the Dispute Resolution Chapter.
135. If the Nisga'a Nation, a Nisga'a Village, a Nisga'a Corporation, or a Nisga'a citizen has a water licence approved under paragraph 126 or 129 and reasonably requires access across, or an interest in, lands set out in [Appendix B-2](#) for the construction, maintenance, improvement, or operation of works authorized under the licence, the Nisga'a Nation, Nisga'a Village, Nisga'a Corporation, or Nisga'a citizen may acquire the access or interest in accordance with provincial laws of general application.
136. The Nisga'a Nation may nominate a water bailiff under the *Water Act* for:
- a. that portion of the Nass River within Nisga'a Lands; and
 - b. other streams wholly or partially within Nisga'a Lands
- and British Columbia will not unreasonably withhold appointment of that nominee.
137. Notwithstanding paragraph 128, if British Columbia appoints a water bailiff nominated by the Nisga'a Nation under paragraph 135, the water bailiff will be compensated in accordance with provincial laws of general application.
138. This Agreement is not intended to grant the Nisga'a Nation any property in water.
139. This Agreement does not preclude the Nisga'a Nation, a Nisga'a Village, a Nisga'a Corporation, or a Nisga'a citizen from selling water in accordance with federal and provincial laws.
140. The Nisga'a Nation, a Nisga'a Village, a Nisga'a Corporation, or a Nisga'a citizen may apply in accordance with provincial laws of general application for a water licence in respect of a stream wholly outside Nisga'a Lands.

Nisga'a Hydro Power Reservation

140. In addition to the Nisga'a water reservation established under paragraph 122, British Columbia will establish a water reservation in favour of the Nisga'a Nation, for 20 years after the effective date, of all of the unrecorded waters of all streams, other than the Nass River, that are wholly or partially within Nisga'a Lands (the "Nisga'a Hydro Power Reservation"), to enable the Nisga'a Nation to investigate the suitability of those streams for hydro power purposes, including related storage purposes.
141. If the Nisga'a Nation applies for a water reservation for hydro power purposes on a stream subject to the Nisga'a Hydro Power Reservation, British Columbia will, after considering the results of any investigations referred to in paragraph 140, establish a water reservation for hydro power purposes and any related storage purposes on the unrecorded waters of that stream if it considers that stream to be suitable for hydro power purposes.
142. If British Columbia establishes a water reservation for a stream under paragraph 141, the Nisga'a Hydro Power Reservation will terminate in respect of that stream.
143. If, after British Columbia establishes a water reservation under paragraph 141, the Nisga'a Nation applies for a water licence for hydro power purposes and any related storage purposes for a volume of flow from the stream subject to that water reservation,

British Columbia will grant the water licence if the proposed hydro power project conforms to federal and provincial regulatory requirements.

144. If British Columbia issues a water licence under paragraph 143 for a stream, the water reservation established under paragraph 141 will terminate in respect of that stream.