1. OVERVIEW

Wa Ni Ska Tan asked Jerch Law to research and provide a legal opinion with respect to the broad topic of "Aboriginal Rights to water in Canadian law".

We set out a number of "legal tests" and different methods for potentially asserting and protecting Indigenous water Rights. We provided a legal opinion and memorandum that could perhaps provide a template for communities to utilize for assessing the likelihood of success for their own claims based on the assertion of an Aboriginal and/or Treaty Right to water. This paper is a very condensed version of that 65-page research memorandum/legal opinion.

The legal research conducted, and the potential legal strategy and options that we prepared were considered within the confines and parameters of Canadian law. This process is flawed from the outset. One of the distinctions that we draw is between:

1. "Aboriginal law", which we describe as "Canadian law as it specifically applies to Indigenous Peoples within what is now called Canada"; and,
2. "Indigenous law", which we understand to be the laws that existed since time immemorial, prior to European and Canadian occupation of this territory, and which continue to exist today as practiced by Indigenous Peoples in what is now called Canada.

Of importance, "Aboriginal Rights" are not characterized in Canadian jurisprudence as rights to a specific resource but, are characterized as *usufructuary rights* to a resource; meaning, the right to use the resource, not the right to the resource itself.

Given this important distinction, seeking to establish and assert an "Aboriginal Right to water" itself would be unlikely to succeed. However, seeking to establish and assert an Aboriginal Right to an activity directly linked to water may have a higher probability of success. For example, it may be possible to establish an Aboriginal Right to water stewardship and governance.

On a preliminary basis, our research found:

- To date, an Aboriginal Right to water has not been recognized by Canadian courts. However, the courts have never determined or ruled that this Right does not exist at law;
- An Aboriginal Right to water stewardship and governance, which we also characterize as a Right to decision-making with respect to impacts and potential impacts to, and protection of, water in any form, has not been asserted by any Indigenous groups;
- An Aboriginal Right to water stewardship could be asserted and successfully established, if a community could establish the evidentiary basis to prove the existence of water stewardship and governance as an ancestral practice, custom or tradition which was integral to the distinctive culture of the claimant's society prior to European contact; and could demonstrate reasonable continuity between the pre-contact practice and the contemporary claim;

- To date, Aboriginal Title claims to water have been asserted, but have not been successfully established under Canadian jurisprudence;
- Canadian courts have indicated that Aboriginal Title to water exists, and therefore if a community has a strong evidentiary basis for asserting such a claim, a claim could be successfully established;
- To date, a Treaty Right to water has not been found to be included in Treaties in what is now called Manitoba, but could be asserted, and such a claim may be successful though it is also possible that the Crown could justify infringement of such a Treaty Right;
- Potential legal options may arise from the *United Nations Declaration on the Rights of Indigenous Peoples* however, it is not clear what the appropriate forum is to bring such claims or what challenges may arise in relation to making such a claim.

2. RECOMMENDATION – IN BRIEF

Our recommendation was that, if an Indigenous group can establish a strong evidentiary basis to prove a claim to the waters in their territory, that group should claim Aboriginal Title to the specific body or bodies of water within their territory. Though asserting and establishing a claim for Aboriginal Title to water would likely be very expensive and time consuming, with no guarantee of success, if successfully established, Aboriginal Title to water would afford the claimant group with the greatest level of control over potential impacts to the water body or bodies that are the subject of Aboriginal Title.

While engaged in the process to assert an Aboriginal Title claim, the Indigenous claimant should also assert an Aboriginal Right to water stewardship and governance, meaning the Right to "take the lead" on management and decision-making processes involving water in their traditional territory, to ensure the health of and protection for the water.

Finally, if the Indigenous claimant is the descendant of a signatory to Treaty 5, that claimant should also claim a Treaty Right to water arising from obligations contained within Treaty 5.

These courses of action could be pursued either separately or independently of each other.

Under Canadian law, consideration of an Aboriginal Right involves an analysis and examination of pre-contact practices. Establishing an Aboriginal or Treaty Right requires an Indigenous claimant in a specific community or geographic area to set out the specific set of facts pertaining to their community, and the evidentiary basis for their assertions, which could then be applied to the tests and methods for asserting and protecting Aboriginal and Treaty Rights in Canada.

3. LEGAL ANALYSIS AND OPINION

We considered the historical and jurisdictional context of water laws in what is now Canada, and then separated our discussion into:

1. consideration of the possible Aboriginal Rights to water;
2. consideration of the possible Aboriginal Title to water; and,
3. consideration of the possible Treaty Rights to water.

This separation is somewhat artificial as the Supreme Court of Canada (the "SCC") has articulated that Aboriginal Title is a subset of Aboriginal Rights and has stated that the analysis for impacts to and infringement of Treaty Rights is similar to that of Aboriginal Rights, though the Rights are derived from different sources.

4. CONSIDERATION OF POSSIBLE ABORIGINAL RIGHTS TO WATER

A. Aboriginal Rights in General

Aboriginal Rights are specific Rights, collectively held by Rights-bearing communities, but exercised by individual members of those communities.

Section 35(1) of the *Constitution Act, 1982*, recognizes and affirms existing Aboriginal and Treaty Rights based on the fact that when Europeans arrived in North America, Indigenous Peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done since time immemorial.

Canadian case law has established legal tests that an Indigenous claimant must satisfy in order to establish a practice as a constitutionally protected Aboriginal Right. Once established an Aboriginal Right can be infringed by "justified" governmental action.

B. Aboriginal Right to Water

Aboriginal Rights are characterized as being founded on actual practices, customs or traditions of the group claiming the Rights or practices that were 'integral to the distinctive culture' of the group. Aboriginal Rights to water may include:

- Rights to travel and navigation;
- Rights to use water for domestic purposes such as food, drinking, washing, tanning hides and watering stock; and,
- Rights to use water for spiritual, ceremonial, cultural or recreational purposes.

Further, the use of water is connected with harvesting activities such as fishing, gathering of country food, hunting, trapping, and lumbering.[1] The SCC in *R v Sappier; R v Gray*,[2] recognized that "all harvesting activities are land and water based".

C. Has an Aboriginal Right to water been successfully established in Canada?

An Aboriginal Right to water has not been recognized by Canadian courts. However, the issue has been raised by Indigenous groups and judicially considered multiple times, by various levels of Canadian courts, and has never been decided determinedly against Indigenous peoples.[3]

1 David K. Laidlaw & Monique Passelac-Ross, "Water Rights and Water Stewardship: What About Aboriginal Peoples?" 35 Law Now 1, 2010 at pg 17

2 *R v Sappier; R v Gray*, [2006] 2 SCR 686 at para 51 [*Sappier; Gray*].

3 Deborah Curran, "Leaks in the System: Environmental Flows, Aboriginal Rights, and the Modernization

D. What is the likelihood of success for asserting an Aboriginal Right to Water?

The most significant challenge in establishing an Aboriginal Right to water would be in the use of language. Asserting a Right to a particular resource, rather than to a practice, would be very likely to fail. Thus, some specific consideration must be given to the language to be used in an assertion of an Aboriginal Right to water.

It follows that the uses of water directly associated with the particular way of life of an Indigenous community and necessary for its survival are likely protected as Aboriginal Rights.

E. Aboriginal Right to Water Stewardship

We chose to frame our legal opinion as considering an "Aboriginal Right to water stewardship", though we recognize that this is a misnomer. This language suggests a Right to a responsibility. We refer to the practice of being involved in decision-making with respect to water, as well as the Aboriginal Right to protect the waters.

For our research memo/legal opinion we used the language of "Aboriginal Rights" to "fit" within the Canadian legal system, and specifically to fit within the protections afforded by s. 35 of the Constitution. However, this language-based issue highlights and provides some insight into a critical difference between a largely held Indigenous worldview and a Canadian worldview; the difference between "Rights" versus "responsibilities".

Our suggestion is certainly not to establish a proprietary Right to water, but to seek respect for natural laws pursuant to which Indigenous Peoples have a responsibility to protect water as a communal resource; an entity in all forms – ground water, rivers, lakes, rain, surface water, etc. We also suggest the application of Indigenous laws to the management of bodies of water and water-related practices.

Recognition of an Aboriginal Right to water stewardship would trigger not only the Crown's duty to consult, negotiate in good faith and potentially accommodate the Indigenous group's interests, but also the more stringent requirement for the Crown to justify impacts prior to acting and a requirement to show that those actions minimally impair Aboriginal or Treaty Rights.

F. How could an Aboriginal Right to water stewardship be established (i.e. what are the legal tests, etc.)?[4]

In *R v Sparrow*, the first case before the SCC to consider the application of s. 35(1) of the Canadian Constitution, the Court developed the basic, common law, analytical framework for considering an Aboriginal Rights claim; a framework which is still in use today. In subsequent case law, the SCC further particularized some of the steps of the "Sparrow test", combined into:

Imperative for Water Law in British Columbia", 50 UBC L Rev 233 (2017) Page 265

4 Much of this legal framework has been adapted from the framework for asserting aboriginal Rights as articulated by Garson J. in *Ahousaht Indian Band and Nations v Canada (Attorney General),* 2009 BCSC 1494 [*Ahousaht*] and verified with reference to the "Aboriginal Law" section of the Canadian Encyclopedic Digest, online: <https://nextcanada.westlaw.com>.

a. Is there an existing Aboriginal Right?
    i. characterizing the claimed aboriginal Right;
    ii. establishing the existence of the ancestral practice, custom or tradition advanced as supporting the claimed Right;
    iii. determining whether the ancestral practices, customs or traditions were integral to the distinctive culture of the claimant's pre-contact society;
    iv. determining whether reasonable continuity exists between the pre-contact practice and the contemporary claim.
b. Has the Aboriginal Right been extinguished?
    i. by surrender;
    ii. by constitutional amendment (prior to 1982); or,
    iii. by clearly worded federal legislation (prior to 1982).
c. Is the protected activity being claimed incidental to an existing Aboriginal Right?
d. Has there been a *prima facie* infringement of the Right?
    i. is the limitation unreasonable?
    ii. does the limitation impose undue hardship?
    iii. does the regulation deny to the holders of the Right their preferred means of exercising that Right?
e. Can that infringement be justified?
    i. is the infringement in furtherance of a legislative objective that is compelling and substantial?
    ii. is the infringement consistent with the special fiduciary relationship that exists between the Crown and Aboriginal peoples?[5]

The SCC steadily developed the jurisprudence relating to Aboriginal Rights, stating that "the honour of the Crown is always at stake in its dealing with Indian people."[6] It is arguable that the broader framework of nation to nation relationships and the honour of the Crown must also be considered in applying the *Sparrow* test.

i. Is there an existing Aboriginal Right? (Step 1 of the "Sparrow Test")

As enunciated by the SCC in *Van der Peet*,[7] an Aboriginal Right is an activity that is an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the Right. In that decision, the Court set out a multi-tiered analysis for considering the existence of an Aboriginal Right:

i. characterizing the claimed Aboriginal Right;
ii. establishing the existence of the ancestral practice, custom or tradition advanced as supporting the claimed Right;
iii. determining whether the ancestral practices, customs or traditions were integral to the distinctive culture of the claimant's pre-contact society; and
iv. determining whether reasonable continuity exists between the pre-contact practice and the contemporary claim.

5 *R v Sparrow, [1990] 1 SCR 1075, [Sparrow]*
6 *R v Badger*, [1996] 1 SCR 771 at para 41 *[Badger]*.
7 *R v Van der Peet*, [1996] 2 SCR 507, at para 46, [*Van der Peet*].

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.

(1) Characterizing the Right (Step 1 of the "Van der Peet" Test)

According to the SCC, the first step in asserting an Aboriginal Right is to characterize the Right claimed. Characterization is guided by three factors:

- the nature of the action which was done pursuant to an Aboriginal Right;
- the nature of the governmental regulation, statute or action being impugned; and
- the pre-contact practice, custom or tradition being relied upon to establish the Right.[8]

Characterization of the claim is important, because whether or not the evidence will support the claim will depend in large measure on what the evidence is being called to support. The purpose of the analysis is to determine whether the activities in which the claimants were engaged come within the constitutionally protected ambit of s. 35(1).
The pre-contact practice that would need to be relied upon in order to establish an Aboriginal Right to water stewardship would be an evidenced practice in some form of water stewardship, or water governance, or some form of decision-making process, relating to potential impacts to waters surrounding the traditional territory of the Indigenous community.

(2) Establishing the existence of the ancestral practice, custom or tradition advanced as supporting the claimed Right (Step 2 of the "Van der Peet Test")

This stage of the analysis requires the Court to determine whether, as a question of fact, the evidence establishes the ancestral practice, custom or tradition supporting the claimed Right. The SCC has stated that the relevant time frame is the period prior to contact with Europeans.[9]

Evidence, including all relevant and available oral histories from the Indigenous community, would need to be gathered and presented to show that water has historically served important roles for the community, for health, social, survival, and spiritual roles. There would then also have to be evidence of water stewardship and governance initiatives.

(3) Integral to the distinctive culture of the claimant's pre-contact society (Step 3 of the "Van der Peet Test")

According to the SCC, the Court must also determine whether the activity is part of "a practice, custom or tradition" that was an integral part of the distinctive culture of the Indigenous nation asserting the Right prior to contact with Europeans.

The SCC has stated that to be "integral", a "practice, custom or tradition" must be a "central and

8 *Ibid* at para 53.
9 *Van der Peet,* supra note 7 at para 60; see also *Sappier; Gray*, supra note 2 at para 34.

significant part" of the society's distinctive culture.[10] The practice cannot be merely incidental to the society's identity to be accepted by the court as a protected Aboriginal Right.

To establish whether water stewardship was integral to the pre-contact society would require establishing that water stewardship was an integral practice to the Indigenous community prior to European contact.

(4) Continuity (step 4 of the "Van der Peet Test")

According to the SCC, Aboriginal Rights are communal in nature and are particular to a specific "aboriginal community".[11] Continuity first requires that claimants establish a connection with the ancestral group upon whose practices they rely to assert an Aboriginal Right.[12] Aboriginal Rights "must be grounded in the existence of a historic and present community".[13]

First, evidence must be provided to establish that the present-day Indigenous community has historical roots in the pre-contact Indigenous community, and that those roots extend to today.

ii. Has the Right been extinguished? (Step 2 of the "Sparrow Test")

Once an Aboriginal Right has been proven, the next step in the "Sparrow test" is to inquire into whether the Right has been extinguished.

Prior to the *Constitution Act, 1982,* Aboriginal and Treaty Rights could be extinguished by:

- surrender;
- constitutional amendment; or,
- clearly worded federal legislation.

The test for extinguishment of Aboriginal Rights before 1982, as stated in *Calder* and confirmed by Chief Justice Dickson and Justice la Forest in *Sparrow*, is "that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal Right". Further, the onus lies on the Crown to prove the intent to extinguish the Right.

There must be strict proof of the fact of extinguishment.[14] The mere fact that a Right has been regulated by the government and its exercise subject to terms and conditions is not sufficient to extinguish the Right.[15]

According to our review of case law, legislation, historical documents and academic literature, Aboriginal Rights to water stewardship within what is now called Manitoba have not been extinguished.

10 *Ibid* at para 55.
11 *R v Powley*, 2003 SCC 43 at para 24, [*Powley*]; *Van der Peet, supra* note 7 at para 69.
12 *R v Marshall; R v Bernard*, 2005 SCC 43, at para 67, [*Marshall; Bernard*].
13 *Powley, supra* note 11 at para 24.
14 *Badger, supra* note 6 at para 41.
15 *Sparrow, supra* note 5 at 1097.

A question to address is whether Aboriginal water Rights were extinguished or modified by Treaty. Even though they all contain a so-called "land surrender clause" (a contentious interpretation), the text of the "numbered Treaties" do not expressly mention waters[16] except to use rivers and lakes to identify tracts of land subject to Treaty.[17] There is also a mention of water in the Treaty 5 text (more likely to affirm water Rights). It is not likely that a court would find that the numbered treaties extinguish Aboriginal Rights to water stewardship.

Given that there has been no Constitutional amendment that extinguished Aboriginal water Rights, the next question is whether Aboriginal water Rights in general, and Aboriginal Rights to water stewardship more specifically, have been extinguished by legislation.

We considered a number of legislative acts that may have had that effect, including the *Indian Act*, the *North-West Irrigation Act*, the *Natural Resources Transfer Act*, the *Water Protection Act*, etc. and our opinion is that no competent legislation has expressed a "clear and plain intention" to eliminate Aboriginal Rights to water stewardship.

iii. Has there been a *prima facie* infringement of the Right? (Step 3 of the "Sparrow Test")

If extinguishment is not proven, the next question is whether there is a *prima facie* infringement of the Right. To receive some form of judicial relief, an Indigenous group claiming an Aboriginal Right must show that the Right claimed has been infringed.

The current state of Canadian common law iterates that Aboriginal Rights are not absolute. Canadian courts have consistently held that governments have the ability to infringe Aboriginal Rights if such infringement is conducted on "justifiable grounds".[18]

The Indigenous claimant has the onus of proving infringement of an asserted Aboriginal Right.[19]

As set out in *Sparrow*, the test for infringement asks whether the impugned government action has the effect of interfering with an existing Aboriginal Right.[20] A Right is infringed where there is a "meaningful diminution" of the Right, which excludes "insignificant interferences".[21] Questions that guide the analysis as to whether an impugned government action has the effect of interfering with an existing Aboriginal Right include:

i. Is the limitation unreasonable?
ii. Does the limitation impose undue hardship?
iii. Does the regulation deny to the holders of the Right their preferred means of exercising that Right?

16 Laidlaw & Passelac-Ross, supra note 1.
17 Monique M. Passelac-Ross & Christina M. Smith "Defining Aboriginal Rights to Water in Alberta: Do They Still "Exist"? How Extensive are They?" CIRL Occasional Paper #29, April 2010, page 18.
18 Linda Nowlan, *Customary Water Laws and Practices in Canada*, (Rome: Food and Agriculture Organization of the United Nations, 2004) online: http://www.fao.org/fileadmin/templates/legal/docs/CaseStudy_Canada.pdf
19 *Van der Peet, supra* note 7 at paras 131-34.
20 *Sparrow, supra* note 5 at 1078.
21 *R v Morris*, 2006 SCC 59 at para 53.

The court's articulation of these "justifiable" limits continues to adversely impact the nation to nation relationship, as the court continues to allow for unilateral governmental infringement of Aboriginal Rights and maintains the ability to determine whether Aboriginal Rights-holders have been respected.

For example, Provincial approval of Manitoba Hydro proposed "development" projects without requiring the approval of an Indigenous group with an established Aboriginal Right to water stewardship would be a prima facie infringement of the Aboriginal Right.

iv. Can the infringement be justified? (Step 4 of the "Sparrow Test")

The government that is seeking to pass or uphold a regulation that infringes upon or denies Aboriginal Rights must justify any infringement of that Right. This test addresses the question of what constitutes legitimate regulation of a constitutionally protected Aboriginal Right.[22]

Sparrow lays out a two-stage analysis with respect to justification:

i. The infringement of the aboriginal Right must be in furtherance of a legislative objective that is compelling and substantial; and,
ii. The infringement must also be consistent with the special fiduciary relationship that exists between the Crown and Aboriginal peoples.

In *Sparrow*, the SCC stated that conserving and managing a natural resource, such as water, is a valid objective that would meet the first part of the justification test. Other valid objectives identified in *Sparrow* are those intended to prevent harm to the general public or to Indigenous peoples.

In *Sparrow*, the SCC indicated that, to assess whether the Crown is justified in infringing an Aboriginal Right, these questions should be addressed:

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

The SCC emphasized that this was not an exhaustive list of the factors to be considered in the assessment of justification.[23]

Our analysis suggests that an Indigenous group may successfully establish an Aboriginal Right to water stewardship, and a court may find that a provincial regime that does not recognize and respect this Aboriginal Right is an unjustifiable infringement.

22 Nowlan, supra note 18.
23 *Sparrow*, supra note 5 at 1119, cited in Nowlan, supra note 18.

5. CONSIDERATION OF ABORIGINAL TITLE TO WATER

It is our contention that another method of articulating concepts similar (if not identical) to those inherent in an Aboriginal Right to water stewardship is recognition of Aboriginal Title to water.

The SCC has stated that Aboriginal Title is one manifestation of the broader category of Aboriginal Rights.[24]

In *Guerin* the SCC 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.[25] In the case of *R v Calder*, the court found that 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".[26]

Aboriginal Title is a communal Right to occupy, and make decisions with respect to, a particular area exclusively and to use it for various purposes, regardless of whether those uses or purposes would qualify independently as Aboriginal Rights.

It is a Right to the land itself,[27] including mineral Rights,[28] conferring "ownership Rights similar to those associated with fee simple, including: the Right to decide how the land will be used; the Right of enjoyment and occupancy of the land; the Right to possess the land; the Right to the economic benefits of the land; and the Right to pro-actively use and manage the land."[29] It is similar, if not directly on par with Crown Title.[30]

As recognized under Canadian common law, an Indigenous community has Aboriginal Title when it can prove that its ancestral community occupied a specific area sufficiently and exclusively at the time the Crown asserted sovereignty over that area.[31]

In *Tsilhqot' in Nation*, the SCC made the first declaration of Aboriginal Title and stated that "the Right to control the land conferred by Aboriginal Title means that governments and others seeking to use the land must obtain the consent of the Aboriginal Title holders."[32]

To prove sufficiency of occupation, the claimant community:

> *must show that it has historically acted in a way that would communicate to third parties that it held the land for its own purposes. […] There must be evidence of a strong presence on or over the land claimed, manifesting itself in acts of*

24 Ibid at page 3.
25 *Guerin v the Queen*, [1984] 2 SCR 335
26 *Calder et al v Attorney-General of British Columbia, [1973] SCR 313*
27 *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 [*Tsilhqot'in*].
28 *Ibid*, see also *Delgamuukw v British Columbia*, [1997] 3 SCR 1010.
29 *Tsilhqot'in*, supra note 27.
30 *Delgamuukw*, supra note 28.
31 *Tsilhqot'in*, supra note 27; *Delgamuukw*, supra 28.
32 Kathryn Gullason, **"**The *Water Sustainability Act*, Groundwater Regulation, and Indigenous Rights to Water: Missed Opportunities and Future Challenges" (2018) 23 *Appeal* 29 at page 36.

> *occupation that could reasonably be interpreted as demonstrating that the land in question belong to, was controlled by, or was under the exclusive stewardship of the claimant group*.[33]

According to Canadian jurisprudence, Aboriginal Title may be subject to valid federal and provincial laws. The SCC has signaled that "regulatory legislation, such as legislation aimed at managing the forests in a way that deals with pest invasions or prevents forest fires" will not infringe Aboriginal Title and will require no justification.[34]

On the other hand, legislation that assigns interests to third parties (such as timber licences) in Aboriginal Title land without the consent of the Title-holding community "is a serious infringement that will not lightly be justified."[35]

However, it must also be recognized that, while Aboriginal Title recognizes the greatest degree of decision-making authority held by an Indigenous community, Aboriginal Title claims are exceedingly time-consuming and expensive to assert.

G. Aboriginal Title to Water

Canadian jurisprudence suggests that Aboriginal interests in land include adjacent waters. Some commentators suggest that *Tsilhqot'in* lays the foundation for Aboriginal Title claims to water.[36]

While an Aboriginal Title claim to water may be established within Canadian law, Canadian courts have not dealt squarely with the issue. In two cases in which such a claim was raised, *Adams*[37] and *Ahousaht*,[38] the courts declined to deal with the Aboriginal Title issue, preferring to find that the First Nations had established an Aboriginal fishing Right.[39]

Canadian court offers no sureties, but Canadian jurisprudence has also not precluded an Aboriginal Title claim to water. Even in dissent in *Van der Peet*, Justice McLachlin (as she then was) had described the Aboriginal interests recognized by the common law as "interests in the land and waters" (emphasis added) and suggested that:

> *...the interests which aboriginal peoples had in using the land and adjacent waters for their sustenance were to be removed only by solemn Treaty with due compensation to the people and its descendants. This Right to use the land and adjacent waters as the people had traditionally done for its sustenance may be seen as a fundamental Aboriginal Right*.[40]

Aboriginal Title to water should be the ultimate goal (within the goals afforded by Canadian

33 *Tsilhqot'in,* supra note 27.
34 Ibid.
35 Ibid.
36 Ibid.
37 *R v Adams, [1996] 3 SCR 101 at para 33, [Adams].*
38 *Ahousaht*, supra note 4.
39 Passelac-Ross & Smith, supra note 17 at page 8.
40 *Van der Peet*, supra note 7 at para 275, quoted in Laidlaw & Passelac-Ross, supra note 1.

law). "Suggested permitted activities include the diversion or impounding of water, the pollution or prevention of pollution of water, the generation of hydroelectric power, as well as the sale and trade of water or limiting the sale of water by others. Aboriginal Title even imparts the Right to apply Aboriginal legal systems to water use."[41]

H. What is the likelihood of success for asserting a claim for Aboriginal Title to Water?

An Aboriginal Title claim to water could be asserted, as there has been no jurisprudence to preclude such a claim, however caution must be exercised, as doing so would likely be a very expensive and time-consuming endeavour, with no guarantee of success (as with all litigation).

The claimant would have to have a very strong evidentiary basis for their claim, as a failed claim could result in establishing precedent with negative repercussions for other groups seeking to establish a similar (or potentially better) claim.

Given that no Indigenous group has successfully established an Aboriginal Title claim to water, it is very difficult to determine the likelihood of success for asserting such a claim.

I. How to Establish an Aboriginal Title to Water Claim (what are the legal tests?)

As a subset of Aboriginal Rights, a claim to Aboriginal Title to a specific body or bodies of water would be similar to asserting any other Aboriginal Rights claim, with some nuances.

The *Calder/Delgamuukw/Tsilqot'in* family of cases set the following tests for Aboriginal Title:

a. Is there existing Aboriginal Title?
    i. establishing the existence of the intention and capacity to retain exclusive control over the tract of land or body of water;
    ii. determining whether reasonable continuity exists between the pre-contact practice and the contemporary claim.
b. Has the Aboriginal Title been extinguished?
    i. by surrender;
    ii. by constitutional amendment (prior to 1982); or,
    iii. by clearly worded federal legislation (prior to 1982).
c. Has there been a *prima facie* infringement of the Aboriginal Title?
    i. is the limitation unreasonable?
    ii. does the limitation impose undue hardship?
    iii. does the regulation deny to the holders of the Right their preferred means of exercising that Right?
d. Can that infringement be justified?
    i. is the infringement in furtherance of a legislative objective that is compelling and substantial?
    ii. is the infringement consistent with the fiduciary relationship that exists between the Crown and Aboriginal peoples?

41 Anna Côté, "Reconciling Canadian Aboriginal water Rights with water governance and trade" Water Law Committee newsletter, September 2015, Toronto.

i. Is there existing Aboriginal Title over a specific body or bodies of water?

It is very likely that this stage of the analysis will be a significant hurdle, as it would require a very strong evidentiary base within a fact specific and contextual analysis.

One of the main issues, among many others, would likely be establishing specific geographic boundaries over which the direct ancestors of an Indigenous claimant exercised exclusive control. Although the SCC found in *Tsilqhot'in* that it is not about a "dots on a map" approach but an approach that considers Title over large swaths of territory.

It would also be necessary to firmly establish the connection between the pre-contact Indigenous community and the contemporary claimant, as well as continuity between the pre-contact exercise of control over a specific water body, and present-day exercise of control.

This would, of course, be exceedingly difficult given the legislative regime in place with respect to water; a regime that neither recognizes, nor allows, Indigenous groups to exercise control. It would be very challenging to show reasonable continuity between pre-contact practices and the contemporary claim.

ii. Has the Aboriginal Title Been Extinguished?

The onus would be on the Crown to establish that the asserted Title had been extinguished.

> *The question of whether Aboriginal Title to water was extinguished by the "land surrender clause" remains unsettled. There has been no judicial consideration of this issue in Canada. There is an argument to be made that Aboriginal Title remained unextinguished on reserves set aside pursuant to Treaties, notably when reserves were originally selected as part of the Treaty negotiations. Further, scholars point to the fact that it was not always assumed in Canada that "lands" include "waters". At the time when Treaty 5 was signed, the common law held that "flowing water could not be owned by anyone*.[42]

Canada has carried on business since shortly after the signing of the numbered Treaties under the interpretation of the numbered Treaties as surrender documents. Indigenous peoples and many others largely discount and discredit this interpretation, arguing that the Treaties were intended to establish the framework for a reciprocal, and mutually beneficial relationship.

Our opinion is that the Canadian interpretation is patently incorrect. The text and context of the Treaty documents suggest that they were not surrenders but intended to be beneficial to settlers and Indigenous Peoples alike for as long as the grass grows, the rivers flow, and the sun shines.

However, within the text and context of Treaty 5 specifically, there is also some "grey area" that does not seem to have been largely canvassed in the literature on Aboriginal Title in what is now Manitoba; that being, a clause which reserves "*the free navigation of the said lake and river, and free access to the shores and waters thereof, for Her Majesty and all Her subjects".*

42 Passelac-Ross & Smith, supra note 17, at page 18.

We submit that it would be unnecessary for "Her Majesty" to reserve to herself the Right to navigate the lake and river if the understanding was that the Right to the exclusive control of the water bodies had been extinguished.

While it is our opinion that this clause of Treaty 5 provides an evidentiary basis for a claim for Aboriginal Title to water in Treaty 5 territory, this requires a discussion about the principles of Treaty interpretation, to which we now turn.

6. CONSIDERATION OF POSSIBLE TREATY RIGHTS TO WATER

J. Treaty Rights in General

In very broad terms, Treaties define specific Rights, benefits and obligations for the signatories that vary from Treaty to Treaty. Similar to Aboriginal Rights, Treaty Rights are collectively held by Rights-bearing communities but are exercised by individual members of those communities.[43] However, a marked distinction from Aboriginal Rights is that Treaty Rights can include Rights to specific resources, for example Rights to specific reserve lands, or farming implements.

The SCC's perspective on the difference between Aboriginal and Treaty Rights is that:

> *aboriginal Rights flow from the customs and traditions of the native peoples, (…) they embody the Right of native people to continue living as their forefathers lived. Treaty Rights, on the other hand, are those contained in official agreements between the Crown and the native peoples. (…) the scope of Treaty Rights will be determined by their wording, which must be interpreted in accordance with the principles enunciated by this Court*.[44]

Treaties are not contracts. Treaties are an articulation of the framework of a sacred reciprocal relationship between First Nations and settler nations. The process of Treaty making was and remains an acknowledgement of the sovereignty of First Nations people and a commitment by the Crown to responsibilities in the relationship with First Nations and their ancestral lands.

The SCC in *Keewatin* found that, even though the provinces were not signatories to the Treaties, the Treaties were entered into by the Crown, and as such the provinces are "burdened by Crown obligations towards Aboriginal people" and when dealing with Aboriginal interests the province is subject to the fiduciary duties of the Crown and must uphold the honour of the Crown.

The effect is that, not only can the federal government justify an infringement of a Treaty Right, but following *Keewatin*, now so too can a provincial government justify such an infringement.

K. Treaty Rights to Water

Treaty analysis requires consideration of the text and the context of the specific Treaty at issue.

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43 *R v Sundown, [1999] 1 SCR 393 [Sundown]*; *Behn v. Moulton Contracting Ltd*., 2013 SCC 26.
44 *Badger, supra* note 6 at para 76.

There are significant disparities between the parties to the Treaty as to whether the intention of the Indigenous signatories was to "cede, release and surrender" land, especially given that the Indigenous signatories did not subscribe to the worldview that land could be "owned".

However, even if one were to agree with the Treaty as a "land surrender agreement" which is not conceded, it is a glaring omission that the numbered Treaties do not "surrender" waters.

The text of the Treaties in what is now Manitoba mention "water" very few times, however the context of the Treaties must be considered, that being an articulation of specific Rights such as fishing and hunting Rights, which require a supply of water.

Without the inclusion of water Rights, the "lands reserved for the Indians" by Treaty would be useless, which interpretation would be absurd,[45] and, in more modern parlance, would not be consistent with the honour of the Crown.

> *Such water Rights might be construed to extend to hydro electric power and other aids to economic development, especially in instances of contemporary reserve land selection. Indian Rights to hunt, trap and fish were assured to them in the treaties and in the oral explanations thereof. To that extent, the treaties clearly reserved Indian water Rights outside reserve lands.*[46]

L. Has a Treaty Right to Water been Established in Treaty 5?

For the purposes of this memorandum, and to provide an example, we considered, at a very high level, the specificities of Treaty 5, first signed in 1875 at Norway House and Berens River by various Indigenous peoples in what is now northern Manitoba and the Crown, with later adhesions signed at various times.[47]

Our research has found that, to date, a Treaty Right to water in Treaty 5 has not been established. However, a Treaty Right to water could be asserted by a First Nation with ancestral signatories to Treaty 5. The likelihood of success for such a claim is difficult to ascertain, as there has been little jurisprudence on this proposition, though the majority of the literature in this area of law posits that a Treaty Right to water exists.

M. How to Establish a Treaty Right to Water in Treaty 5 (what are the legal tests?)

The SCC stated in *Badger* and many cases following that proving the existence of a Treaty Right is to be done in a manner similar to the analysis above for the assertion of an Aboriginal Right:

- Is there a Treaty Right?
- Has the Right been extinguished?
- If the Treaty Right has not been extinguished, has it been infringed?

45 See also: Nowlan, supra note 18.
46 Richard H. Bartlett, Indian Water Rights on the Prairies, 11 Man LJ 59 (1980) at page 65.
47 *Treaty No. 5 Between Her Majesty The Queen and the Saulteaux and Swampy Cree Tribes of Indians At Beren's River and Norway House*, 20 September 1875:

- If the Treaty Right has been infringed, can the Crown justify the infringement?

i. Is There a Treaty Right to Water in Treaty No. 5? (Step 1 of the "Sparrow/Badger Test")

Proving the existence of a Treaty Right requires an analysis of the text and context of the Treaty, utilizing principles of Treaty interpretation, to ascertain the objectives and common intentions of the signatories.

The principles of Treaty interpretation were summarized by McLachlin J., as she then was, in *Marshall No. 1*:[48]

- Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation;
- Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the Aboriginal signatories;
- The goal of Treaty interpretation is to choose from among the various possible interpretations of common intention, and determine which best reconciles the interests of both parties at the time the Treaty was signed;
- In searching for the common intention of the parties, the integrity and honour of the Crown is presumed;
- In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties;
- The words of the Treaty must be given the sense that they would naturally have held for the parties at the time;
- A technical or contractual interpretation of Treaty wording should be avoided;
- While construing the language generously, courts cannot alter the terms of the Treaty by exceeding what "is possible in the language" or realistic;
- Treaty Rights must not be interpreted in a static or rigid way; they are not frozen at the date of signature. The interpreting court must update Treaty Rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core Treaty Right in its modern context.

It is purported that the government's intention in signing Treaty 5, and other Treaties, was to "settle" or "quiet" Indian Title to the land to allow for organized settlement,[49] with the First Nation signatories seeking to ensure that their Rights to hunt and fish, and carry on their livelihoods, would remain unimpeded.

Some scholars have also suggested that the intention of both parties to the numbered Treaties was to protect the livelihood of First Nations.[50] Beyond the explicit recognition of the Rights to hunt and fish in Treaty 5, it is likely that the common intention of the parties to the Treaties was that First Nations would remain economically self-sufficient. Flowing from that recognition,

48 *R v Marshall (No. 1)*, [1999] 3 SCR 456 at para 78.
49 Kenneth S. Coates & William R. Morrison, *Treaty Research Report - Treaty Five (1875)*, Treaties and Historical Research Centre, Indian and Northern Affairs Canada, online: http://www.aadnc-aandc.gc.ca/eng/1100100028695/1100100028697
50 Ibid at page 21

> *the Rights to live off the land, to a livelihood, to a culture, expressed in the treaties as Rights to hunt, fish and gather, are fundamentally linked to the use of water resources. Water was essential to that way of life. Access to waterways was indispensable for transportation, for domestic and for ceremonial purposes. It was understood that all traditional activities that necessitate access to and use of water resources, be it for food, shelter, transportation, or spiritual purposes, would continue unhindered. In effect, the treaties confirmed existing Aboriginal Right to water*.[51]

The text of Treaty 5 specifies that, in exchange for maintaining hunting and fishing Rights in their traditional territories the First Nation signatories:

> *do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors for ever, all their Rights, Titles and privileges whatsoever to <u>the lands</u> included within the following limits, […].* (emphasis added)

As discussed above and of note, the textual interpretation does not include text setting out to surrender Rights, Titles and privileges to the waters.

Also, within the text and context of Treaty 5 specifically, there is some "grey area" that does not seem to have been largely canvassed in the literature on Aboriginal Title or Treaty Rights to water in what is now Manitoba[52] that being, a clause which reserves:

> *the free navigation of the said lake and river, and free access to the shores and waters thereof, for Her Majesty and all Her subjects,*

Nowhere in the Official Reports of the Commissioners is "water" specifically referred to in the Treaty negotiations, neither in reference to surrender by the Indians nor as property of the Crown. The Reports indicate the dual purpose intended by the Crown of encouraging the "Indians" to develop agriculture but to reserve to them their traditional practice of hunting and fishing insofar as the land was not otherwise taken up.[53]

A much more thorough Treaty analysis should be undertaken, however on its face:

- even if textual interpretation of Treaty 5 as a land surrender document is accepted (which it is not), the text does not purport to surrender water;
- the text of Treaty 5 acknowledges a retention of a Crown Right to navigate waters – i.e. not Crown Title to water – suggesting that Indigenous signatories to Treaty 5 maintained control, i.e. Title, over waters;
- the common intention of Treaty 5 was to guarantee to the Indigenous signatories the

51 Ibid.
52 Assembly of First Nations Environmental Stewardship Unit, Climate Change and Water: Impacts and Adaptations for First Nations Communities, 2008, online: https://www.afn.ca/uploads/files/env/08-03-27_climate_change_and_water_research_paper_final.pdf [*AFN*].
53 Bartlett, Indian Water Rights, supra note 46 at page 60.

continuation of vocations such as fishing and hunting – absurd without water;
- the intention of the Crown was to encourage the Indigenous signatories to Treaty 5 to farming and agriculture – which cannot be done without water.

It is likely that an inference can be drawn that the water Rights of Indigenous signatories to Treaty 5 were not only included in the Treaty but, were protected by the Treaty.

Furthermore, if it is recognized by a Canadian court that Treaty 5 includes water Rights, those Rights would have then also subsequently received constitutional protection in section 35.

If it is found that Treaty 5 includes Treaty Rights to water, the onus then shifts to the Crown to show that the Treaty Right to water in Treaty 5 has been extinguished.[54]

ii. Has the Right to Water in Treaty No. 5 been Extinguished? (Step 2 of the "Sparrow/Badger Test")

It is likely that the Crown would ague that any Treaty Rights to water that may have existed were extinguished by the NWIA, and the many, many water-related pieces of legislation that have since followed. However, extinguishment requires a clear and plain intent to do so, which we submit is a requirement that has not been met by any legislation.

The SCC found in *Badger* that the NRTA did not extinguish Treaty Rights, but did "modify" them. Therefore, we did not consider the applicability of the NRTA, and worked on the understanding that the NRTA did not extinguish Treaty Rights to water.

In addition to water being required for agricultural purposes, at the time of the signing of Treaty 5 the British common law of riparian Rights was still "in play" and riparian Rights had not yet been "extinguished" by the NWIA.

We submit that the Treaty Right to water in Treaty 5 has not been extinguished.

iii. If the Treaty Right to Water in Treaty No. 5 has not been extinguished, has it been infringed? (Step 3 of the "Sparrow/Badger Test")

If it is found that there is a Treaty Right to water in Treaty 5, and if it is found that such a Right has not been extinguished, the onus would shift back on to the Indigenous, Rights-bearing community claimant to show that the Treaty Right has been infringed.

Government action that impacted a Treaty Right would be a prima facie infringement.

Impacts could arise in many ways, including, for example, from the diversion of water to generate hydro-electric power, from government-approved pollution of waters that are the subject of Treaty Rights, decisions made with respect to waters that are the subject of Treaty Rights without the inclusion of the Rights-bearing peoples.

54 *Badger*, supra note 6.

These impacts would require the Crown to seek to justify the infringement.

iv. If the Treaty Right to Water has been infringed, can the Crown Justify the Infringement? (Step 4 of the "Sparrow/Badger Test"

In Canadian jurisprudence, Treaty Rights are not absolute, but can be "justifiably infringed", so long as the government can justify that interference, with consideration for the following:

- Has there been consultation with all the potentially affected Indigenous peoples?
- Is there is a valid objective to the interference?
- Have the Rights been given priority over competing interests?
- Is there as little infringement of the Rights as possible?[55]

When legislation has been found to infringe a Treaty Right, valid objectives have included conservation of game and fish, or the environment.

Infringement of a Treaty Right by legislation can only take place with "proper justification". The process for justifying an infringement was suggested in *Sundown* as:

1) The legislation must be clearly aimed at conservation.
2) Careful consideration of Treaty Rights must be undertaken.
3) The purpose of the legislation and accommodation of the Treaty Rights in issue must be clear in the wording of the regulation.
4) Infringement must be as little as possible and must not unduly impair Treaty Rights.

Successful cases in BC dealing with habitat protection to preserve Treaty Rights have dealt with developments proposed close to a reserve. Development activity "hundreds of miles away" that may affect the quantity and quality of water Rights may also be restrained.[56] Theoretically, the same principle would hold true for the holders of Aboriginal or Treaty Rights to water – i.e. the impact of large scale hydroelectric development upstream to a water Rights holder that results in the inability of the Rights holder to exercise their constitutionally protected Rights may be considered unjustifiable.

7. CONCLUSION

There are potentially very significant opportunities that arise from an assertion of an Aboriginal Right to water stewardship and governance, through whatever means that assertion is made.

If it was found that Indigenous peoples were required to be not only involved in decision-making with respect to water, but were the decision makers, this could provide Indigenous peoples with the ability to halt or participate in water governance, water-related trade (if they saw fit), and would recognize the place of Indigenous peoples in determining the best methods for protecting water and Indigenous Rights as related to water.

55 Ibid.
56 Graham Statt, "Tapping into Water Rights: An Exploration of Native EnTitlement in the Treaty 8 Area of Northern Alberta" (2003) CJLS 103

Increased exercise of these Rights could take many forms, including engaging in or ensuring that members, or other parties, cease activities if deemed to be in the best interest of the water body.

This is where the distinction ultimately lies. What is in the best interest of the water body?

> *Indigenous peoples may have a greater role in determining the appropriateness of the sale of hydroelectric power and the sale of water for consumption, among many others. Given the potential breadth of Aboriginal water claims, Indigenous peoples stand to control significant portions of the resource, in whatever way they see fit.*[57]

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As a method of challenging hydro "development" in what is now called Manitoba, an assertion of Aboriginal Title to water bodies, and/or an assertion of an Aboriginal Right to water stewardship and governance, and/or an assertion of a Treaty Right to water may all be very useful tools.

If an Indigenous community was successful in establishing Aboriginal Title over water bodies in their traditional territory, or an Aboriginal Right to water stewardship and governance, or a Treaty Right to water, that community would necessarily be involved, and in fact would likely be able to "take the lead", in decision-making processes with respect to the waters in their traditional territory. Indigenous Peoples would have a recognized Right to protect the waters in their territory. This may help to alleviate concerns about the legitimacy of colonial decision-makers and decision-making processes, some of which, such as the National Energy Board, have faced a "crisis of legitimacy".[58]

If an Indigenous community was able to successfully establish a claim to Aboriginal Title over a water body on which Manitoba Hydro currently pays water rental fees to the province of Manitoba, this could potentially be a significant source of funding to that First Nation. This could fundamentally shift the financial implications of the present water-related landscape in Manitoba, although the potential impacts are beyond the scope of this memorandum and thus should be explored in future work.

It would also be left to consider the potential for claiming compensation for fees that were already paid on waters that subsequently had been determined to be subject to Aboriginal Title.

Perhaps asserting Aboriginal Title over waters in an Indigenous community's traditional territory, coupled with an assertion of an Aboriginal Right to water stewardship and governance over those waters, and an assertion of a Treaty Right to water may be a method of gaining back some control that has been lost.

57 Côté, supra note 41.

58 https://www.wcel.org/blog/vancouveroilspill-kinder-morgan-nebs-crisis-legitimacy