

Water Rights and Water Stewardship: What About Aboriginal Peoples?

By David Laidlaw and Monique Passelac-Ross

Introduction

The province of Alberta is currently reviewing its approach to the allocation, licensing and transfer of water rights. The government has received advice from a number of groups of experts established under various government initiatives and concerned citizens have come forward with their own recommendations. In addition, the government has announced that it will hold public consultations on the proposed review of its water allocation and management system in the summer of 2010.

One striking feature of the reports received by the Alberta government is the absence of attention paid to the issue of Aboriginal uses of, and rights to, water. First Nations are only mentioned, along with other designated groups, in passing in a single recommendation (at #12 of the 15 recommendations) in the report submitted by the Minister's Advisory Group dealing with governance of water management and allocation: Minister's Advisory Group, *Recommendations for Improving Alberta's Water Management and Allocation*, August 2009.

One reason for this lack of attention is Alberta's long-standing position that Aboriginal water rights have been extinguished and the province has exclusive jurisdiction over water in the province (see Nigel Bankes, "Water Law Reform in Alberta: Paying Obeisance to the 'Lords of Yesterday', or Creating a Water Charter for the Future?" (1995) 49 Resources 1 at 5).

Alberta's position has been challenged by several First Nations in several lawsuits alleging that their water rights still exist, both on and off reserve, and those rights now receive the benefit of constitutional protection. In connection with these rights Aboriginal peoples assert that they must be adequately consulted by the government on proposed reviews of the water allocation system and on ongoing land and water initiatives that impact their rights. In response, the government has stated that it will seek input from First Nations on water use and watershed planning initiatives through an undefined separate "yet parallel process": Government of Alberta, *Water for Life: Alberta's Water Allocation Management System Review*; see "Who is involved in the Water Allocation System Review?"

In November 2009, the Canadian Institute of Resources Law (CIRL) convened a small workshop, funded by the Alberta Law Foundation and the Canadian Boreal Initiative, to discuss the issue of Aboriginal rights to water in Alberta. The meeting was attended by First Nations elders and councillors, community leaders, lawyers and scholars. This article draws in part from the proceedings of this workshop and a CIRL Occasional Paper #29, *Defining Aboriginal Rights to Water in Alberta: Do They Still "Exist"? How Extensive are They?* by Monique M. Passelac-Ross and Christina M. Smith (2010).

Different approaches to water

Settler society and Aboriginal conceptions of water rights differ in many respects. At common law water could not be owned but *riparian* doctrines have in the past maintained a semblance of communal ownership and guarantees of water quality. In common law, riparian lands lay along the shores of non-tidal rivers and streams. The owners of riparian rights were entitled, among other things, to divert waters for domestic consumption and any other reasonable purpose. Downstream owners along the watercourse were entitled to obtain waters not significantly diminished in quantity or quality by upstream uses: Alastair Lucas, *Security of Title in Canadian Water Rights* (Calgary: Canadian Institute of Resources Law, 1990) at 5-7.

Water scarcity and the commoditization of water have led the Crown to claim ownership of almost all waters. In western Canada, the assertion of federal Crown ownership in and control over waters occurred in the late 19th century with the *North-west Irrigation Act*, S.C. 1894 c.30, s. 4, am. by S.C. 1895 c. 33, s.2 (*NWIA*). This ownership was transferred to the province under the 1930 *Natural Resources Transfer Agreement (NRTA)* being a Schedule to the *Alberta Natural Resources Act*, S.C. 1930, c. 3. Riparian rights were then extinguished under provincial land grants unless confirmed by a court before June 18, 1931 or by the terms of the grant: *Public Lands Act*, R.S.A 2000, c. P-40, s. 3. This would include regulating the right for water diversion of riparian property owners: *Water Act*, R.S.A. 2000, c. W-3, s.22. The current model is for the Crown to allocate (license) fixed amounts of water to municipal or private interests, on some priority basis, usually first in time: David R. Percy, *The Framework of Water Rights Legislation in Canada* (Calgary: Canadian Institute of Resources Law, University of Calgary, 1988) at 12-14. The individualism of modern settler society and the market imperative have resulted in limited self-regulation and limited regulation of water uses with consequent dangers to the environment, fisheries, water quality and quantity. Current water legislation does not even impose a “beneficial use” requirement as in Western U.S. Water Law; see Arlene J. Kwasniak, “Waste Not Want Not: A Comparative Analysis and Critique of Legal Rights to Use and Re-Use Produced Water – Lessons for Alberta” (2006-2007) 10 U. Denv. Water L. Rev. 357.

Aboriginal conceptions of water usually deem waters to be sacred givers of life. Water must be shared respectfully without any use being paramount. The use of water for sacred purposes, hunting and fishing, transportation, recreation and domestic consumption is a shared responsibility, and must address current needs, the needs of the land and future generations. The use of waters is governed by a natural law, by which the taking of waters without due regard to the environment and the needs of current and future generations can only lead to disaster. Aboriginal peoples see themselves as caretakers with responsibilities to preserve water and life.

Aboriginal rights/responsibilities to water: Do they still exist?

Aboriginal peoples were here first. Water rights in Aboriginal conceptions flow from their use and occupation of their traditional lands from time immemorial. Waters were not separable from the land and the rights to water have long been asserted by Aboriginal peoples as part of their rights to live on their lands.

The difficulty faced by Aboriginal peoples in seeking recognition of their water rights is that there has never been a court ruling in Alberta (or for that matter, in Canada) that has unequivocally established or denied Aboriginal rights to water. As discussed below, First Nations in Alberta assert their rights to water in Canadian law under either claims of Aboriginal title, Aboriginal rights, treaty rights or even riparian rights.

The Supreme Court of Canada has described Aboriginal title as a right in “land” that gives Aboriginal peoples the right to exclusive use, occupation and possession of the land for a broad range of purposes. In the seminal case of *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at paragraph 111, Chief Justice Lamer for the majority stated that common law Aboriginal title: “encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be [traditional practices].” Insofar as water is considered an integral part of land, then Aboriginal title gives Aboriginal peoples the right to the lands submerged by water and entitles them to make use of the waters for a wide variety of purposes not restricted to traditional occupations. Aboriginal title also imparts the right to make decisions with respect to water, and the right to apply Aboriginal law systems to water uses. In *Delgamuukw*, Chief Justice Lamer’s comments on the test for infringement of Aboriginal title at para.166, were as follows:

Three aspects of aboriginal title are relevant here. First, aboriginal title encompasses the right to exclusive use and occupation of land; second, aboriginal title encompasses the right to choose to what uses land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of aboriginal peoples; and third, that lands held pursuant to aboriginal title have an inescapable economic component.(emphasis in original)

Even in dissent in an earlier case, *R. v. Van der Peet*, [1996] 2 S.C.R. 507, Justice McLachlin had described (at para. 275) the Aboriginal interests recognized by the common law as “interests in the land and waters” 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. It is supported by the common law and by the history of this country. It may safely be said to be enshrined in s. 35(1) of the *Constitution Act, 1982*. (emphasis added)

As to Aboriginal rights, they confer the right to engage in site-specific activities on a tract of land to which Aboriginal people may not have title. Aboriginal rights can exist independently of Aboriginal title: *R. v. Adams*, [1996] 3 S.C.R. 101 at paras. 25 to 30. Aboriginal rights are characterized as being founded on actual practices, customs or traditions of the group claiming the rights, practices that were ‘integral to the distinctive culture’ of the group. Canadian jurisprudence confirms that the uses of water directly associated with the particular way of life of an Aboriginal community and necessary for its survival are protected as Aboriginal rights. The uses of water that are vital to the life of an Aboriginal community are quite extensive. They may include rights to travel and navigation, rights to use water for domestic purposes such as drinking, washing, tanning hides and watering stock, as well as rights to use water for spiritual, ceremonial, cultural or recreational purposes. In addition, the use of water is connected with harvesting activities such as fishing, gathering country food, hunting, trapping, and lumbering. The Supreme Court in *R. v. Sappier; R. v. Gray*, [2006] 2 S.C.R. 686 at para. 51 recognized that “all harvesting activities are land and water based” (emphasis added).

Given that Aboriginal rights to waters have existed from time immemorial, on what basis could the government claim to have extinguished these inherent rights? According to settler law, Aboriginal rights can only be extinguished through treaty, surrender or express legislation that states a “clear and plain intention” to do so. A number of questions arise in this context: Did

Aboriginal peoples in Alberta agree to give up their water rights through statements in treaties? Did the Crown extinguish Aboriginal water rights by legislation? Were Aboriginal rights to water extinguished by the 1930 *Natural Resources Transfer Agreement (NRTA)*? If the answers to these questions are negative, then Aboriginal water rights still exist.

The first 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”, the text of the older treaties (including the Alberta Numbered Treaties) does not expressly mention waters, with the exception of a clause in Treaty 7 reserving to the Crown certain rights to the rivers of the reserves set aside for the First Nations. This was understandable in that water was not viewed as separate from the land promised to First Nations, and the promise of the treaties was to build sustainable communities and to ensure both a traditional and an agricultural livelihood from the land. It appears to have been the common intention of the parties to the Alberta treaties that the First Nations would remain economically self-sufficient, by practicing agriculture and stock raising, and/or by continuing to gain a livelihood from traditional activities such as hunting, trapping and fishing: see Richard Bartlett, *Aboriginal Water Rights in Canada: A Study of Aboriginal Title to Water and Indian Water Rights* (Calgary, Canadian Institute of Resources Law, 1988), at 25-28 and Graham Statt, “Tapping into Water Rights: An Exploration of Native Entitlement in the Treaty 8 Area of Northern Alberta”, (2003) *Canadian J. L. & Soc.* 103 at 115-116. This is confirmed by the written provisions of the treaties and by historical evidence of oral promises made at the time of treaty-making. Indeed, it may be suggested that the right to water was affirmed as an incidental right, given the fundamental need for water to exercise the treaty rights granted.

The second question to be debated is whether Aboriginal water rights have been extinguished by legislation. The test for extinguishment of Aboriginal rights before 1982, as stated in *Calder* and confirmed by Chief Justice Dickson (as he then was) 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”: *Calder v. British Columbia (A.-G.)*, [1973] S.C.R. 313, 34 D.L.R. (3rd) 145; *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1099. The simple answer is that there has been no competent legislation that expresses a “clear and plain intention” to eliminate Aboriginal rights to water. The *Indian Act* (1876), S.C. 1876, c. 18 and the successor statutes were passed by the federal Parliament in accordance with its constitutional authority under subsection 91(24) of the *Constitution Act 1867*. The *Indian Act* did not mention Aboriginal water rights (aside from Band Councils’ powers to approve the construction and maintenance of watercourses and the construction and regulation of water supplies), let alone extinguish them. The *NWIA* which asserted federal ownership of surface waters (1895 amendment) in the Prairie Provinces, was passed to ensure access to irrigation and encourage settlement. The *NWIA* did not mention, let alone expressly revoke, Aboriginal water rights. Indeed, the declaration in section 2 of an exclusive property interest was made subject to prior rights inconsistent with the Crown’s deemed vesting. Section 2 of *NWIA* (S.C. 1895, c. 33) reads:

The property in and the right to the use of all the water at any time in any stream ... be deemed to be vested in the Crown unless and until and except so far as some right therein, or to the use thereof, inconsistent with the right of the Crown and which is not a public right or a right common to the public is established; and, save in the exercise of any legal right existing at the time.(emphasis added)

The *NWIA* was enacted while treaty negotiations were ongoing in what is now Alberta. The lands to which the Act applied were either subject to Treaty (the lands encompassed within Treaties 6 and 7, signed respectively in 1876 and 1877), or subject to subsisting Aboriginal title (the lands

later encompassed within Treaty 8, signed in 1899). As Richard Bartlett has suggested, it would take “a highly disenchanted view of federal policy” to suggest that the *NWIA* aimed to extinguish Aboriginal water rights while treaty negotiations were ongoing and while government representatives were promising Aboriginal peoples continued use of and access to waterways for transportation, fishing, and everyday use as well as promoting reserve lands for agricultural uses which would require adequate water in order to be successful (Bartlett, *Aboriginal Water Rights* at 163 to 164).

The third question that arises is whether Aboriginal water rights were extinguished or modified by the *Natural Resources Transfer Agreement (NRTA)*. Alberta was established in 1905 by the *Alberta Act*, S.C. 1905, c. 3, but the province did not have authority over lands and resources within its borders. An agreement was reached to transfer certain lands and resources to the province under the *NRTA*. The list of resources transferred did not specifically include waters and it was not until 1938 that the agreement was amended to “clarify” that surface water was included in the transfer in the *Natural Resources Transfer (Amendment) Act 1938*, S.C. 1938, c. 36. Further, groundwater was originally not included. It was not until 1962 that Alberta claimed jurisdiction over all surface and subsurface waters by simply including ground water in the types of water regulated by provincial legislation: *Water Resources Amendment Act*, S.A. 1962, c., s. 2.

All of these transfers were qualified as the resources were transferred in Clause 1 as being “subject to any trusts existing in respect thereof, and to any interest other than that of the [federal] Crown in the same.” This clause is similar to s. 109 of the *Constitution Act, 1867*. In *Delgamuukw*, Chief Justice Lamer confirmed in para. 175, that s. 109 of the *Constitution Act, 1867* “qualifies provincial ownership by making it subject to the “any Interest other than that of the Province in the same”” and he refers to the *St. Catherine’s Milling* case, where the Privy Council held that Aboriginal title was such an interest and found that provinces can only acquire beneficial title upon the surrender of Aboriginal lands by treaty and characterized Aboriginal title as a prior burden on Crown title: *St. Catherine’s Milling and Lumber Co. v. The Queen (1888)*, 14 A.C. 46, pp. 118 and 123-124. Aboriginal title and Aboriginal rights to water, to the extent that they were unextinguished, are clearly interests “other than that of the Crown” and thus protected from extinguishment under Clause 1 of the *NRTA*.

Clause 10 of the *NRTA* speaks of Indian reserves then existing, and the resources located on the reserves as continuing to be vested in the federal Crown. That clause goes on to say that further Indian reserves may also be set aside: “[...] to enable Canada to fulfil its obligations under the treaties with the Indians of the Province, and such areas shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province under the provisions hereof.” (emphasis added). This suggests that any transfers of resources, including water, were revocable by the federal Crown and hence there was no effective transfer of resources of any kind on reserve lands whenever the reserve was established.

Justice Cory, in dissent on a different point in *Canada (Director of Soldier Settlement) v. Snider Estate*, [1991] 2 S.C.R. 481 noted at para. 96 that:

This Agreement has been incorporated into the Constitution of Canada as Schedule 2 of the *Constitution Act, 1930*. Paragraph 1 of the Agreement transferred the federal government's interest “. . . in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom . . .” to Alberta. Certain lands were excluded from the transfer. These included Indian reserves . . . (emphasis added).

We can conclude from the preceding discussion that it is highly unlikely that Aboriginal and/or treaty rights to water were ever ceded or extinguished. If anything, the treaties actually confirmed existing water rights, although they admittedly modified these rights. And neither the *NWIA* nor the *NRTA* show a clear and plain intention to extinguish the water rights held by Aboriginal peoples.

What is the nature and scope of the water rights asserted by Aboriginal peoples?

Aboriginal peoples in Alberta assert that they have water rights both on reserve lands and on traditional lands. While the existence of some of these rights is accepted by government, many others are not. In the various lawsuits that they have launched against the Alberta and the federal governments (as outlined below), First Nations are claiming an extensive array of rights to water. Asserted water rights can be categorized as outlined below.

First, there are rights to a traditional livelihood, including rights to hunt, fish, trap and gather, but also domestic uses (drinking, washing, watering animals), navigation, as well as cultural, spiritual, and ceremonial uses. As stated earlier, the treaties guaranteed that Aboriginal peoples would retain the right to live off the land, either by relying on their traditional activities or by engaging in stock raising and agriculture. Aboriginal peoples were promised that their way of life would remain substantially the same, and that they would not be confined to reserves. Water was essential to that way of life. Not only is the survival of fish and wildlife populations dependent on water, access to waterways is also indispensable for the exercise of the above-mentioned uses. These rights exist both on and off reserves (on lands not “taken up”). Implicit in the treaty rights to water is the continued ability to exercise the rights. This means that water must be of a sufficient quantity and quality to support these uses. In addition, water rights give rise to governance rights: the right and responsibility to make decisions grounded in Aboriginal laws and customs.

In the second category are rights to the use of water for agricultural, commercial and industrial purposes, e.g. irrigation and hydroelectric development. These rights exist on reserve lands. The treaties contained no express reference to water or water rights in the surrender or in the reservation of lands, but declared that the object of the reserves was to encourage agriculture and cattle raising. Scholars have argued that there is a presumption that water rights were appropriated along with reserve lands. In particular, Bartlett wrote in 1988 that the object of the provision of reserves was “to enable the aboriginal people to become a settled and “civilized” people in the European manner, and to encourage the adoption of non-traditional as well as traditional uses of the land and water” (Bartlett, *Aboriginal Water Rights* at 20). He noted that the water rights on reservations in the United States are founded upon interpretive principles that are similar to the ones adopted by the Supreme Court of Canada. The leading U.S. case in this respect is *Winters v. United States*, 207 U.S. 564 (1908), involving the construction of dams or reservoirs on the Milk River in the state of Montana. In Bartlett’s view:

The treaties and agreements with Indians in Canada promised lands for farming and other developments, and the maintenance of hunting, trapping and fishing. Ordinary principles of interpretation require that water rights be implied in the undertakings given by the Crown. Without water rights, the promises made by the Crown cannot be fulfilled. Reference to principles requiring a “fair, large and liberal construction” and regard for the Indian understanding of the treaties and agreements affirm that conclusion. (Bartlett, *Aboriginal Rights to Water* at 35).

The modern uses of water on reserves cannot be restricted to those uses (e.g. irrigation) that sustain agriculture or cattle raising. They may include other water uses needed to support commercial or industrial developments that may provide a livelihood for First Nations.

The third category of water rights asserted by Aboriginal peoples is riparian rights. In addition to the above-mentioned water rights, Aboriginal peoples benefit from riparian rights on reserves (Bartlett, *Aboriginal Water Rights* at 49-51). At the time Treaties 6 and 7 were negotiated, the common law was the law of riparian rights. Because reserve lands are held for the use and benefit of the respective First Nations, First Nations are the lawful riparian land owners and holders of riparian rights. Riparian rights include rights of access to water, rights to drain surface water from adjacent land into the water body, rights to the natural flow of water, rights to the quality of water, rights to use the water for both “domestic” and “extraordinary” purposes (with some limitations), and rights of accretion: Statt, “Tapping into Water Rights” at 111.

A fourth category of rights is based on ownership of the waterbeds. There is a common law rule of presumption of riparian ownership of the beds of non-tidal rivers and streams. Riparian owners own the bed of the river in equal half *ad medium filum aquae* – to the centre thread or channel of the stream. In Western Canada, the common law presumption has been held to only apply to non-navigable waters. It is unclear whether the presumption applies to Indian Reserves, see: *R. v. Lewis* [1996] 1 S.C.R. 921 at paragraphs 61 to 62; and *R. v. Nikal* [1996] 1 S.C.R. 1013. In 1988, Bartlett suggested that the granting of reserves to Indian bands “was made upon the understanding that traditional hunting, fishing and trapping would entail substantial use and dependence upon the water-bed or foreshore and, accordingly, it may be considered to pass with the setting apart of riparian lands, irrespective of a presumption to the same effect” (Bartlett, *Aboriginal Water Rights* at 93). The rights arising from ownership of the waterbed and the foreshore are quite extensive. They include the right to erect anything thereon: wharf, bridge, dam or diversion projects. In addition, the owner of the bed has the exclusive right to hunt, trap and fish over the waters, subject to applicable game and fishing laws. The question of Aboriginal ownership of the beds and shores of rivers and lakes on reserve lands remains unsettled. As stated below, this issue has recently been brought to the courts by the Stoney Nakoda Nations.

Alberta cases in relation to asserted Aboriginal and treaty water rights

The ongoing uncertainty surrounding the legal recognition of their asserted rights to water has compelled First Nations in Alberta to resort to the courts. In 1986, the Piikani launched a lawsuit against the Alberta government as a result of Alberta’s proposed construction of a dam and reservoir (the Oldman River Dam) upstream from its reserve. The Band claimed that it had rights to appropriate water for its reasonable needs, that the riverbed of the Oldman River formed part of the reserve, and that the construction of the dam and reservoir would change the flow and quality of the Oldman River through the reserve and interfere with the Band’s water or riparian rights: *Peigan Indian Band v. Alberta*, [1998] A.J. No. 1108 (QB), paras. 14-16. However, the issue of the nature and extent of the Piikani’s water rights, including their ownership of the riverbed, was never resolved by the courts. All legal challenges against Alberta and Canada were discontinued when the Piikani entered into a settlement agreement with both levels of government in 2002: *Settlement Agreement dated the 16th of July 2002 among: Her Majesty the Queen in Right of Canada and the Piikani Nation and Her Majesty the Queen in Right of Alberta*, Section J – The Action. (24.1 and 24.2). For a discussion of the Piikani settlement agreement, see Merrell-Ann S. Phare, *Denying the Source – The Crisis of First Nations Water Rights* (Surrey: Rocky Mountain Books, 2009), at 1-8; Vivienne Beisel, “Do Not Take them

From Myself and My Children Forever”: Aboriginal Water Rights in Treaty 7 Territories and the Duty to Consult, LL.M. Thesis (Saskatoon: University of Saskatchewan, April 2008), at 66-69.

More recently, other First Nations have initiated legal challenges against both the provincial and the federal government in relation to their asserted water rights. The Stoney Nakoda Nations are advancing an express challenge to Alberta’s assertion of ownership and jurisdiction over lands and waters under the *NRTA*: Alberta Court of Queen’s Bench, Action No. 0601-14544. The First Nations are claiming ownership of lands and waters, including waterbeds, on reserves. This is a broad and extensive challenge to the validity of Alberta’s position. Another action claims Aboriginal title, Aboriginal rights and treaty rights in surface and subsurface waters in lands off reserve within the traditional territory of the Nations: Alberta Court of Queen’s Bench, Action No. 0301-19586.

Further, the Tsuu T’ina and Samson Cree have challenged the Water Management Plan for the South Saskatchewan River, on the grounds that the Plan has been developed and adopted without proper and adequate consultation with them, and does not adequately accommodate their existing rights to use and enjoy their reserve lands, their hunting and fishing rights, and their asserted Treaty water rights: ACQB 0701-02170 and 0701-02169. A Court of Queen’s Bench chambers decision, handed down in 2008, rejected the claims of the First Nations: *Tsuu T’ina First Nation v. Alberta*, 2008 ABQB 547, 453 A.R. 114, [2009] 2 W.W.R. 735, 96 Alta. L.R. (4th) 65 at para. 152 to 155. Justice Sal LoVecchio held, in part, that the Water Management Plan was a completed approval, not an anticipated one, and further that it had minimal, if any, adverse impact on the water use of the First Nations. For a comment on the decision, see Nigel Bankes, Water management planning and the Crown’s duty to consult and accommodate.

An appeal of the decision was heard in November 2009, with reasons delivered on April 28, 2010 in *Tsuu T’ina Nation v. Alberta (Environment)*, 2010 ABCA 137. The Court of Appeal noted the separate ongoing litigation over the substantive claims brought by the Tsuu T’ina First Nation in a Statement of Claim filed in 2007. The case under appeal was an administrative law challenge to the adequacy of the consultation launched by way of Originating Notice. The Court of Appeal dismissed the appeal, with some misgivings about the negotiating tactics of Alberta Environment (at para. 129). The decision included an *obiter* clarification as to Justice LoVecchio’s characterization of a completed action, as the Court of Appeal said that completed legislative actions were *not* immunized from a consultation requirement (para. 56 and 57). For a comment on the Court of Appeal decision, see Nigel Bankes, Water management planning and the Crown’s duty to consult and accommodate: the Court of Appeal rejects First Nations’ application for judicial review of the South Saskatchewan Water Management Plan.

For its part, the Beaver Lake Cree Nation has commenced an action against the provincial and federal governments on different grounds: *Beaver Lake Cree Nation v. Alberta and Canada*, ACQB Action No. 0803-06718. The significant legal argument is that, while particular resource development approvals may have included some consultation with First Nations (although the bulk have not), the cumulative impacts of multiple project approvals have resulted in a denial of and infringement of treaty rights to hunt, fish, trap for subsistence and for cultural, social and spiritual needs. The boreal forest, which is the homeland of the First Nation, is an intricate ecosystem of bogs, fens, marshes and forest in which water is a key component of the ecosystem. The clear cumulative consequences from multiple development projects on the environment have been the loss of fishing and hunting rights (in that waters in the boreal forest are needed to support wildlife) in violation of treaty rights that affirm existing Aboriginal rights.

Conclusion

Aboriginal conceptions of water stewardship and governance have much to contribute to Canadian law. The concept of water stewardship as a collective responsibility, embraced in the Northwest Territories' *Northern Voices, Northern Waters NWT Water Stewardship Strategy* reflects Aboriginal understandings. The Strategy is founded on a collaborative partnership approach that includes Aboriginal governments and states its intention to support existing rights and improve the decision-making processes of all parties involved in water stewardship in the NWT. To date, any framework that acknowledges Aboriginal concerns and rights to water have not been forthcoming from either the provincial or federal levels of government.

Why this is so is puzzling. The continued existence of Aboriginal water rights, as argued in this comment, highlights the need for negotiation and consultation with Aboriginal peoples leading to true accommodation of their rights and involvement regarding water use and management. Until this happens, Aboriginal peoples will have little recourse but to engage in continuing litigation.