BRIDGE OVER TROUBLED WATERS:

Canadian Law on Aboriginal and Treaty "Water" Rights, and the Great Lakes Annex

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SUMMARY

This paper is a critical analysis of how the Annex Regime could affect aboriginal and treaty rights in Ontario. It is a paper about aboriginal and treaty rights to and dependent on water.

The "Annex Regime" is a set of proposed agreements (and implementing laws) that would create a scheme for permitting large water withdrawals from the Great Lakes Basin where certain criteria are met. These criteria comprise the "Standard" to assess the potential impacts of the proposed withdrawal. Withdrawals are classified as "consumptive use" (water taken and lost or not returned) and diversions (water diverted by pipeline, canal or other means from one area for use in another, with the assumption, one supposes, that one way or the other most of such water would eventually be returned from where it was taken – not in the same condition).

There is a non-binding "Annex Agreement" between all eight US Great Lakes states and the Provinces of Ontario and Quebec; and an "Annex Compact" binding as between the states alone.

The Annex Agreement proposes that each of the ten jurisdictions would have to assess applications for water withdrawals and diversions of over 100,000 gallons per day in accordance with the Standard, and regulate these. Where proposed withdrawals are much larger than this (consumptive use of over 3 million gallons a day, and diversions of over 1 million gallons a day), they would be assessed by a Regional Body composed of each of the eight governors and the two premiers or their designates. This Regional Body would assess the proposal in accordance with the Standard and render a finding as to whether or not the application should be approved (or under what conditions it could be approved). This finding does not bind any of the jurisdictions; the ultimate decision is made by the jurisdiction from which the application arose.

The Compact is almost the same, but also creates a Council (of the eight governors or their designates) which makes a binding decision on the consumptive uses and diversions subject to regional review. Each of the governors has a veto over any proposed diversion subject to this review, and three of eight governors acting together can veto any proposed consumptive use. Neither Ontario nor Quebec has any such veto over any proposal subject to regional review.

The Standard has seven criteria, which include a requirement to return some flow to the waters from which the water was taken; there can be no reasonable alternative to the water withdrawal; the quantity of water taken must be reasonable (for its intended use); and there cannot be significant adverse impacts (individual or cumulative).

There have been a number of criticism of the Annex Regime, including that it is too permissive (e.g., does not prevent further withdrawals, does not apply to existing withdrawals); too narrow (does not apply to water quality but only quantity); would create obligations under trade law to allow withdrawals by jurisdictions not in the Basin; and the decision-making regime is unfair and ineffective.

An outline of the Annex Regime and relevant instruments is attached as Appendix A. An outline of the criticisms of and concerns with the Annex is attached as Appendix B. An outline of

Canada's and Ontario's jurisdiction over, and current stated position in respect of the Regime is attached as Appendix C.

There was almost no involvement of aboriginal peoples in the development of the Annex Regime, and there has been inadequate involvement in the comment and review period. The Regime, if adopted, proposes that this lack of meaningful involvement and voice would continue. Consultation requirements are minimal, and there is no direct voice for aboriginal peoples contemplated within any regional review body or in any other capacity in this Regime.

The paper has four major parts:

- Overview of the law on aboriginal and treaty rights in Canada (from common law to constitutional law).
- Overview of "water law" (mostly common law) in Ontario.
- Analysis of aboriginal and treaty rights in relation to water and Canadian water law.
- Analysis of potential effects of Annex Regime on aboriginal and treaty rights.

"Common law" means law as decided by courts, based on fundamental principles and precedents. Legislation can override the common law. However, all legislation must be within the parameters of the Constitution, and courts can decide whether it is or not.

Before proceeding to summarize this paper, I must emphasize two underlying paradoxes.

First, this analysis is of Canadian-made law, the law as developed primarily by and under English. This "English" law, at its earlier stages, recognized indigenous peoples as distinct self-governing societies occupying their own lands in North America, with the right to do so. Here is the paradox. English law (judge-made and legislature-made) in what became Canada changed, not necessarily by precedent or for legitimate purposes, but for pragmatic reasons: to meet the needs or demands of the European settlers. As settlers demanded more land and resources, it had to come from somewhere or from someone. It came from, of course, indigenous peoples. Much of this taking away from indigenous peoples to give to European people had no basis in properly-applied law. This taking became a fact – a pervasive fact. And this fact seems now to be simply accepted as law (because "it's here"). Put another way, Canadian law in respect of aboriginal peoples seems to be built in part on facts (circumstances) that should never have been allowed by law.

The second paradox is this: As soon as one accepts that there were existing self-governing societies, which were not conquered, how therefore does one assume that one's legal, political, cultural and linguistic rules should or could "legally" apply to determine the rights of the self-governing societies? Applying one's own rules and perspectives to self-governing others creates a hierarchy which of itself denies equality; further, it is submitted, the application of this hierarchy in Canada has often exacerbated the inequality and has subjugated aboriginal peoples.

Therefore, any proper analysis of Canadian law today has to examine both the factual and legal underpinnings to attempt to sort out what might be valid from what was derived contrary to law: from political pragmatism, misunderstanding, and even, sometimes, greed.

Canadian law must today reconcile three things: assertion of Crown sovereignty (perhaps or even likely without right); the taking of so much from indigenous peoples, often without right; and the fact that indigenous peoples had and have the right to survive here in their own societies as their own peoples. Courts and governments have an obligation to reconcile so as to rectify the egregious wrongs. To do anything else is unconstitutional, because the first principle of constitutional law is the Rule of Law.[1]

Part One

The Canadian-made law on aboriginal and treaty rights is developing, and cannot in any way be considered set in stone. This law has been developing in significant ways particularly since aboriginal and treaty rights were entrenched in the Constitution in 1982. Courts are grappling with how to reconcile the fact that self-governing aboriginal societies were here occupying and living on and by the lands and waters for centuries, with the fact of assertion of British sovereignty over aboriginal peoples. To have been legally valid (according to the imperial law of Britain and international law at the time), such assertion of sovereignty would have required either the conquest of aboriginal peoples, or settlement on lands that were "terra nullius" (not occupied, or at least not occupied by organized societies), or ceding of sovereignty through treaty None of these circumstances existed.[2]

These two facts may be irreconcilable in the end, since there is strong evidence that there was a tenuous basis in law at best (and likely no legal basis) for the assertion of British sovereignty over aboriginal societies as self-governing units (ie: British law could not govern where indigenous law was already governing its own people).

The British (and later Canadian) Crown did acquire title to areas of lands and waters that had belonged to aboriginal peoples, largely through treaties where such tracts were ceded and surrendered. But there is good evidence that all the treaties did and were intended to do was pass incidents of ownership to lands and waters, and nothing more (i.e., there was no subjecting of indigenous peoples to the governing powers of the Crown). And there is evidence that even ceding of title, as title was and is understood by Europeans and Euro-Canadians, may not have been intended by aboriginal parties. Just what was acquired and what was reserved or retained by aboriginal peoples (both in respect of aspects of title, and in respect of self-governance and exercise of other societal/cultural rights) remains very unclear in Canadian law.

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[1] The Rule of Law is part of Canada's written constitution, but is also considered an unwritten constitutional convention by which "government officials must act in accordance with the law": peter Hogg, Constitutional Law of Canada (looseleaf: Toronto, Carswell) at 1-2. Hogg goes on to state that this requires an independent judiciary. To be independent, judges must decide law in accordance with principles of justice, and precedent, and not as a result of political persuasion or the persuasion of politically-motivated circumstances. See also the Manitoba Language Reference, [1985] 1 SCR 721 where the Court decided the case on the "rule of law" as an unwritten foundation of the constitution. It found that one aspect of the rule of law is that a community must be governed by law.

[2] See R. v. Van der Peet, [1996] 2 SCR 507 at para 109 where L'Heureux Dube J. notes: "there is still debate as to whether the land was indeed free for occupation." It is difficult to imagine how there could be such debate, especially given judicial pronouncements about the existence of aboriginal societies in North America when Europeans arrived. See infra. One supposes any such debate is an attempt to find some legal basis for assertion of British sovereignty. There could well be none.

This paper posits that current Canadian courts have often misunderstood and misapplied both facts and law that existed at the times of arrival of Europeans in North America, assertion of British sovereignty, and treaty-making. Yet, courts today rely on the law and facts from these past dates to determine and define the rights of aboriginal peoples today. To the extent they get it wrong, courts today render judgments that are wrong in law.

It is fair to say that Canadian law in respect of these rights will continue to develop as more is understood, as it becomes increasingly apparent that the law in its current state is not respecting aboriginal rights and peoples (and as such, they continue to be abused and oppressed), and as aboriginal peoples continue to bring challenges to attempt to rectify this untenable situation. Thus, the first part of this paper also contains a critique of the Canadian-made law and how it should have developed, and should develop in the future.

Part Two

Aboriginal rights in relation to water including title to waterbeds, and other rights that depend on access to and use of water, have been analysed by Canadian courts within the context of the English common law of water -- since aboriginal rights were, until 1982, considered as part of the English common law. Thus, this part of the paper outlines how English common law in respect of water developed and was applied in Ontario.

Part Three

The third part of the paper contains a critical analysis of the law of water rights of aboriginal peoples, bringing together the first and second parts of the paper. It is shown here that because Canadian law in respect of aboriginal and treaty rights has often been based on misunderstandings, including of the relationship between the English common law of water and the English common law in respect of aboriginal peoples and their rights, water rights of aboriginal peoples are in fact greater than is currently recognized. If facts and law are properly understood and applied, aboriginal peoples have significant rights in respect of the Great Lake Basin.

Following is an outline of the arguments as to how the law should properly be understood, and following each argument, a synopsis of how the law is actually understood or applied at present.

How aboriginal rights pertaining to water should be regarded:

- The so-called assertion of British sovereignty over aboriginal peoples (i.e.; the right to govern aboriginal peoples on their lands, exercising their rights) was not valid as there was no basis in law at the time for this. Only British *title* to certain aboriginal lands was acquired through treaties, and almost none of these lands were lakebeds of the Great Lakes Thus, in all respects relating to unsurrendered or reserved title lands, and in respect of all rights of aboriginal peoples to live by their own cultures and to govern themselves in so doing (including in regard to fishing, hunting, and all other harvesting), neither the federal nor provincial governments have any right to govern.

  This is not how Canadian law currently perceives the situation, and thus having this perspective accepted in Canadian law (if it ever were to be) will take time and effort. In

the interim, the fact that this argument has merit could be used in negotiating with governments about developing recognition of rights.

- If British sovereignty can be perceived as legitimately asserted in respect of lands held under aboriginal title, allowing some degree of governance and regulation of these lands by Canadian governments, then Canadian governments and courts today must apply the law and facts as they existed when such title was considered to have been recognized by English common law. To do anything else is a violation of *English* law. British imperial law itself regarded aboriginal peoples as governing themselves (in their own territories exercising their own rights) in distinct and separate units. They were not subject to the same British colonial (or "municipal"[3]) law as was applied to settlers. Further, British colonial law adapted to the unique North American (later, Canadian) situation under the "particular or local custom" rule, which would and should recognize these unique aboriginal rights as defined from the aboriginal perspective. Where aboriginal peoples considered themselves to have held title to the waterbed, or exclusive rights to the waters, and this title can be proved to have not been surrendered or extinguished (including on reserves), then it exists today.

  Canadian courts appear to accept that aboriginal title does include title to waterbeds of non-navigable waters where historic exclusive occupancy of the waters can be proved, but have been reluctant to accept it existed in *non-tidal navigable* waters (and even more so, in tidal waters) after introduction of English common law. This reluctance is not based on a proper understanding of the law at the time, and should be corrected.

- All aboriginal title lands (including reserves) carry paramount rights (akin to US doctrine) to *use of* water *feeding and bordering* the lands. These are akin to but greater than riparian rights (which are shared rights "reduced" by the rights of other riparian owners), where aboriginal uses are paramount over (not reduced by) the interests of non-aboriginal users of the water. Even though aboriginal title was perceived as part of the British/Canadian common law, and riparian rights were also a part of this law, given the purpose of s. 35 of the Constitution to reconcile the assertion of British sovereignty with the fact of pre-existing self-governing aboriginal societies, these rights should be considered paramount. Only the narrowest (and least accurate and least just) interpretation of the law would result in application of bare riparian rights to aboriginal title and reserve lands bordering a shoreline. Riparian rights themselves can lead to significant power to prevent the taking and diverting of water by others.

  Canadian law currently favours the narrowest interpretation for reserve lands (i.e.: they come with riparian rights where the reserve extends to the water's edge) but this issue is evolving and if law is properly applied, should evolve toward paramount rights to use of water.

How Canadian governments should interact with these rights (once properly defined):

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[3] The reference to municipal law in this context has the meaning applied in the field of international law, and it means domestic law.

- Section 91(24) of the Constitution provides the federal government with exclusive jurisdiction to govern in respect of "Indians, and lands reserved for Indians" (two separate heads of authority). Section 88 of the Indian Act (a federal law) gives certain provincial laws the force of federal law if they meet certain criteria. In this way, these provincial laws can apply to affect rights held by aboriginal people – otherwise, they could not.

- Section 88 of the Indian Act does not give provincial law federal force so as to make it apply to "lands reserved for Indians". Only the federal government may regulate or infringe rights in respect of Indian reserve lands and unsurrendered aboriginal title lands. Water is an aspect of "land", and thus rights to the waterbed and rights akin to riparian rights are land or "property" rights. Thus, only the federal government may regulate in respect of such Indian water rights, on reserves, and on unsurrendered aboriginal title lands. Provincial governments may not so regulate and any provincial regulation that purports to limit or affect such water rights should be ultra vires the province as unconstitutional.

  It is unsettled in Canadian law whether s. 88 of the Indian Act gives federal force to provincial law (thus allowing such law to apply) in respect of aboriginal title and reserve lands. Rights to water and waterbeds are generally considered land or property rights, but Canadian law has barely dealt with the issue of such rights as held by aboriginal peoples, nor has it dealt much with which level of Canadian government can regulate in respect of such water rights.

- In respect of "Indians" (aboriginal peoples), only the federal government can regulate or infringe treaty rights, because s. 88 of the Indian Act does not give federal force to provincial laws that are inconsistent with *treaty* rights. Further, s. 88 of the Indian Act is unconstitutional to the extent it allows provincial governments to regulate *aboriginal* rights, or infringe on these where such infringement would impair the status or capacity of aboriginal peoples as peoples. These rights are at the very core of "Indianness", and thus within the exclusive jurisdiction of the federal government pursuant to s. 91(24) of the Constitution.

  The law seems more weighted toward prohibiting any provincial infringement of any treaty right, except in the prairie provinces which are in a unique situation given the *Natural Resources Transfer Act* as noted below. As for any ability of provincial governments to infringe aboriginal rights, courts have held this is permissible, but the Supreme Court of Canada has not yet considered all the implications of this, especially in regard to s. 88. A case to be argued before the Supreme Court of Canada in the near future, *Morris*, might provide some clarity once decided.

- Any government that intends to infringe aboriginal and treaty rights must justify the infringement. Whether or not only the federal government is permitted to so infringe, the test for justifying infringement (by any government) of rights in relation to water must be very strict. Water feeds all aspects of life (the lifeblood of Mother Earth), and of "society" or social organization (navigation or mobility, health, culture, economy, and the ability to self-govern in respect of these). Rights to a quantity and quality of water sufficient to sustain life and society are prerequisite to and necessary for virtually all

other aboriginal rights and treaty rights. Given this, rights to water and rights directly reliant on water should be prioritized over any other private rights (and, possibly, co-exist with certain public rights, such as to navigation).

Since the law in respect of water rights is inconsistent and in flux, so too is the law in regard to justifying infringement of such rights. Again, if such law properly applies facts and properly respects the nature of aboriginal rights, "reconciling" requires a very high threshold for justification.

Part Four

The final part of the paper explores how the Annex Regime could affect aboriginal and treaty rights in respect of or that depend on water.

The conclusion is reached that since these "water rights" are properly understood as significant and profound, aboriginal people must have a direct decision-making voice in any water regime governing the Great Lakes. In some cases, arguably they must have a veto (their consent must be required before any actions are taken that could affect such rights). Further, both since these aboriginal rights are so significant, and since little is known about current impacts on the Great Lakes and needs of the Lakes to be viable (e.g.; how much water is being taken now, what harm is being done now, and just how much further we can go before impacts become permanent and too threatening to economic, cultural and physical well-being or survival), it is recommended here that that no further larger-scale water withdrawals or diversions should be permitted. The risk to serious impairment of aboriginal rights and cultural survival as peoples is too great otherwise.

INTRODUCTION: GREAT LAKES FACTS AND HISTORY

The Great Lakes Basin forms the environmental, cultural and economic lifeblood of a good portion of Canada and the US, including indigenous peoples. Threats to the physical or environmental integrity of the Basin or parts of it thus threaten the viability of societies, ways of life, economies and cultures. Protecting the integrity of the Basin is about much more than water.

The five Great Lakes (Superior, Michigan, Huron, Erie and Ontario) span about 1200 kilometres from west to east, with most of their waters emptying into the St. Lawrence and out to the Atlantic Ocean. They hold about 20% of the world's surface freshwater.

The glaciers in the last ice age, about 10,000 years ago, scoured out the land to form the basins of the Great Lakes and deposited the water in the basins. Less than 1% of the waters in the Great Lakes is renewed each year by precipitation and run-off. It is only this 1% that we should "live off" – it is the interest income on the capital.

The Basin includes the Great Lakes themselves, as well the rivers, streams and smaller lakes that drain into them. The entire Basin occupies about 775,000 square kilometers. On the Canadian side, the Basin extends from north of Lake Nipigon to the southern shore of Pelee Island in Lake Erie, and from just west of Thunder Bay east to Ontario-Quebec border.

Maps of the Basin and the ice age effect are found in Appendix D.

About 33 million people inhabit the Basin (about 75% of Ontario's population), and about 45% of Canada's industries are located in the Basin, accounting for about 50% of the trade between Canada and the US.

Indigenous peoples – Cree, Ojibwe, Ottawa, Potawatomi, Chippewa, Algonquin, Haudenausenee/Iroquois, Mississauga, Wyandot/Huron and others – have occupied areas of the Basin for thousands of years. The English and French both sought alliances with indigenous peoples for military, trade and other purposes. Treaties were signed.

Today, about 350,000 aboriginal people, descendants of the first peoples, live in "reserves" in the Basin; with about 60% of the reserves along shorelines.

While there are many differences between indigenous cultures and societies, there is a common link among them all in regard to their relationship with lands and waters, and the determining role of this relationship in their identity and way of life. This worldview, of holistic integration or embeddedness of environment and human, is distinctly different from the Euro-North American worldview. The latter is hierarchical and fragmented, assuming human existence and identity apart from, above and dominating the environment, which in turns leads to exploitation and justification for same.

"Water calls forth all life and is required to sustain all other life. Knowledge of this simple truth forms the foundation of Indigenous laws and responsibility to caretake water."[4] Yet this indigenous worldview, and the relationship it engenders and cultural survival needs it entails, has been almost completely ignored in North American law, policy and practice.

Nonetheless, Euro-North Americans have had to begin the process of coming to grips with the reality of our ultimate dependence on the natural world, especially water, for our very existence, and with the fact that this world is ever-more threatened. The Basin itself has become polluted, depleted and its ecosystems are at serious risk. The Basin has lost almost 60% of its wetlands, and about 160 foreign invasive species have intruded the Basin. Great Lakes residents are some of the largest consumers, and wasters, of water in the world. Freshwater around the world is becoming polluted and depleted at an alarming rate, increasing the pressure to apply principles of privatization and global trade to what is left so that it can be moved to areas of short supply.

Canada and the US recognized certain threats to and needs for preservation of the integrity of the Great Lakes at the beginning of the 1900s when they entered into the Boundary Waters Treaty. This Treaty contains protection principles and measures to address threats to both water quality and quantity. Threats continued to water quality, and the first Great Lakes Water Quality Agreement was signed by the two nations in 1972.

In the last 30 years, threats have also occurred against water quantity in the Basin, which have sparked the Great Lakes Annex regime (outlined in next section).

Threats to the integrity of the Basin affect indigenous peoples more than anyone because their lives and ways of life are intimately tied to the lands and waters through a special stewardship relationship with Mother Earth. Where go the lands and waters, so too go the essence and cultures of many indigenous peoples as peoples. These threats comprise one of the greatest assimilative forces against indigenous peoples in the Basin in this century. Unless and until Canadian and American jurisdictions truly respect this fact and act with honour to address the needs of and threats to indigenous peoples, no water regime for the basin can be considered legitimate.

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[4] Ardith Walkem, "Indigenous Peoples Water Rights: Challenges and Opportunities in an Era of Increased North American Integration", in Canada and the New American Empire, p. 1.

A. ABORIGINAL AND TREATY RIGHTS: AN OVERVIEW

Following is an overview and analysis or critique of Canadian law on aboriginal and treaty rights. This law exists and has effectively been imposed on aboriginal peoples in Canada. There are many indigenous peoples and individuals, and others including the author of this paper, who hold that the rights and interests of indigenous peoples should be determined pursuant to indigenous peoples' own self-determined laws and governance, and pursuant to international law reconstituted to respect such self-determination. British (and later Canadian) assertion of sovereignty over indigenous peoples is tenuously grounded at best, and likely illegitimate – according to Britain's own imperial laws at the time, and certainly according to indigenous peoples' laws and perspectives.

Since water is the source of all life -- lifeblood of Mother Earth -- virtually all rights of aboriginal peoples are dependent on a viable and sufficient quantity and quality of water.

Canadian aboriginal law (as distinct from indigenous law as determined by indigenous peoples) is in a state of flux. Courts attempt to reconcile the existence, for thousands of years, of self-governing aboriginal societies, who occupied and lived of and by the lands and waters, with the assertion of British (then Canadian) sovereignty over aboriginal peoples. In the end, this might not be reconcilable – if peoples were and continue to have the right to be self-determining, how can another government and set of laws be legitimately imposed on them? Especially if nothing has intervened to take away this right? Certainly, this paradox has created confusion and inconsistency in legal judgments.

Further, it has led to misunderstanding and misapplication of facts and laws as they existed at the time aboriginal rights were purported to become part of British/Canadian law: the arrival of Europeans in North America, the assertion of British sovereignty, and when treaties were made. And it is these pre-existing laws and facts on which courts rely today (as this is when aboriginal rights are held to have become "defined" under English law) to pronounce and develop current law. If past law and facts have been misapprehended, then some, perhaps much, of the current judicial law is seriously flawed.

As aboriginal peoples continue to challenge this untenable and oppressive state of the law, Canadian law will have to develop, or it will be abandoned by aboriginal peoples who will turn to development of their own self-determined laws.

If law and facts are properly understood, then aboriginal peoples hold significant aboriginal and treaty rights in Canada – including and especially to water. Canadian governments and courts have a legal duty to recognize these rights, and to counteract the threats to aboriginal peoples and their survival and viability that would be caused by further depletion of the Great Lakes and any regime that permits this.

1. Basis of Aboriginal and Treaty Rights

The basis of virtually all aboriginal rights is inherency. This is also true of treaty rights, as treaties, properly understood, are affirmations of existing inherent rights and a grant from indigenous peoples to the Crown of certain rights (not the other way around).

Aboriginal rights are properly seen as derived from two inalienable facts: that indigenous peoples have been living for thousands of years in what has become Canada, with their own societies, ways of life and governments; and the special relationship that indigenous peoples have with the lands and waters, which in turn defines their identity, rights and responsibilities.

Inherent indigenous rights are derived from existence (being here) and custom (adaptation of a way of life to perpetuate existence or survival as peoples). Custom (or customary law) is in turn derived from the relationship with the Creator and the understanding of why and for what purposes the Creator put a people here (in their own place in the universe).

Neither the British nor Canadian Crowns granted such rights – they exist because of the fact of indigenous peoples' inherent status as peoples. "Aboriginal rights are not dependent on acts of government; they are inherent rights."[5]

This is the basis of the rights. However, the *understanding and treatment* of these rights by the Crown has followed its own path – which began with respect, was followed by complete disrespect as settlers' interests grew and began to "compete" with such rights, and has resulted today in quasi-respect. Quasi-respect is seen by courts' and governments' attempts to grapple with gross injustices of the past (which continue to oppress in the present). But such injustices still colour and inform such attempts to "reconcile", and to some extent are held out as justification for, and thus perpetuation of, continuing injustice. It is the Crown's and courts' understanding of the basis of the rights that determines the current, and erroneous, state of Canadian-made law.

This pattern of understanding and treatment of aboriginal rights in Canada/Ontario, explained in more detail below, is summarized as follows:

- Stage One -- Prior to European contact (time immemorial to perhaps 1600s): indigenous rights based on inherency (living in organized self-governing societies in defined territories). They lived in and of the lands and waters in North America for thousands of years.

- Stage Two -- First era of contact between settlers and indigenous peoples (1600s to 1763): equal relationship of mutual protection and assistance, sovereign status of indigenous peoples recognized.

- Stage Three -- Assertion of British sovereignty (1763): Sovereignty purported to be asserted, but not over self-governing, territorial and related rights of Indians in their

[5] Jack Woodward, Native Law (Toronto: Carswell, binder series), at p. 5-6.

territories, as the status of indigenous peoples as peoples was recognized during this stage. Indigenous societies were seen as distinct self-governing units with their own distinct "local-custom" laws (see discussion of this term below) within the British Empire, and in this way, aboriginal rights were recognized by British common law. For Britain to assume any jurisdiction (in the way of title) over Indian lands and waters, they first had to be surrendered to the Crown (ceded through treaties and agreements).

- Stage Four – (Earlier) treaty-making (1763 to 1812): As demand for land increased with arrival of more settlers, British (then Canadian) Crown entered into treaties with many indigenous peoples to acquire legal title to and over land. Not all indigenous peoples entered into treaty. In most cases (in Ontario), certain traditional territorial lands were ceded to the Crown, but aboriginal rights, including to hunt and fish, and to self-govern, were not affected (not referenced in the treaty at all), or were explicitly reserved/retained. in such lands. Further, from this traditional territory, certain lands were reserved (as "reserves") where Indians had certain exclusive rights.

- Stage Five -- Assertion of Canadian sovereignty and control (1812 to 1982): Crown entered new treaties to assume title to a large part of Canada (and most of Ontario). Settlers now outnumbered and overpowered aboriginal people, so aboriginal rights became seen as fully defined and subsumed by Canadian common law. Aboriginal peoples were seen not as distinct aboriginal societies, but as subjects of Canada.[6] Aboriginal rights and interests were weighed against competing interests of other "Canadians" and could be extinguished. The Canadian Crown purported to assert sovereignty over many (perhaps all) aspects of aboriginal peoples' lives, by fully regulating them (Indian Act), by abrogating and extinguishing aboriginal rights, and by taking more lands and waters, even where there was no legal basis to do so.

- Stage Six -- Section 35 of Constitution (1982 to present): Aboriginal rights recognized as having status of constitutional rights (greater than common law rights), and unilateral extinguishment of aboriginal and treaty rights no longer allowed. However, rights can be infringed, as long as government can justify the infringement. This model still assumes that Indians are full subjects to and under Canadian law, but with some special or different status thereunder.

- Stage Seven – Respect for Sovereign Status (future): It is hoped that the Crown and courts will come to respect the status of indigenous peoples as peoples, with the right to determine the nature of their own sovereignty.

The basis of aboriginal rights is not and cannot be properly regarded as how Canadian governments and courts currently view these rights, as such a view has been coloured by the historical development which became increasingly (at least since the start of stage five) one of abuse, annihilation and assimilation – a history based in fact and not in law. Assimilative

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[6] More evocatively, Aboriginal military power was severely weakened after the Battle of Fallen Timbers, at the same time as the British gained military supremacy (burning Washington in 1814). Later, Indian administration moved from military officials (who tended to treat Indians as allies) to civil land managers (who tended to treat Indians as children). In 1860 the responsibility for Indian administration was transferred from colonial officials in London to local officials.

doctrine and practice continue to exist today, although they might no longer be increasing. Even though governments, over the years, created policies and passed statutes that denied or failed to respect aboriginal rights, these government policies and laws were themselves contrary to precedent and constitutional law. Any reliance by courts today on past oppressive policies and actions to justify limits to or infringements on aboriginal rights is wrong in law. To be at all internally consistent and valid, judicial decisions of Canadian courts must properly understand and apply the British/Canadian law, and the facts, at the time that such aboriginal rights were purported to become part of the British/Canadian law (and thus were so "defined"). If this is done, it will be seen that such rights are far broader and stronger than is now wrongly adjudged and thought.

a. Stage One

"Archaeological information shows evidence of fishing in the Great Lakes as far back as about 3000 BC…"[7], and there is other evidence, including oral accounts passed down through generations, that many indigenous peoples lived in and occupied territories in and around the Great Lakes well before this, back to the last Ice Age. The Supreme Court of Canada has recognized that prior to the arrival of Europeans in North America, indigenous peoples lived on the land in distinctive societies, with their own practices, traditions and cultures.[8] Unless one inappropriately imposes a Euro-Canadian perspective on this, such practices and traditions would properly be termed as laws and governance.[9]

b. Stage Two

There is strong substantive evidence that a relationship of "equal respect" (mutual protection through military and trade alliance, and respect of sovereign peoples) was in fact the first relationship between the British and indigenous peoples in North America.[10] "From the earliest times, the colonial instruments assumed that the Indians were autonomous societies, and that relations between the Indian nations and the British were 'to be governed by treaties, entered into by mutual consent'".[11]

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[7] Peggy J. Blair, "Settling the Fisheries: Pre-Confederation Crown Policy in Upper Canada and the Supreme Court's Decisions in R. v. Nikal and Lewis", in (2001) 31 RGD 87 at 105; citing C. Cleland, "The Historical Development of the Great Lakes Aboriginal Fishery", conference paper, CBA-Ontario/Canadian Aquatic Resources Section Conference, "Aboriginal Fishing: Traditional Values and Evolving Resource Stewardship", Sept. 1996. .

[8] R. v. Van Der Peet, [1996] 2 SCR 507 at para. 30.

[9] See Brian Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1983), 8 Queen's L.J. 232.

[10] This is the subject of much research, including that by Prof. Bruce Morito of Athabasca University, who uses the term "equal ficuciaries" to describe the relationship at this stage. .

[11] Woodward, Native Law at p. 199, citing Brian Slattery, The Land Rights of Indigenous Canadian Peoples (1979), doctoral thesis, p. 350.

c. Stage Three

In 1761, King George instructed Governor Robert Monckton to "support and protect the said Indians in their just Rights and Possessions and to keep inviolable the treaties and compacts which have been entered into with them…"[12]

The Royal Proclamation of 1763 and other instruments of the time also refer to Indians as "subjects". This is considered the assertion of British sovereignty over aboriginal peoples. There is very little in law that existed at the time to support the validity of such an assertion. If this is seen as an assertion akin to acquisition of territory, then laws at the time did not support the acquisition of territory held in fact and law by indigenous peoples (as distinct self-governing societies, with their own kind of communal ownership). Those laws of the time held that territory could only be legitimately acquired through conquest of the people occupying the territory (it is generally recognized that this was not the case in Canada[13]), or through occupation and settlement, which required that the lands be "terra nullius" (that is, not occupied by anyone else – which was certainly not the case in British North America[14]), or by cession (the consensual ceding, granting or selling of the lands).

Thus, unless and until lands were ceded (through treaties or the like), the lands could not have been legitimately subject to the sovereignty of a foreign power. The Royal Proclamation of 1763, despite its reference to "subjects", acknowledges this. It refers to "several *nations* or Tribes of Indians" and states that they "should not be molested or disturbed in such part of our Dominions and territories as not having been ceded to us are reserved to them as their hunting grounds." Some colonial officials later noted that the Royal Proclamation of 1763 recognized the "territorial privileges of independent sovereigns."[15] John Graves Simcoe, the first lieutenant governor of Upper Canada, assured the Indian allies in 1793 that "no King of Great Britain has ever claimed absolute power or sovereignty over any of your lands or Territories that were not fairly sold or bestowed by your ancestors at Public Treaties."[16] Despite the question of whether the indigenous parties understood their lands to have been "sold" as would the British have

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[12] Instructions from King George to Governor Robert Monckton, 9 December 1761, Public Records Office, London, England CO / 1130:31d-80, as cited in Peggy Blair, Settling the Fisheries at p. 107.

[13] Brian Slattery, "Understanding Aboriginal Rights" (1987), 66 Can. Bar. Rev. 727 at 733.

[14] To some extent, courts grapple with the dilemma of the assertion of British sovereignty and the apparent lack of legal basis for this, including through grappling with concepts of occupation and settlement. See, for instance, L'Heureux Dube J., in dissent (though not necessarily on this point) in R. v. Van der Peet, [1996] 2 SCR 507 at para. 109: "In the eyes of international law, the settlement thesis is the one rationale which can most plausibly justify European sovereignty over Canadian territory and the native people living on it (see Patrick Macklem, "Normative Dimensions of an Aboriginal Right of Self-Government" (1995), 21 *Queen's L.J.* 173) although there is still debate as to whether the land was indeed free for occupation. See Brian Slattery, "Aboriginal Sovereignty and Imperial Claims" (1991), 29 *Osgoode Hall L.J.* 681, and Michael Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (1984)." This simply does not accord with other Supreme Court of Canada determinations that aboriginal peoples were living here in their own organized societies (see, for instance, Gladstone, Delgamuukw, infra).

[15] R.T. Pennefather, Superintendent General, Indian Department, "Annual Report 1856", Imperial Blue Books, 1860, No. 595, p. 4, as cited in Blair, Settling the Fisheries.

[16] Donald B. Smith, Sacred Feathers: The Reverend Peter Jones (Kahkewaquonaby) and the Mississauga Indians (Toronto: University of Toronto Press, 1987), p. 163., as cited in Peggy Blair, "Taken for 'Granted': Aboriginal Title and Public Fishing Rights in Upper Canada", Ontario History, Volume XCII, No. 2, Spring 2000, at p. 33.

understood, and whether or not such were "fairly" sold, this indicates that the British Crown recognized the inherent rights of indigenous peoples to grant or sell, or not.

Further, even with acquisition of title through treaty, to indigenous peoples this did not mean they were ceding or surrendering more (i.e., no other rights including the right to govern themselves). There is good argument and evidence that the British Crown, during this stage, and British law, also perceived of the issue this way.

Mark Walters[17] persuasively argues that the assertion of British sovereignty meant that aboriginal societies were held to be parts of the British Empire, but distinct self-governing parts to which English law was not applied as it was to settlers. "By the [Royal Proclamation of 1763], the Great Lakes region… was constituted an Indian territory into which no form of municipal colonial law or government was introduced."[18] The "principle of continuity" (an element of British imperial law), and the "local-custom rule" (an element of British colonial law in what became Canada), served to continue the legal status of aboriginal rights after the so-called assertion of British sovereignty. They continued in force by one or a combination of these two legal routes (imperial, or colonial, law).

Aboriginal rights were recognized by imperial law as legal systems distinct from English municipal[19] systems, because municipal law "brought over" to North America by British settlers was only intended to apply to the *settlers*. This way, municipal law as developed for and applied to settlers would not apply to aboriginal peoples in territories to which they had title and in areas where they had distinct rights (such as rights to fishing and fishing grounds); instead, aboriginal peoples' own laws continued in force as distinct "municipal" systems (different and apart from the English municipal system) within the Empire. This was the case under the Royal Proclamation, and remained the case through earlier treaty-making.

The second route by which aboriginal rights continued following assertion of British sovereignty, is through English colonial/municipal law as it developed and was applied in Canada. Such law recognized and adjusted to "local conditions" or "particular customs" that were already in existence and continued to be practiced after assertion of British sovereignty. These pre-existing rights, customs and practices would have to be reconciled with other aspects of the common law brought over to Canada, which creates a system of prioritizing and balancing.

If the two legal foundations are considered together – imperial continuity principle, and colonial/municipal local-custom rule – British colonial/municipal law applies only where aboriginal territories have been surrendered and only in regard to the nature and scope of the surrender. Otherwise, English law accepts and adapts to the unique circumstances of indigenous peoples -- including their rights to their own unsurrendered territories and their rights to self-govern therein.

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[17] Mark D. Walters, "Aboriginal Rights, Magna Carta and Exclusive Rights to Fisheries in the Waters of Upper Canada", (1998) 23 Queen's L.J. 301 at 333 to 363.

[18] Walters at p. 353.

[19] "Municipal" in this context means domestic or internal law (that applied in British North American by and for British North Americans).

The British Privy Council confirms this as the proper understanding of the application of British law in colonial countries, by stating: "A mere change in sovereignty is not to be presumed as meant to disturb rights of private owners ….and not with a view to altering substantive titles already existing."[20] This is the view taken by courts in other countries that were formerly British colonies.[21] It was noted by a judge in a New Zealand case that the common law of England "came as part of our European law, and not as a body of principles to be applied in ascertaining and interpreting the Maori customs and usages."[22] In another New Zealand case, the Court states: "In British territories with native populations, the introduced common law adapted to reflect local custom, including property rights…The laws of England were applied in New Zealand only 'so far as applicable to the circumstances thereof.'"[23]

Thus, indigenous peoples in British North America were recognized as governing themselves in their own unsurrendered territories.

d. Stage Four

To secure any jurisdiction over lands, the British Crown had to acquire title, and the only legitimate way it could do so when the lands were not terra nullius and when the indigenous societies had not been conquered, was through surrenders or cessions (mostly through treaty). Treaties were entered into between the British Crown (and later the Canadian Crown) and indigenous peoples, because and based on the fact that indigenous peoples, and not British or other governments or settlers, had inherent rights to and in North America. Treaties granted rights and privileges by indigenous peoples to the British and not the other way around.[24]

Just what they granted and withheld is often a matter of debate, in part because it is arguable there was never a "meeting of the minds" between the British and indigenous signatories, given the vastly different worldviews and perspectives, the different languages, and perhaps the very different intentions. It is said by many indigenous people that their ancestors never understood treaty-making to entail "cede and surrender" in the sense of forsaking all rights and dividing up territory. Instead, this meant exclusivity was exchanged for sharing of territory and resources. Sharing would mean that neither party could take or use more than would permit the other party to have a sustainable existence. Further, treaties are regarded by indigenous people, and were regarded by British law as applied in North America (see Walters above) as the granting of some incidents to title (ownership) only, and not granting any authority to the grantee to assume sovereign control over the grantor.

Treaties are to be understood as grounded in indigenous inherent rights which only indigenous peoples had the right to grant to others. There are no doubt exceptions in which the aboriginal

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[20] Amoda Tijani v. Secretary, Southern Nigeria [1921] 2 AC 399 to 407-8 (PC).

[21] See Te Weehi v. Regional Fisheries Officer, [1986] 1 NZLR 680 (HC). and Re Bed of Wanganui River, [1955] NZLR 419 (CA).

[22] Re Bed of Wanganui River, [1955] NZLR 419 at 450 (CA). This was also the approach taken by Australian courts; see, for instance, Mabo v. Queensland (1988) 166 CLR 186; (no 2) (1992) 175 CLR 1.

[23] Attorney-General v. Ngati Apa (2003) 3 NZLR 643 at 652 (CA).

[24] In the US, this is the "reserved rights" doctrine in which treaties reserve all pre-existing inherent rights not explicitly granted away (to the government): see US v. Winans, 198 US 371, 381 (1905). See US v. Adair, 723 F.2d. 1394 (1983), where the Court held that a treaty does not grant rights to the indigenous people but confirms inherent rights which existed since time immemorial.

party actually acquired a new right through the treaty different than the inherent right. Treaties, then, are by and large affirmations of pre-existing inherent rights and grants of certain specified rights by indigenous peoples to the Crown.

e. Stage Five

Despite the legal status of aboriginal peoples and rights, even as recognized by imperial law, as British and other settlers came to outnumber indigenous people, the needs and wants of the settlers created a new and often abusive reality. Legal status was forgotten, and factual discrimination and abuse came to dictate many laws and systems. No doubt s. 35 of the Constitution was designed to eliminate or minimize some of this abuse. However, as will be argued, courts have failed to properly understand and interpret the legal status of aboriginal peoples and their rights, and thus have perpetuated the abuse.

f. Stage Six

Section 35(1) of the Constitution Act, 1982 states: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." Section 35 is not a grant of rights, but a recognition of rights derived from other sources, and the according of such rights with constitutional status.[25]

Constitutionalized aboriginal and treaty rights are paramount over common law rights. As of 1982, these rights can no longer be extinguished by either the federal or provincial governments. The problem is that aboriginal rights and treaty rights are today incorrectly viewed as having been captured within and bounded by Canadian (Euro-centric) law and perspectives (as applicable to settlers). This is legally inaccurate and has created great injustice. This injustice can be greatly diminished by courts and governments according much greater respect for the status of indigenous peoples as the only peoples in North America with inherent rights in respect of the lands and waters, and themselves. This is in fact the way it used to be, and there is no legal or just reason for such respect to have become abrogated.

The purposes of s. 35 of the Constitution Act, 1982 have been identified as recognizing the prior occupation of territory by aboriginal peoples or societies, and reconciling this with the assertion of Crown sovereignty.[26] The mistake made is in assuming, incorrectly, that British sovereignty could have been and was asserted over indigenous peoples in regard to their status *as peoples* and the rights attendant to this. This is akin to assuming that English municipal law (common law as developed in Canada) was legitimately applied to and subsumed aboriginal peoples and customs in all regards, the same as it applied to settlers. Thus, we end up with judicial determinations that the doctrine of aboriginal rights exists within the "general legal system of Canada"[27].

Reconciling on this basis is fraught with internal conflict. It at once assumes that "total" assertion of sovereignty over indigenous peoples was and remains somehow legitimate, yet also

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[25] R. v. Van der Peet, [1996] 2 SCR 507.
[26] R. v. Gladstone, [1996] 2 SCR 723 at para. 72.
[27] Van Der Peet at para. 49.

recognizes that indigenous peoples had and have rights as peoples (which presumably includes rights of self-governance to and over their own people and territories). This has created a pattern of judicial determinations that are at best confusing and internally inconsistent, and at worst paternalistic and disrespectful of indigenous rights.

"While [the Supreme Court of Canada] has yet to describe exactly how it is that European people came to acquire title and sovereignty over areas occupied by indigenous peoples in the absence of conquest, it has at least expressed the need to incorporate aboriginal perspectives and laws in judicial approaches to issues involving aboriginal tenure."[28]

Consideration of aboriginal perspectives alongside British and Canadian common law perspectives[29] becomes problematic when one realizes that perspectives are the basis for identifying and defining identity, laws and rights to begin with, that these perspectives are grounded in entirely different and often conflicting worldviews.

The "indigenous" worldview is one of embeddedness and holistic integration and sharing, in which the environment is embedded within the identity and existence of humans, and humans are embedded within the environment. It is represented by the circle, which never ends (no end points) and is thus self-sustaining. The Euro-Canadian worldview is linear, hierarchical, based on dominance, and fragmented. The environment exists separate and apart from human identity, under human domain, and can be and is fragmented into private property. This permits and provokes subjugation and exploitation, both of nature and of those peoples who have a different and embedded view of nature. More is better, and taking and acquisition (often unfettered) are rewarded. This worldview is represented by the line, and lines end in dead ends.

"Indigenous Peoples relationship with water demands far more than a simple recognition of a right to use or drink water, and must include respect for our responsibility to make decisions for the preservation of water and its ability to sustain life."[30]

> Aboriginal people have told us of their special relationship to the land and its resources. This relationship, they say, is both spiritual and material, not only one of livelihood, but of community and of their cultures and societies.
>
> Many aboriginal languages have a term that can be translated as 'land'. Thus, the Cree, the Innu and the Montagnais say aski; Dene, digeh; the Ojibwa and Odawa, aki. To Aboriginal peoples, land has a broad meaning, covering the environment, or what ecologists know as the biosphere, the earth's life-support system. Land means not just the surface of the land, but the subsurface, as well as the rivers, lakes (and in winter, ice), shorelines, the marine environment and the air. To Aboriginal people, land is not simply the basis of livelihood but of life and must be treated as such….To survive and prosper as communities, as well as fulfil the role of steward assigned to them by the Creator, Aboriginal societies needed laws

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[28] Peggy J. Blair, Settling the Fisheries, at 96.
[29] R. v. Van der Peet, [1996] 4 CNLR 177 (SCC) at 202: the Court required that aboriginal rights be considered from both the aboriginal and the common law perspectives.
[30] Ardith Walkem, Indigenous Peoples Water Rights, at p. 6.

> and rules that could be known and enforced by their citizens and institutions of governance.[31]

The way people have related to and lived on the land (and in many cases continue to) also forms the basis of society, nationhood, governance and community.

Yet the indigenous worldview, which in large part defines who they are as peoples, has all but been disregarded by Canadian law and systems.

To date, what we have are some ill-defined Euro-centric concepts which attempt to accord some respect to aboriginal peoples and rights by and under Canadian governments and courts. First, the court has determined that with the assertion of sovereignty, governments became obligated to uphold the "honour of the Crown" by treating aboriginal peoples fairly, honourably, and in good faith, which might in some circumstances also create a fiduciary duty.[32] This has led to, among other things, the requirement for the Crown to justify any infringements on aboriginal or treaty rights (the "justification test" which is set out below). Yet, aboriginal people are regarded under Canadian law as subjects, among but with somewhat different status than all the other subjects to which the Crown owes some duty. Thus, the Crown's duty to act honourably toward aboriginal peoples is balanced against competing interests of Canada's other subjects who are far more numerous. Aboriginal people often lose in this competition.

g. Stage Seven

If courts and governments were to properly apply historical facts and law, as the premise for understanding aboriginal rights in today's law, then these rights would be correctly recognized as far greater than the status they are currently and wrongly accorded. They would be recognized as not subsumed within or under Canadian/English law and systems, but as parallel to this law, and self-determined.

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[31] Report of the Royal Commission on Aboriginal Peoples, Vol 2, Part 2 (Ottawa: Minister of Supply and Services, 1996) pp. 448-9.

[32] Mitchell v. Minister of National Revenue, [2001] 1 SCR 911 at para. 9. See also R. v. Sparrow, [1990] 1 SCR 1075; Wewaykum Indian Band v. Canada, [2002] 4 SCR 245; Haida Nation v. BC (Minister of Forests), [2004] 3 SCR 511.

2. Current Canadian Legal Regime for Aboriginal and Treaty Rights

a. Which Government Can Regulate or Infringe What

With the enactment of s. 35 of the Constitution, aboriginal and treaty rights can no longer be extinguished by federal or provincial governments, since constitutional rights are the supreme law of the land to which other laws must adhere. Constitutional rights must be defined in a liberal, generous and purposive way[33], capable of growth according to developing circumstances, knowledge and needs (the "living tree" concept of the constitution[34]).

The affirmation of "existing" rights in s. 35 means those rights that were not extinguished prior to 1982 (when s. 35 came into force).[35] Only the federal government (and not provincial governments) could have validly extinguished any aboriginal and treaty rights prior to 1982, and neither government can extinguish rights now.[36] The federal government must prove a clear and plain intention to extinguish such rights, before courts will find they have been extinguished.[37] Regulation of the practice that comprises the right is not enough to show extinguishment,[38] and in fact, continuing regulation of the exercise of the right is strong evidence that the right exists.[39]

Given the tenuous basis for the assertion of British sovereignty over aboriginal peoples in respect of their rights as peoples (self-governance and related rights) and in respect of unsurrendered aboriginal territory, it seems unlikely that the federal government could have legitimately unilaterally extinguished any such aboriginal rights (including title), prior to 1982. However, this is not the position of the Supreme Court of Canada. Nonetheless, requiring a clear and plain intention to extinguish sets the threshold for proving extinguishment prior to 1982 quite high.

Though these constitutionalized rights can no longer be *extinguished*, courts have determined that they can still be *infringed* by the federal government (and in some cases, by the provincial government – see below). Thus, rights cannot be totally eliminated (without consent) but their exercise can be limited. Rights are not absolute, and the power of the governments to legislate in certain areas must be reconciled with the fiduciary duty owed by governments by demanding *justification* of any government regulation or action that infringes upon such rights.[40]

Further, the constitutional division of powers (set out in the 1867 Constitution) as between the federal and provincial governments continues despite the 1982 Constitution Act. Thus, the federal government retains the exclusive authority to legislate in regard to "Indians and lands reserved for Indians" (s. 91(24) of the Constitution, 1867). This includes anything that touches on the "core of Indianness" -- the status or identity of Indians or aboriginal peoples as peoples[41] -

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[33] R. v. Sparrow, [1990] 1 SCR 1075 at 1106.
[34] Edwards v. Canada (AG), [1930] AC 124 at 136.
[35] Sparrow.
[36] Delgamuukw v. BC, [1997] 3 SCR 1010 at para. 172.
[37] R. v. Badger, [1996] 1 SCR 771 at para. 41.
[38] R. v. Gladstone, [1996] 2 SCR 723 at para. 31.
[39] R. v. Sparrow (1986) 9 BCLR (2d) 300 (CA) at 320; aff'd [1990] 1 SCR 1075.
[40] Sparrow at 1109.
[41] Things that are at the core of Indianness include aboriginal rights, aboriginal title, treaty rights (R. v. Simon, [1985] 2 SCR 287; Delgamuukw), matters relating to Indian status, identity, character or relationship (Four B Manufacturing v. United Garment Workers of America, [1980] 1 SCR 1031; Natural Parents v. Supt of Child Welfare, [1976] 2 SCR 751).

- and this includes aboriginal rights.[42] By this, the federal government can infringe aboriginal and treaty rights.

The question then becomes what jurisdiction provincial laws can have in respect of aboriginal and treaty rights. And this question is by no means easy to answer. The test was set out by the Supreme Court of Canada in 1985 in *Dick*[43], but the matter remains highly confusing.

There are three types of provincial laws (as far as their relationship with Indians goes): laws that always apply, laws that never apply, and laws that only apply because they have been given the status of federal law.

At one end of the spectrum, provincial laws of *general application* that do not touch on the core of Indianness (such as, arguably, traffic laws or employment laws) apply of their own force to Indians and Indian lands,[44] the same as they would to anyone else in the province.

At the other end of the spectrum, provincial laws that purport to *govern* (display a controlling intention to govern[45]) the core of Indianness can never apply, as this would be outside the constitutional division of powers for the province. Only federal laws can so govern.

In between the two ends of the spectrum, are provincial laws that fall within the parameters of s. 88 of the Indian Act (a federal law). These are adopted as and given the force of *federal* law, and apply that way. Here, these laws are referred to as "hybrid" laws. Section 88 (still in force[46]) states:

> Subject to the terms of any treaty and another other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect if Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

These hybrid laws must be "of general application" in that they apply uniformly across the province[47], and are not "in relation to" or do not have the intent of being directed at Indians[48]

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[42] Delgamuukw.

[43] Dick v. R., [1985] 2 SCR 309.

[44] See R. v. Francis, [1988] 1 SCR 1025 in which the court held that motor vehicle laws apply to Indians on reserves; see Four B Manufacturing where the court held that provincial labour relations laws so applied.

[45] Kerry Wilkins, "Still Crazy After All These Years: Section 88 of the Indian Act at Fifty", (2000) 38 Alta L. Rev. 458-503 at fn 64 and fn 107

[46] Section 88 was recently amended by the First Nations Fiscal and Statistical Management Act (not yet proclaimed in force), to read: "Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or the *First Nations Fiscal and Statistical Management Act*, or with any order, rule, regulation or law of a first nation made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts."

[47] Wilkins points out that it remains unclear whether uniform statutes that permit local options or exemptions are considered of general application in this sense.

differently than anyone else. But they nevertheless can have an incidental or inadvertent *effect* on the core of Indianness. This incidental effect on Indianness would prevent such laws from applying as mere provincial laws, because of the division of powers in s. 91(24) of the Constitution, so they must apply as, or be given the status of, federal laws through operation of s. 88 of the Indian Act. These hybrid laws include hunting, fishing, conservation and wildlife management laws.

Thus, under this test, provincial laws are only held to be invalid (i.e., can never apply or be given the status of federal law) if they are not neutral on their face, and if they have the *intent* (not just the effect) of infringing the core of Indianness or an aboriginal right.[49]

It is submitted that this test in regard to provincial laws is wrong. It should not be the *intent* of the provincial legislation, nor whether it was applied "equally" or the same to aboriginal and non-aboriginal people, that is at issue. This is akin to the old and now rejected test of discrimination. It is now understood that it is the *effect* of the legislation, and not the *intent*, that determines whether laws are discriminatory or not. It is also understood that facially neutral or equally-applied laws can result in very different effects on different peoples. It is the starting point of each group of people (their level of relative disadvantage, historical discrimination against them, and their particular needs and status) that assists in determining how any law might impact them and be allowed to do so.[50] The Supreme Court has gone at least part way in acknowledging this:

> Our history has shown, unfortunately all too well, that Canada's aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but constitute de facto threats to the existence of aboriginal rights and interests.[51]

If a provincial law has the *effect*, though not the *intent*, of impairing the very status or capacity of the relevant aboriginal people as a people (i.e., more than ancillary or peripheral effect) it should be held to be invalid. It would no longer be of "general application", and s. 88 could not invigorate it as federal law. Only those provincial laws that have but a peripheral effect on the exercise of aboriginal rights should be given federal force under s. 88 (and only because it is likely that many provincial laws would have some impact on aboriginal rights). This is not, however, how courts have determined the issue to date, as there are numerous provincial regulations about fishing, hunting and other pursuits at the core of aboriginal culture, which impact aboriginal rights and status in this regard, and which are assumed to be valid.

Apart from the above, there are a number of exceptions where provincial laws cannot apply as federal law through s. 88:

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[48] R. v. Kruger and Manuel, [1978] 1 SCR 104. Actually, the test is that the law cannot be in relation to one class of citizens in object or purpose, and such class might be Indian or non-Indian. Such law might impact on one group differently or worse than another, but if its intent was to, and it does, impair the status or capacity of that group it has crossed the line and is no longer of general application. The court must find both intent and effect to so impair, before the law will be declared invalid such that it is not of general application and cannot be incorporated through s. 88 as federal law.

[49] R. v. Alphonse, [1993] 4 CNLR 19 (BCCA).

[50] See Law v. Canada (Minister of Employment and Immigration), [1999] 1 SCR 497.

[51] R. v. Sparrow, [1996] 3 CNLR 161 (SCC) at 181.

- Where the law conflicts with the term of a treaty
- Where the law conflicts with any federal law
- Where the law overlaps with or deals with the same subject matter as anything in or under the Indian Act.

In respect of treaties (between aboriginal peoples and the Crown[52]), s. 88 "preclude[s] any interference with rights under treaties resulting from the impact of provincial legislation"[53]; "terms of the treaty are paramount"[54]; and "provincial legislation cannot restrict native treaty rights."[55]

Thus, it would appear that s. 88 cannot apply so as to permit a federally-incorporated provincial law to infringe a treaty right.[56] That is, it appears that provincial laws cannot ever infringe a treaty right, whether or not the province might be able to justify any such infringement. The basis

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[52] R v. Francis, [1956] SCR 267 at 281 (s. 88 does not apply to the Jay Treaty).
[53] R v. George, [1966] 2 SCR 267.
[54] Kruger and Manuel at 114.
[55] R v. Simon, [1985] 2 SCR 387 at 410
[56] The weight of case law does seem to hold to this position. Since treaties often explicitly refer to hunting, fishing and other harvesting rights, it means that provincial laws in respect of hunting, fishing and other harvesting cannot apply where they infringe on such treaties. But it also means that provincial laws that are not directed at such treaty rights, but which would impact the exercise of such treaty rights, also could not apply. These would include laws about mining, zoning, forestry, water use, etc. on or affecting treaty territory where treaty rights can otherwise be exercised. Kent McNeil, "Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction" (1998) 61 Sask LR 431at 463, and Patrick Macklem, "The Impact of Treaty 9 on Natural Resource Development in Northern Ontario" in Aboriginal Title and Treaty Rights in Canada, M. Asch ed. (Vancouver: UBC Press, 1997) at 130, both essentially make this argument, in that any law that "takes away" land covered by a treaty, from the pursuit of hunting, fishing or other treaty rights, must be federal law.

There is some debate about the position that provincial laws cannot infringe treaty rights, although any contrary view seems weakly grounded. Wilkins at fn 86 notes that in Marshall v. R, [1999] 3 SCR 533 (rehearing application), the Court made passing reference to the authority of the federal and provincial governments to regulate treaty rights, within the exercise of their respective legislative fields. But Wilkins points out that this was not the finding in the main Marshall decision on the merits (which only dealt with federal infringement of a treaty right), and that the court does not consider or mention precedent that holds that provincial law can not so regulate in respect of treaty rights. Wilkins thus concludes that this statement by the Court was likely a mistake.

Further, Wilkins at para 26 notes that in some treaties, there is a provision that makes the treaty rights "subject to such regulation as may from time to time be made by the Government of the country". This provision by itself means only the federal government can so regulate: R v. Batisse (1977), 19 OR (2d) 145 (Dist Ct): Chechoo v. R, [1981] 3 CNLR 45 (Ont Dist Ct). See also discussion in R. v. Cote, [1996] 3 SCR 139, and in Badger infra. It appears that where the Natural Resources Transfer Act applies – in the prairie provinces only – because of the wording of the NRTA, a part of constitutional law, this type of phrase in a treaty is broadened to allow both federal and provincial laws to regulate or infringe said treaty rights: see R v. Badger, [1996] 1 SCR 771. Wilkins, fn 74 states: "Where this is so, the provincial law will likely operate on the right as an internal limit, derived from the terms of the treaty itself, not as a conflicting restriction imposed externally. In such circumstances, there will be no conflict between the provincial measure and the terms of the treaty, so s. 88 will not control the provincial measure's operation."

for this is the argument that an infringement of a treaty right[57] is in pith and substance at the core of Indianness, and thus wholly within federal jurisdiction under the constitutional division of powers. It does not matter if the provincial law is directed at the treaty right, or is directed at some other activity (for instance, mining or forestry) but has effect on the treaty right. This would indeed mean that the status quo is not constitutional and would have to change, and in major ways, because many provincial laws do have the effect of taking away land on which treaty rights are exercised, either by permitting others to use or exploit the land, or by permitting impacts on land that render it unfit for the full exercise of a treaty right.

However, s. 88 can permit the infringement of an aboriginal (inherent) right (not set out in a treaty). This seems wholly unjust and illogical. Inherent (aboriginal) rights pre-exist, are the basis of and underlie treaty rights. Prior to 1982, aboriginal rights were recognized as part of the English common law, but it might be that this different treatment (as between treaty and aboriginal rights) resulted from some unfair idea that treaty rights carried more weight because they were already "recognized" by the Crown (written on paper).[58]

In respect of other federal laws, these prevail over hybrid laws (given their status of federal law pursuant to s. 88) to the extent of any conflict between them.[59]

In respect of the Indian Act or any provision made by or under it (including Band bylaws), these prevail over provincial laws where there is any overlap in subject matter between them.[60]

There is one other possible exclusion: s. 88 should not apply to "lands reserved for Indians" (i.e., not incorporate provincial laws so that they apply as federal law when affecting lands reserved for Indians). There is controversy over this. While s. 88 says that provincial laws "are applicable to and in respect of *Indians*", s. 88 does not say such laws are applicable in respect of "lands reserved for Indians". Indians, and lands reserved for Indians, are two separate heads of federal authority under s. 91(24) of the Constitution, and the omission of the latter in s. 88 of the Indian Act could be held to mean that s. 88 was not intended to incorporate provincial laws dealing with such lands. On the other hands, s. 88 states that "*all* laws of general application" in the province apply. This controversy has not been definitely resolved by the Supreme Court of Canada but almost every lower court and commentator has found that s. 88 does not apply (and thus does not

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[57] Certainly most treaty rights would be at the core of Indianness, although it is possible that not all such rights are.

[58] See R. v. Cote, [1996] 3 SCR 139.

[59] Wilkins at para 33 points out that s. 88 does not clarify whether the "other Acts of Parliament" which are held to prevail over hybrid laws, include pre-Confederation statutes including the Royal Proclamation of 1763. Some lower court decisions have held that the Proclamation is not such a federal law (does not prevail over hybrid laws), but this has not been decided by the Supreme Court of Canada (and Brian Slattery in "Understanding Aboriginal Rights", (1987) 66 Can Bar Rev 727 at 779 argues that other Acts of Parliament "include all laws and acts in force in Canada that are subject to repeal by Parliament, including Crown acts prior to Confederation."

[60] The term "matter" is not defined here, and it is unclear what it means. Further, an Indian Act provision or Band bylaw, to oust an overlapping provincial law of the same "matter", must create some substantive regime or arrangement. It is not enough for the Act to allow a bylaw to be passed on this matter. See R v. Martin (12 August 1985) (Ont Dist Ct).

invigorate provincial laws to apply) to lands reserved for Indians (reserves or aboriginal title lands).[61]

"Lands reserved for Indians", under s. 91(24) of the Constitution, includes not only Indian Act reserves but aboriginal title lands.[62] Clearly, provincial laws cannot of their own force (without s. 88) regulate matters respecting aboriginal title or reserve lands, for these matters fall squarely within federal jurisdiction.[63] The definition of a reserve under the Indian Act is narrower than under s. 91(24) of the Constitution, and for the former, the Indian Act sets out a number of provisions that deal with reserve lands, and a number of possible Band bylaws that deal with lands, waters and resources. In these cases, overlapping provincial laws are ousted from application on the "reserve" anyway. This is not the case for aboriginal title lands which are not Indian Act reserves.

There are two strong arguments that support the interpretation that s. 88 does not apply to Indian lands. First, there is a well-established rule that statutes affecting Indians must be liberally and generously construed and ambiguities resolved in favour of the Indians.[64] Section 88 is ambiguous in regard to its application to Indian lands, and thus should be construed to not apply in this regard (such that provincial laws could not apply in respect of Indian lands). Second, since provincial laws in respect of lands that fall squarely within federal jurisdiction under s. 91(24) of the Constitution could have no application at all of their own force (without s. 88), then with s. 88 such laws apply only to Indians and not non-Indians on such lands. This is contrary to all other cases in which s. 88 applies (i.e., in those other cases it takes an otherwise general law that applies to all non-Indians in the province and allows its application to Indians as well). In all other cases, s. 88 creates parity of application of law. If s. 88 were held to apply to Indian lands, however, it would create disparity of application.[65]

> On Aboriginal title lands, where the land-related provisions in the *Indian Act* have no application, it would mean that statutory Indians were subject to provincial restrictions on the use, enjoyment, possession, and disposition of their ancestral lands, but that non-Aboriginal people, who might well have no legal right whatever to use or occupy those lands, could operate free of those constraints.[66]

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[61] Wilkins fn 148 and fn 149 citing numerous sources. But see Delgamuukw at para. 182 where the Court mentions without elaboration or analysis that "s. 88 extends the effect of provincial laws of general application to Indians and Indian lands…". This does not, however, seem to be a definitive statement of law in respect of the application of s. 88 to Indian lands. It was made in the context of an assessment of whether the province had the capacity to extinguish aboriginal rights prior to 1982 (finding that s. 88 did not provide such capacity), and it was made without reference to or any analysis of other court decisions that found that s. 88 does not apply to Indian lands.

[62] In regard to the meaning of "lands reserved for Indians" in s. 91(24) of the Constitution, see St. Catherine's Milling & Lumber v. R (1889), 14 App Cas 46 (PC); Delgamuukw.

[63] Provincial laws cannot regulate in respect of occupation, possession, use or nature of interests in such lands (see Delgamuukw; Derrickson v. Derrickson, [1986] 1 SCR 285; Chippewas of Sarnia Band v. Canada (AG) (30 April 1999) (Ont SCJ)).

[64] See Nowegejick v R, [1983] 1 SCR 29; R v Sioui, [1990] 1 SCR 1025; R v Badger, [1996] 1 SCR 771 at para. 41.

[65] Wilkins at paras73 to 74.

[66] Wilkins at para. 74.

This contradiction and injustice in application seems contrary to the rules of statutory interpretation, the nature of aboriginal title and its relationship to aboriginal ways of life, and to s. 15 of the Charter in respect of rights to equality.[67]

It is submitted that s. 88 of the Indian Act is, since the enactment of s. 35 of the Constitution, unconstitutional. This view is supported by commentators such as Kent McNeil, Brian Slattery and Kerry Wilkins. As Wilkins points out, s. 88 is a blanket incorporation of provincial law (that which otherwise meets the criteria of s. 88, as set out above) before the fact. There is no case by case scrutiny by the federal government of which provincial laws should be so applied and why. Of course, there remains a case by case requirement – after the fact – for both governments to justify any infringements on aboriginal rights that their regulations or actions might cause. But often enough it appears that governments either do not engage in this internal analysis or if they do, they proceed on a very tenuous foundation for justification. Too often either aboriginal parties are harmed (perhaps unjustifiably so) with little or no recourse, or forced into court to challenge what the government has already done, which is costly and time consuming and sometimes too late to have little practical effect. Further, s. 88 considers treaty rights and aboriginal rights very differently, and given the equal protection to both afforded by s. 35 of the Constitution, and the basis of both as inherency, this different treatment itself seems unconstitutional.

In sum, the case law in regard to s. 91(24) of the Constitution and s. 88 of the Indian Act, has left us to date with the following:

- *aboriginal rights: both federal and provincial governments can infringe*

- *aboriginal title: the federal government can infringe, but it remains quite uncertain whether the provincial government could infringe*

- *treaty rights: only the federal government can infringe (although there are a couple of statements in case law that question this, these do not seem well considered), except in the case of the prairie provinces (to the extent the NRTA broadens the application of certain treaty language).*

Under s. 35 of the Constitution, whichever government is permitted to infringe a right must only do so if such infringement can be justified.

It seems much more in accord with past law (at the time aboriginal rights were "defined" as within English law), and the fact of pre-existing self-governing aboriginal societies, to hold that provincial law (through s. 88 of the Indian Act or otherwise) applies as follows:

- *aboriginal rights:* could not apply to infringe aboriginal rights if the effect of such infringement was to impair the status or capacity of the relevant aboriginal people as a people

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[67] Wilkins at fn 191 regarding the rule of statutory interpretation that the legislature does not intend to produce absurd consequences (De Rizzo & Rizzo Shoes, [1998] 1 SCR 27). Wilkins at fn 189, noting that Corbiere v. Canada, [1999] 2 SCR 203 applied s. 15 of the Charter to Indian Act provisions in respect of band member status and elections, but also noting that this was in respect of unequal treatment as between two groups of Indians (on reserve, and off reserve).

- *aboriginal title:* could never apply on aboriginal title land (including reserves) in any regard, unless the aboriginal party consented to its application

- *treaty rights:* could not apply so as to infringe treaty rights.

In these cases, no infringement by provincial law could ever be justified, and if any infringement were to occur, the law or its applicability to the aboriginal party would be struck. In all other cases (ancillary effects of provincial laws on exercise of aboriginal rights below level of impairing status or capacity, and application of federal laws), proper application of law and facts requires the test for justifying infringement to be set very high, much higher than it is today.

b. Three Part Test for Aboriginal Rights

For an aboriginal party to succeed in stopping or preventing a government infringement of its right, the following legal test[68] applies:

- Is there an existing right? (onus on the aboriginal party)

- Has there been a prima facie infringement of the right? (onus on the aboriginal party)

- Can the infringement be justified? (onus on the government)

Note that this three-part test is applicable to both aboriginal and treaty rights[69]. But of course, if only the federal government can infringe treaty rights then where a provincial law so infringes and this prima facie infringement can be proved, the law would be struck as invalid or inapplicable and step three of the test – justification for infringement – becomes unnecessary (there can be no justification).[70]

Rules of evidence in aboriginal rights cases must be applied flexibly; oral history may be admissible if it is useful (provides the aboriginal perspective of the right) and reasonably reliable.[71]

Proof of the right occurs either in court or through recognition by the federal government through some land claim negotiation or similar process. Certain rights might already have been proved to exist, because they have previously been proved in court, or are recognized in a treaty, land claim or other similar agreement. Even then, the specific meaning and content of the right might have to be clarified in later court action. If the content of the right is clarified enough, the parties can proceed right to the infringement leg, and then the justification leg.

What all this means is that even though the basis of the right is inherency, and even though there is likely no legitimate basis on which British sovereignty could have been asserted over aboriginal peoples in regard to the exercise of their rights, aboriginal peoples must submit to the

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[68] Sparrow
[69] R. v. Badger, [1996] 1 SCR 771 at para. 75.
[70] See discussion in section above.
[71] Delgamuukw ; see also Mitchell v. MNR, [2001] 1 SCR 911 at para. 31. See also Benoit v. Canada, [2003] 3 CNLR 20 (Fed. CA) where it was held that a sensitive application of the rules of evidence does not mean such rules can be completely abandoned.

jurisdiction of another government and its laws to prove that they have a right as defined by that government and those laws. Not only is this profoundly unjust, it is illogical and contrary to principles of international law and British law as it existed at the time of the purported assertion of British sovereignty.

What this means is that, under Canadian law, aboriginal peoples or persons cannot simply go about practicing an inherent aboriginal right and expect Canadian governments and others to respect how the aboriginal party has defined and wishes to practice such right. Instead, aboriginal rights must be fit within Canadian law, and weighed against the interests of other Canadians.

Prior to proof of this right, the aboriginal party has "procedural" rights, especially the right to be consulted where government action would infringe a right that has been asserted (not yet proved or recognized). Where the aboriginal party feels that the government has not fulfilled its duty to consult, it can go to court to seek to strike any government action taken without proper consultation, and/or prevent further government action being taken without proper consultation.

The aboriginal party can do this both when the right being infringed has been proven or recognized already, and when it has asserted but not yet proved (either because negotiations in regard to a land claim or other agreement are ongoing, it has initiated other litigation to prove this right, or taken other measures to have it defined or recognized). If successful on the narrow issue of failure to consult, this would force renewed and better consultation but would not necessarily result in a permanent prohibition on the government action or an action different than what was first taken.

It would be more in accord with the nature of such rights, and the status of aboriginal peoples as peoples, to create a presumption that the aboriginal right exists (or a much lower burden of proof to prove its existence) and shift the onus to the Crown to rebut this. This is the test that is applied under British common law for "local customs". A custom is a rule in a particular locale that obtains the force of law. Local customs take priority over the general rule of common law if certain conditions are met (it is immemorial, reasonable , certain in its terms as to the locale and the people who are entitled to practice it, and must have continued as of right since its inception). "A custom possible in law, being reasonable and otherwise fulfilling the requisites of a good custom, may be established by very slender evidence."[72] Courts presume the existence of the custom to time immemorial if it can be proved to exist in "living testimony" (as far back as the memory of the older witnesses). Courts "are slow to draw an inference of fact which would defeat a custom which has apparently existed for a long time; for it is a maxim of the law to give effect to everything which appears to have been established for a considerable course of time, and to presume that that which has been done was done of right and not in wrong."[73] The presumption of the existence of a custom since time immemorial and its reasonableness can be rebutted (by the Crown) through sufficient evidence to the contrary.

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[72] Halsbury's Laws of England, Vol 12(1), Customs, at para 627.

[73] Halsbury's at para. 607. This was essentially the approach of L'Heureux Dube, dissenting, in R v. Van der Peet at para 177: "The substantial continuous period of time for which the aboriginal practice, tradition or custom must have been engaged in will depend on the circumstances and on the nature of the aboriginal right claimed. However, as proposed by Professor Slattery, in "Understanding Aboriginal Rights", *supra*, at p. 758, in the context of aboriginal title, "in most cases a period of some twenty to fifty years would seem adequate". This, in my view, should constitute a reference period to determine whether an aboriginal activity has been in existence for long enough to warrant constitutional protection under s. 35(1).

This type of presumption, with the burden of proof reduced for the party seeking to rely on the custom, and the onus shifted to the Crown to disprove or rebut the presumption, is far more in keeping with the status and nature of aboriginal rights, and imperial law which treated aboriginal societies as governing in accordance to "local customs".

c. Proving the Right

In the first leg, to prove an aboriginal right, the aboriginal party must prove that this was an activity that was "an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right" at the time of first contact with Europeans, and that still exists (in some form) today.[74] This is an attempt to distinguish what is uniquely "aboriginal" from what is not. This date of "first contact" is held to be the threshold because it has been determined that after contact with Europeans, aboriginal peoples might have adopted practices that were not, prior to this, part of their culture, and thus such practices could not be "aboriginal". As such, the right asserted could not be an "aboriginal" right. See above regarding the common law of local customs – this is the test that should properly apply in Canada.

Courts have held that such a practice as comprises the right may be exercised in a modern form.[75] This has tended to set up a duality in case law that distinguishes between new means to engage in a practice which is a right, and a new practice altogether which is not part of the right.[76]

This duality of *means to engage in a practice*, versus the *practice itself* is a false one. Surely, the means of engaging in, for instance, hunting and fishing, have been modernized in part because of the exposure of aboriginal peoples to European technologies and practices. By the same logic, aboriginal peoples – any peoples – are exposed to influences from different cultures that affect their choices of which practices should be engaged and are engaged in to begin with. Cultures are dynamic and not frozen in time. In fact, only those cultures that are "adaptive" (i.e., change with circumstances and needs) survive. But courts have effectively frozen aboriginal culture, and rights, in time by insisting that no new practices can be held up as being a part of aboriginal culture and thus be asserted as an aboriginal right.[77] This legal test also denies the fact of aboriginal, or indigenous, peoples as peoples. Peoples are by definition *self*-defined or determined, and survive because they adapt and absorb what works for them to continue to survive, and because they have some system or governance for doing so. The Court's test has relegated aboriginal peoples to the status of quaint relics.

To be integral, the practice must be of central significance, a defining feature of or lie at the core of the peoples' identity.[78] This excludes practices that are considered marginal to a people's identity and way of life.

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[74] Van der Peet.
[75] Van der Peet at paras. 63-64 and 171-72 defining rights as dynamic and not frozen in time; Sparrow at 1093.
[76] See, for instance, Van der Peet at paras. 62 to 64 where the Chief Justice sets out a requirement for some continuity between the practice and custom between the time of first contact with Europeans and present day, which seems to have been misapplied to create this duality.
[77] Van der Peet at para. 73.
[78] Mitchell v. MNR at para. 12.

However, activities reasonably incidental to, meaningfully related or significantly connected with the exercise of the right might be considered as a protected part or aspect of that right.[79]

This of course sets up the almost impossible task of determining the relationship between various practices, and the relationship of each to self-identity. This fragments and carves up aspects of culture and identity instead of treating culture as an integrated set of practices, perspectives and systems through which identity emerges. Again, identity is *self*-determined, not other-determined. The onus should shift to the Crown to prove that a practice is not integral to a culture.

To be "distinctive", the practice need not be unique to that people, but it had to have played some defining role in making that culture what it was.[80] "Practices common to every society are not protected" as rights.[81] Again, we get into the same difficulties as illustrated above.

Some aboriginal rights are necessarily attached to land but not reliant on proving aboriginal title (more on title to follow). Thus, there need not be proof of exclusive ownership to establish such rights, but these site-specific rights (such as hunting and fishing) do attach to the lands in which they were exercised at first contact. Other aboriginal rights exist independent of any attachment to land, and these are "status" rights that relate to governing relationships in an organized society, and rights to personal and cultural property (akin to intellectual property).[82] All of this sounds fine in theory, but often does not align to indigenous peoples' understanding of the relationship between governance of their citizens, and governance of or attachment to their land, all of which derives from the same integrated worldview of humans and environment being embedded in each other. This again illustrates the problem of Euro-centric Canadian courts trying to understand what it is to be an indigenous people, and imposing a very different worldview on indigenous people. This is akin to trying to squeeze a large round circle into a small square hole.

d. Proving the Infringement

In the second leg of the test, the aboriginal party must prove prima facie infringement. To do so, it must prove:

- That the limitation was unreasonable.
- That the limitation imposes or would impose undue hardship.
- That the limitation or regulation denies to the right-holder its preferred means of exercising the right.[83]

It has been held that this threshold is not a stringent one, and that it is enough to show that the legislation or action has the effect of interfering with an existing aboriginal right.[84] However,

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[79] R. v. Sundown, [1999] 1 SCR 393 at para. 30, referring to treaty rights but the same can be said in regard to aboriginal rights. See also, R. v. Simon, [1985] 2 SCR 387; R. v. Cote, [1996] 3 SCR 139.
[80] Delgamuukw; Woodward at 5-16 to 5-17.
[81] Ibid.
[82] Woodward at 5-14 to 5-15.
[83] Sparrow at 1078.

case law has determined that there must be some action or regulation that of itself would infringe an aboriginal or treaty right. If legislation or other actions are permissive or discretionary, and do not contain enough guidance as to how the discretion is to be exercised, then this type of legislation will also be found to be an infringement.[85] On the other hand, permissive or discretionary legislation that contains "sufficient" guidance, would not be an infringement.

In cases where the permissive scheme is not seen as the infringement, the aboriginal party has no recourse under Canadian law to challenge such legislation, and must wait until actions are taken pursuant to the legislation. This creates a scenario that forces aboriginal parties to come to court on potentially multiple instances (each exercise of the legislative permission) rather than being able to challenge, once and first, the legislation itself.

It is submitted that this is wrong in law. Legislation that permits certain actions is a specific legislative grant of authority, and this specific grant must be able to be challenged as contrary to aboriginal rights inhering in aboriginal peoples as peoples (i.e., self-government rights). Even the Supreme Court of Canada has gone part way in acknowledging this by recognizing that consultation about such schemes should (at least in certain circumstances) begin at the planning stage.[86] This recognizes the rights of aboriginal peoples to be part of a decision-making process that affects them, and since this right is now a *constitutional right* (i.e., not a right shared by other "Canadians") there can be no other basis for this other than the recognition that aboriginal peoples have the right to govern in respect of actions that will affect them.

e. Proving Infringement is Justified

The onus is on the government to prove "justification" of the infringement. To do so, the government must meet a two-part test[87]:

- Is there a compelling and substantial legislative objective?
- Were the Crown's actions consistent with its fiduciary duty toward aboriginal people? Note that since the case that set out this test was decided, it would appear that it is not fiduciary duty which creates these sorts of obligations, but rather the "honour of the Crown". This second leg is now more accurately stated as: Were the Crown's actions consistent with upholding the honour of the Crown?

In regard to the objective, conservation of a natural resource has been held to be valid.[88] It has also been held (only where there is no internal limit on the right itself) that any goal intending to further the good of the community as a whole, including the pursuit of economic and regional fairness, is valid.[89]

This type of test weighs aboriginal rights against the interests of non-aboriginal parties. This approach has been criticized as effectively equalizing aboriginal rights with the interests (not

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[84] Sparrow at 1078; Gladstone at para. 151.
[85] R. v. Adams, [1985] 4 CNLR 39 (Que. S.C.).
[86] Haida Nation v BC (Minister of Forests), [2004] 3 SCR 511.
[87] Sparrow.
[88] R. v. Kruger and Manuel, [1978] 1 SCR 104 at 112.
[89] Gladstone; Delgamuukw at para. 161.

rights) of non-aboriginal Canadians. It has been stated that the very reason that aboriginal rights were constitutionalized (to reconcile prior sovereignty with Crown-asserted sovereignty) must inform any determination of whether limits on such rights can be considered valid.[90]

In regard to whether the Crown's actions were consistent with the "honour of the Crown", courts must consider a number of factors to determine whether the Crown has adequately accommodated the right, including:

- whether the right has been given adequate priority in relation to other rights
- whether there has been as little infringement as possible
- whether, in a situation of expropriation, fair compensation is available
- whether the aboriginal group in question has been consulted.[91]

Priority:

Where the aboriginal right is internally limited (for instance, the right to fish for subsistence/food, which at some quantity would be satisfied), the aboriginal right would be given priority next only to conservation of the resource at issue, and above all other (non-aboriginal) interests. This means that, subject to valid conservation needs, allocations of the resource are first made to satisfy the aboriginal right. And all methods to conserve a resource other than those that infringe the right should be employed first.[92]

However, where the aboriginal right is not internally limited (for instance, the right to fish for any purpose, or aboriginal title), then governments must show that its decisions to allocate a resource are respectful of the right (considering the relative extent of aboriginal participation in the resource use, and the importance of the exercise of the right to the aboriginal group's well-being, among other things).[93]

Minimal impairment:

The Crown need not take all measures to avoid or minimize impairment. Instead, it must show that it took reasonable measures to do so, and that "the infringement was one which in the context of the circumstances presented could reasonably be considered to be as minimal as possible…".[94]

Given everything that has been said above, this test is too lax and leaves too much to government discretion (i.e., what is "reasonable).

Compensation:

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[90] Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2002] 1 CNLR 169 (Fed. TD) at para. 118.
[91] Sparrow
[92] R. v. Jones, [1993] 3 CNLR 182 (Ont. P.C.).
[93] Gladstone at para. 64.
[94] R. v. Nikal, [1996] 1 SCR 1013 at para. 110.

Compensation for infringement should never be held to determine whether the infringement was justified in the first place. It should only, as it is in the common law of contract and tort, be considered at the stage of determining remedy once an unjustified infringement is found (i.e., considered as a setoff against other remedies owed). Payment of money can never return what was taken away – it can only help someone find alternate means to deal with what has happened. When rights are infringed that go to the core of the people's existence, it is hard to imagine any viable alternate means that would help perpetuate cultural survival equivalent to being able to exercise the right (which was infringed) itself.

In regard to aboriginal title (which once infringed by the settlement of others on aboriginal title lands, is difficult to recapture), compensation is likely appropriate. Courts have held that compensation should likely always be paid for infringement of aboriginal title, but it is not settled as to how the amount of compensation would be determined (will depend on nature of title, and nature and extent of infringement).[95]

Duty to consult:

Two recent Supreme Court of Canada decisions clarified the rights (pursuant to current Canadian law) of aboriginal people to be consulted when a government action or legislation might infringe their asserted rights.[96] Both the federal and provincial governments must consult the aboriginal groups who would be adversely affected. They must consult both when a right has already been proved through court or recognized by the Crown (through treaty, land claim agreement or similar instrument) as had already been established before these decisions, and when such a claim has been asserted but not yet proved or recognized. The duty to consult in the case of asserted rights is grounded in the "honour of the Crown", which is to be understood to reconcile the assertion of Crown sovereignty over self-governing aboriginal societies.

In *Haida*, the Court said that to be meaningful (in this context), consultation must take place at the level of strategic resource use planning. The Haida had launched an aboriginal title claim in court in regard to lands for which the government was issuing tree farm licences. Rather than consulting just at the issuance of each cutting permit, the Crown had to consult at a prior level, when the licencing scheme was being developed.

Case law before *Haida* held that consultation might not be required in the process of making new legislation or developing new government regulatory or licencing schemes, if these have enough guidelines in them to satisfy the court that the discretion will be properly applied. That is, the duty to consult might not be activated until there is governmental action which actually carries out and applies this permissive discretion.[97] For reasons stated above, this is wrong because it defies the nature of aboriginal rights as deriving from pre-existing self-*governing* aboriginal societies. To govern, one must be able to be part of decision-making processes from the

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[95] Delgamuukw at para. 169.

[96] Haida Nation v BC (Minister of Forests), [2004] 3 SCR 511; Taku River Tlingit First Nation v BC (Project Assessment Director), [2004] 3 SCR 550.

[97] See Shade v. Canada (AG), 2003 FCT 327 (T.D.), where the court struck an application for judicial review of Bill C-7 (the First Nations Governance Act) for lack of meaningful consultation, since the court held that the process of legislation is not justiciable, particularly where there is an alternative measure of appearing before a parliamentary committee. Note, however, that this case was determined before Haida and Taku, and by a lower court.

beginning. It appears that *Haida* supports this precept, and advances the law beyond where it had been previously. It is submitted that *Haida* stands for the proposition of aboriginal and governmental *co-management*.

It is the Crown (federal and provincial) which must consult, and while the Crown can delegate procedural aspects of its duty to other processes (such as environmental assessments), it cannot delegate the legal duty itself entirely to another process, nor to any other decision-maker including a corporation.

Under Canadian law, the content of the duty varies. It will be stronger where the right is proved versus just asserted, and where the potential impact on the right is greater.

In *Delgamuukw*, the Court said that there was a spectrum of consultation measures that the Crown might have to take to justify infringement of aboriginal title, ranging from discussing decisions to be taken, to securing the consent of the aboriginal party to any proposed decision before it is made. At the low end of the spectrum, where the claim to a right appears weak, and the potential infringement minor, the duty would require giving notice, disclosing information and discussing issues raised in response to the notice. Information disclosed must be sufficient for the aboriginal party to make a reasonable assessment of the potential impacts on the exercise of their right.[98] Even at this level (in fact, at all levels), the government's consultation measures have to be undertaken in good faith, with the intention of substantially addressing the aboriginal party's concerns. The Court expressed approval for the criteria set out in a New Zealand case, of: putting the proposal forward before it was finalized; aboriginal opinion be sought on the proposal; the aboriginal group be informed of all relevant information; the Crown listen with an open mind; the Crown be willing to alter the proposal; and the Crown give feedback to the aboriginal group on how it considers its input.[99]

At the higher end of the spectrum, where the right has been asserted, the claim is strong, and the infringement would be significant, the aboriginal party would, arguably (see above) be required to formally participate in the decision-making process and the decision-maker would have to provide written reasons for its decision.

At the highest end of the spectrum, where the right has been proved and the infringement would be serious, consent might be required before Crown action could be taken (there has been no case yet in which a court required this consent). Each case is to be assessed in its own circumstances.

Consultation (especially at the higher end) might also include a duty to accommodate. This duty remains undefined in Canadian law, but surely, for reasons stated above, it must be considered in the context of who and what aboriginal peoples are (pre-existing sovereign nations). The Supreme Court holds that the Crown might have to take steps to avoid irreparable harm or to minimize the infringement. Applying this Supreme Court case law, a lower court held that the Crown's failure to make reasonable concessions to the aboriginal party might amount to bad

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[98] See Cheslatta Carrier Nation v. BC (Project Assessment Director), [1998] 3 CNLR 1 (BCSC).

[99] Much of this summarization of Haida and other case law on the duty to consult is taken from Roger Townshend, "The Duty to Consult Aboriginal People", Article for Lexpert 2005.

faith consultation or negotiation.[100] In this case, the court held that the Crown should first consult with the aboriginal group about the content of the consultation process itself, and seek to negotiate a mutually-agreeable process. Further, the court suggested that in some cases the Crown must provide funding for the aboriginal group's participation in the consultation process.

f. Treaty Rights

By and large, treaty rights should properly be regarded as affirming pre-existing inherent rights of aboriginal peoples. Treaties were in almost all instances grants of rights from the aboriginal party to the Crown. Canadian law is unclear and confused on this issue. It has been pointed out that "the law of Canadian Indian treaties has developed on a case-by-case basis, without reference to theoretical foundations"[101].

A treaty represents "an exchange of solemn promises …whose nature is sacred".[102]

The federal crown is the only Crown which can confirm treaty rights and can enter into an agreement on consent with the aboriginal parties to a treaty to extinguish treaty rights. Prior to 1982, and the coming into force of s. 35 of the Constitution, it is unclear whether the federal Crown could have validly extinguished such rights by statute or other means.[103]

The federal Crown can infringe such rights (but must justify such infringement). It is submitted here that the provincial Crown cannot infringe treaty rights. Section 91(24) of the Constitution and s. 88 of the Indian Act, which did not stop existing with the coming into force of s. 35 of the Constitution in 1982, should prohibit such provincial infringement:

> …s. 88 [of the Indian Act] accords federal statutory protection to aboriginal treaty rights. The application of such generally applicable provincial laws through federal incorporation is expressly made "[s]ubject to the terms of any treaty". Section 88 accords a special statutory protection to aboriginal treaty rights from contrary provincial law through the operation of the doctrine of federal paramountcy.….
>
> This … purpose, of course, has become of diminished importance as a result of the constitutional entrenchment of treaty rights in 1982. But I note that, on the face of s. 88, treaty rights appear to enjoy a broader protection from contrary provincial law under the ***Indian Act*** than under the ***Constitution Act, 1982***. Once it has been demonstrated that a provincial law infringes "the terms of [a] treaty", the treaty would arguably prevail under s. 88 even in the presence of a well-grounded justification. The statutory provision does not expressly incorporate a justification requirement analogous to the justification stage included in the ***Sparrow*** framework….In the near future, Parliament will no doubt feel compelled to re-examine the existence and scope of this statutory protection in light of these

[100] Gitanyow First nation v. BC (Minister of Forests), 2004 BCSC 1734.
[101] Woodward at 405.
[102] R. v. Badger, [1996] 1 SCR 771 at para. 41.
[103] La Forest, Natural Resources and Public property Under the Canadian Constitution (1969) at p. 119.

> uncertainties and in light of the parallel constitutionalization of treaty rights under s. 35(1).[104]

Cases before the Supreme Court of Canada right now might provide better clarity on this issue once the decisions are released.

The content of the treaty right usually must be proved in court before it is considered defined enough to prevent infringement against it. But unlike proving aboriginal inherent rights, treaty rights are determined by the wording of the treaty, and by seeking to establish intentions of the parties from oral history and documents written at the time (eg: re treaty negotiations and treaty-signing meetings). These other documents (and oral history) are used to indicate terms of agreement or promises missing from the text of the treaty, or to assist in interpreting treaty text.[105] Treaties are to be given a large and liberal interpretation, interpreted in the sense in which they would be understood naturally by the Indians,[106] with ambiguities in wording resolved in favour of the aboriginal party, and limitations restricting rights narrowly construed.[107]

Further, since treaties create an ongoing relationship, they must be interpreted to have meaning today, and as such, treaty rights can evolve to suit the modern context but they cannot be wholly transformed.[108]

As with aboriginal rights, infringements on treaty rights must be proved, and governments must justify these infringement (if not, courts will strike the government action). Many of the numbered treaties state that the Indians retain their right to hunt and fish throughout the lands surrendered, subject to regulations made by Canada and subject to tracts that may be taken up for settlement or other purposes. The Supreme Court of Canada has not yet determined whether such "taking up" of land under a treaty (for disposition to private owners or for designated public purposes) is an "infringement" of any treaty rights. The Federal Court (trial division) has held that it is an infringement and requires justification[109] which was overturned on appeal on a split decision[110], and the case is now pending before the Supreme Court of Canada. The BC Court of Appeal has held that Crown use (including disposition) of land taken up is an infringement. [111]

It is generally held by Canadian courts and governments that the terms "cede and surrender" in treaties extinguished pre-existing aboriginal or inherent title to the lands in question. Pursuant to s. 109 of the Constitution, the provincial Crown acquires underlying title to all public lands in the province (other than those specifically identified as belonging to the federal Crown). Thus, lands ceded through treaty lift the "burden" of aboriginal title and all title reverts to the province.

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[104] R. v. Cote, [1996] 3 SCR 139

[105] R. v. Sundown, [1999] 1 SCR 393; Marshall v. Canada, [1999] SCJ 55. See also R. v. Taylor (1981), 34 OR (2d) 360 (CA) where the court held that the Treaty of 1818 guaranteed hunting rights in the ceded territory even though the treaty text did not state this (extrinsic evidence showed that such promises were made).

[106] Nowegijick v. R., [1983] 1 SCR 29.

[107] Badger at para. 41.

[108] R. v. Marshall, [1999] 4 CNLR 301 (SCC) at para. 19.

[109] Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2002] 1 CNLR 169.

[110] (2004) FCA 66.

[111] Halfway River First Nation v. BC (Ministry of Forests), [1999] BCCA 470.

Other rights (often to continue to hunt and fish, or harvest, on the lands) remain, subject to certain limitations. Such retained rights often require the ability to use and access tracts of undisturbed lands. "As such, First Nation rights depend on the continued existence of an intact land base from which to operate."[112] This places limits on the province as to what it can do with those lands. The courts will look at whether the right as framed today is the modern equivalent or logical evolution of a harvesting right or practice in the past.[113] Treaty harvesting rights extend to the boundary of the tract surrendered unless the aboriginal party can prove that its ancestors exercised such rights in additional lands prior to signing treaty.[114]

The relationship between what has been surrendered and what has been retained, and between Crown rights and responsibilities in regard to the land to which title was surrendered yet to which certain other aboriginal rights remain, is unclear in Canadian law.

g. Aboriginal Title

Aboriginal title is an inherent right grounded in prior occupation and use of, and some governance over, the lands in question. Much of the aboriginal title to lands in Canada is considered to have been surrendered by treaty to the Crown. Where title was surrendered, other aboriginal rights were usually retained (right to hunt, fish and harvest on said lands). Not all aboriginal peoples have signed treaty, or signed treaties that ceded such title. In these cases, aboriginal peoples retain inherent aboriginal title which, like other aboriginal rights under Canadian law, must be proven in court or recognized by a modern treaty (land claim agreement) before it can be more fully protected. Note that land claim agreements to date have not perpetuated, but have extinguished, inherent aboriginal title in "return" for other more specifically defined rights to the lands in question.

Aboriginal title exists on reserves, but some have argued that the nature or scope of the title varies according to the way the reserve was created.[115] Reserves may be carved out of the aboriginal territory, in which case full aboriginal title is preserved.[116] Reserves may be created out of Crown lands, such that the Crown prerogative rights (for instance, to gold and silver deposits on the land) would still exist. Finally, reserve land may be purchased by the Crown from a previous owner, such that only those rights held by the previous owner can be transferred to the reserve land. Finally, others have argued that reserves may be created out of aboriginal territory ceded under a treaty, and the terms of this cession might affect what rights the Crown can convey back to the aboriginal party. This last circumstance is wrongly conceived, because treaties are not grants of rights from the Crown; instead, they affirm pre-existing inherent rights, including title to the area set aside as a reserve.

Nonetheless, the Supreme Court of Canada has declared that the Indian interest in reserve lands and title lands is the same under Canadian law. "It does not matter, in my opinion, that the present case is concerned with the interest of an Indian band in a reserve rather than with

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[112] Woodward at 13-9.
[113] R. v. Bernard, [2003] NBJ 320 (CA), as taken from R. v. Marshall, [1999] 4 CNLR 161 (SCC).
[114] Woodward at 13-11.
[115] P.A. Cumming and N.H. Mickenberg, Native Rights in Canada (1972) at p. 228.
[116] Woodward at p. 240 citing Osoyoos Indian Band v. Oliver (Town), [1999] 4 CNLR 91 (BCCA).

unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases…".[117]

All aboriginal title is a "burden" on the underlying title of the Crown. There is some debate about what "underlying" Crown title means. It might mean very little today, perhaps only that should there be no descendants to land under aboriginal title it would revert to the Crown. What is most important for the purposes of this paper is that in Canada, aboriginal title was recognized as held by aboriginal societies at the time of the assertion of British sovereignty and full title could only be acquired by the Crown through grant from aboriginal peoples (mostly through treaty).[118]

Aboriginal title means the right to exclusive use of the lands for many purposes. Lands are commonly held, and cannot be transferred or sold to anyone other than the federal Crown (a "surrender"). Since the coming into force of s. 35 of the Constitution, title can only be surrendered on consent of the aboriginal party[119] (although s. 35 of the Indian Act provides for expropriation of reserve lands by statute – this might be challenged as unconstitutional now). When either title or reserve lands are surrendered, full title usually vests in the provincial Crown (pursuant to s. 109 of the Constitution). However, Ontario and Canada entered into an agreement in 1924 whereby reserve lands if and when surrendered may be disposed of by or under the direction of Canada.[120] A 1988 statute allows Canada, Ontario and a band to enter into a binding agreement about lands and resources.

The Royal Proclamation of 1763 "recognizes that in all British possessions in North America, the Indian people own their lands until they are ceded."[121] A proper understanding of the law prevents any Crown from asserting its own title or any aspect of sovereignty (governance) over unceded aboriginal title lands (or any reserve lands).[122] Because of this, it has been argued that the onus should shift to require the Crown to prove the validity of its governance over unceded lands, and unless and until it can, the aboriginal group should be able to maintain trespass laws against the Crown.[123]

Right now, Canadian courts require the aboriginal party to prove aboriginal title. To do so, it must prove:

- the land was occupied by their ancestors prior to assertion of Crown sovereignty
- continuity between pre-sovereignty and present day occupation

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[117] Guerin v. R., [1984] 6 WWR 481 at 497 (SCC).
[118] Royal Proclamation of 1763.
[119] Bruce Clark, Indian Title in Canada (1987) at 74.
[120] An act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Reserve lands, S.C. 1924, c. 48.
[121] Woodward at 200, citing Slattery at p. 361.
[122] See Mark D. Walters' discussion about British imperial law as recognizing distinct "municipal" units in Indian territories to which English municipal law (common law) could not be asserted or apply unless and until Indian title was properly ceded to the Crown. See Brian Slattery, the Land Rights of Indigenous Canadian Peoples (1979) doctoral thesis, University of Sask, Native Law Centre, at p. 106: from the earliest times, the colonial instruments assumed that Indians were autonomous societies, and that relations between the Indian nations and the British were to be governed by treaties, entered into by mutual consent.
[123] Kent McNeil, The Onus of Proof of Aboriginal Title, 1999.

- at the assertion of sovereignty, occupation was exclusive.[124]

Either or both physical occupation of the lands, and aboriginal laws in relation to the land (some governance over or in respect of the land), can prove occupancy. The degree of occupation will vary according to the use of the lands (regular or seasonal use for harvesting could be enough, whereas nomadic patterns and uses might not be enough[125]). "Nomadic" is a term often misunderstood and misapplied.

> Despite the popular impression, it is unlikely that there were many aboriginal groups in North America whose movements were so random as to fall into this category. Anthropological research indicates that most, if not all, North American aboriginal peoples occupied definite tracts of land, within which they moved on a seasonal basis, returning to the same locations where they were familiar with the resources, and to which they may have had spiritual ties as well.[126]

"Shared exclusive possession" is possible (more than one aboriginal group occupied the same territory to the exclusion of others). Further, where permission to access or use the lands was sought by and granted to others, this is evidence of exclusive control.[127]

Once title is determined, rights of full exclusive beneficial ownership of the lands flow (i.e., aboriginal group can exercise more than "aboriginal rights" on the land), providing the uses are not incompatible or irreconcilable with the aboriginal attachment to the land (i.e., meaning significant destruction of the lands and its resources).[128] It is argued that title, once established, and subject to the irreconcilable use condition, "entails the absolute and exclusive possession, use and enjoyment of the lands and all its economic resources."[129]

However, as with other aboriginal rights, governments can infringe title rights, if they can justify such infringement. This creates a paradox (or legal inconsistency), since infringement hampers exclusivity. Infringement, especially where the Crown had previously sold land or permitted other parties to develop it, will normally require compensation because title "has an inescapably economic aspect".[130]

The Supreme Court of Canada has held that there are a number of valid legislative objectives which would justify infringements to title, especially given that title is not an internally limited right, such that the rights of aboriginal people to the lands must be weighed against the interests of others in the lands. Such objectives include: "the development of agriculture, forestry, mining,

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[124] Delgamuukw v. BC, [1997] 3 SCR 1010 at para. 143.

[125] This is being litigated now. In R. v. Marshall, 2003 NSCA 105 the Court of Appeal rejected the idea of a group being "too nomadic" to establish title. The court found that such interpretation would be contrary to aboriginal ways of life and perspectives, which the Supreme Court in Delgamuukw also said had to be taken into account when considering whether occupancy was sufficient to establish title. Marshall is pending before the Supreme Court of Canada.

[126] H.W. Roger Townshend, "Forced to Defend the Core of Their Identity: Aboriginal Land Rights Litigation", for Insight Conference, November 2004, at p. 6.

[127] Delgamuukw at para. 157.

[128] Delgamuukw; see also Woodward at 229.

[129] John Hurley, "Aboriginal Rights, the Constitution and the Marshall Court", (1982-83) 17 La Revue Juridique Themis 403 at 443.

[130] Delgamuukw at para. 169.

and hydroelectric power, the general economic development of the interior of [the province], the protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims".[131]

In determining, under the justification test, whether the honour of the Crown has been upheld, the factor of whether the right (title) has been accorded priority requires only that the Crown must take some account of this right, not that it must give the right absolute and unconditional priority.[132] It might be enough for the Crown to involve the aboriginal party in decisions taken with respect to their lands.[133]The other three elements of this test – minimal infringement, compensation, and consultation – are applied to title cases.

It is submitted here that s. 88 of the Indian Act does not apply to "lands reserved for Indians". As such, provincial laws that touch on the core of Indian interest in aboriginal title and reserve lands are not valid.[134]

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[131] Delgamuukw at para. 165.
[132] Delgamuukw at para. 167.
[133] Woodward at 229.
[134] See discussion of s. 88 in this paper at section A.2.a. See also Derrickson v. Derrickson (1986), 65 NR 278 at 285 (SCC): "The right to possession of lands on an Indian reserve is manifestly of the very essence of the federal exclusive legislative power under subsection 91(24) of the Constitution Act 1867. It follows that provincial legislation cannot apply to the right of possession of Indian reserve lands."

B. CANADIAN WATER LAW REGIME

1. Overview

Water rights determine whether and to what extent any government can legislate or assume jurisdiction over the water and the waterbed.

Under English law, water bodies are held to be a form of land. Land has been defined as "every species of ground, soil or earth, whatsoever, as meadows, pastures, woods, moors, waters, marshes, furze and heath," and further, "water, by a solecism, is held to be a species of land."[135] But water itself (each molecule of water) moves, and thus there is no ownership in the water molecules themselves, but rather to the waterbed, and rights to use of the water.[136]

British common law was adopted in and adapted to British North America and what became Canada and its unique circumstances. This common law was altered by later statutes. It will be argued here that neither the common law as it was applied to settlers, nor statute law, could be applied to aboriginal title lands (unless and until they were surrendered), nor to aboriginal water rights – both of which are analysed in the next section.

2. Common Law Ownership of Waterbeds

British common law (adopted in and adapted to Canada) holds that the bed of *non-tidal* rivers is presumed, absent evidence to the contrary, to be owned in equal halves by the bordering owners of the adjacent lands (these are the "riparian" owners, meaning those who own land at the "shoreline"). This is known as the "ad medium filum aquae" rule – ownership to the imaginary centre of the river or stream. No specific grant of such waterbed ownership need be stated in the grant to the bordering land; rather, there must be a specific exclusion of such waterbed ownership in the land grant to deny or rebut the presumption.[137] Thus, a description of a parcel of land bordering on, along, or to the water is sufficient to apply the presumption. It is a long established principle of English law that a conveyance of land is deemed, unless there is a contrary intent expressed in the conveyance, to include "water and water courses appertaining."[138]

Of course, if the same land owner owned the land on both sides of the river, he would own the waterbed underneath all of it – to the borders of his land cutting across the river. If a body of water is entirely enclosed within a single landowner's land (more often a lake), he would own the waterbed underneath the entire water body, and have exclusive rights to the water body.

The owner of the waterbed "owns everything above or below the land".[139]

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[135] Earl Jowitt, The Dictionary of English Law (London: Street and Maxwell, 1959), p. 1053.
[136] William Blackstone, Commentaries on the Laws of England, Vol. II (Chicago: University of Chicago Press, 1979) at p. 18.
[137] MacLaren v. Attorney General for Quebec, [1914] AC 258 (PC).
[138] 49 Halsbury's (4th) para. 373 as cited in Bartlett at 22.
[139] Gerard LaForest, Water Law in Canada – The Atlantic Provinces (1973: Ottawa, Information Canada) at p. 234.

> [T]he solum of a river bed is a property differing in no essential characteristics from other lands. Ownership of a portion of it usually accompanies riparian property and greatly adds to its value.[140]

Under British common law, there was no such presumption of equal ownership of the beds of *tidal* waters (instead, the Crown was presumed to own such waterbeds), and thus, unless explicitly granted, no exclusive rights to tidal waters. The owners of land adjacent to or bordering on tidal water were presumed to own land only to the "high-water mark" (where the water came it at its highest point), unless there was an explicit grant that said otherwise.

Under British common law, all tidal waters were considered *navigational* waters, and all non-tidal waters were considered *non-navigational* (a legal fiction). However, in Ontario (and the Atlantic provinces and BC), it is strongly arguable that British law was adapted to apply the ad medium filum aquae presumption of ownership of the waterbed to *both navigational and non-navigational non-tidal water bodies*.[141] Considered another way, the British law of non-tidal waters applied in Canada to all non-tidal waters, regardless of their navigability.

This presumption has not been extended to the Great Lakes and the St. Lawrence River on the basis that it could too readily be rebutted.[142] This was an adaptation of British common law to British North America, to account for peculiar circumstances and needs (i.e., it was considered unfair to vest ownership to a large waterbed and exclusive rights such as fishing to the water above, based on relatively small grants of lands bordering such lakes).[143] But note that the rebuttal to this presumption is based on the circumstances of the day (well after Europeans first arrived in North America) as applied to settlers. There were many settlers each with relatively smaller grants of land. Surely, this presumption would not be unfair to apply to the Hudson's Bay Company which at one time was given grant to vast tracts of land in what became Canada.

The provincial Crown, at Confederation, held title to all waterbeds, excluding then-existing trusts and interests, and excluding all waterbeds or waters vested in the federal Crown and in unsurrendered Indian lands.[144]

The common law presumption of ownership of waterbeds pursuant to the ad medium filum rule was removed by the Bed of Navigable Waters Act (S.O. 1911, c. 6) on lands granted by the Crown (both before and after the Act was passed in 1911). If ownership could be shown by other means, it was not affected by this Act. This Act held that waterbeds of navigable waters

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[140] Reference re BC Fisheries, [1915] AC 153 (PC) at 167..

[141] Keewatin Power Co. v. Town of Kenora (1908), 16 OLR 184 (CA); Reference re British Columbia Fisheries, [1914] AC 153 (PC), (1912-13) 47 SCR 493. See also The Queen v. Robertson, [1874] 6 SCC 53at 120: "even in a river so used for public purposes [i.e., navigational], the soil is prima facie in the riparian owners and the right of fishing private.". But see also Carroll v. Empire Limestone Co. (1919), App Div 121 at 128 (OCA) where the court held that "the common law of England is not applicable to the Great Lakes of this Province." Note that this case did not say that the English presumption of ownership to waterbeds along all non-tidal navigable waters was rebutted – only in respect of the Great Lakes.

[142] Richard Bartlett, Aboriginal Water Rights in Canada (1988: University of Calgary, Canadian Institute of Resources Law) at 83, citing Keewatin Power at 199.

[143] Walters at 322-24 citing American, Australian, New Zealand and Canadian cases including, in the latter case, The Queen v. Meyers (1853), 3 UCCP 305 at 350-52 and 357-58, and Parker v. Elliott (1852) 1 UCCP 470 at 489-90.

[144] Reference re Ontario Fisheries, (1895) 26 SCR 444 at 533.

bordering lands *granted by the Crown* are deemed to not be owned by the grantee. This Act arguably did not apply to aboriginal title lands, which were not granted by the Crown.[145] "Treaties *and statutes* relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indian."[146] The Bed of Navigable Waters Act should be so construed. Neither aboriginal title lands nor most reserve lands can be considered granted by the Crown. Further, only the federal government could purport to extinguish such land rights, and only with clear and plain intent to do so. A 1924 Agreement between Ontario and Canada (entrenched by legislation at both levels of government[147]) provided that lands might be administered and disposed of by Canada for the benefit of Indians, and said that every such *grant* was subject to the bed of Navigable Waters Act. But again, this reference to "grants" does not apply to aboriginal title and reserve lands (certainly not any established pursuant to treaty or agreement as reservations of part of traditional territory). This is not even close to clear and plain intent to extinguish.

The Bed of Navigable Waters Act also did not repeal riparian rights.

The owner of the waterbed has exclusive rights thereto, including riparian rights, the exclusive right to fish and hunt in and over the waters, and to erect structures in and over the water – subject to the riparian rights of others along the same water body, and subject to "public" rights to water.[148] Public rights do not of themselves defeat or remove private ownership of the waterbed and rights attendant to this. "[S]uch a [public] right is not in the slightest degree inconsistent with an exclusive right of fishing… There is no connection whatever between a [public] right of passage and a [private] right of fishing."[149] Not even the transfer of "Crown" lands to the provinces pursuant to s. 109 of the Constitution Act 1867 could interfere with such pre-existing private ownership and rights.[150]

3. Common Law Riparian Rights

"The owner of land adjoining a river, stream or lake has certain rights respecting the water therein whether or not he owns the bed. These rights arise from his ownership of the bank, and from the Latin word for bank, *ripa*, they derive their name of riparian rights."[151] Certainly, where a party owns the waterbed itself, that party has riparian rights to the water over it, but as stated, these rights are not dependent on such title. If the owner of the bordering land is a private party or the Crown, these riparian rights apply.

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[145] Peggy Blair, "No Middle Ground: Ad Medium Filum Aquae, Aboriginal Fishing Rights and the Supreme Court of Canada's Decisions in Nikal and Lewis", in (2001) 31 RGD 515 at 587.
[146] Nowegijick v. The Queen, [1983] 2 CNLR 89 (SCC) at 94.
[147] An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Reserve Lands, S.C. 1924 c. 48.
[148] LaForest at 234; Bartlett at 111.
[149] The Queen v. Robertson, [1874] 6 SCC 53 at 114.
[150] Robertson at 132.
[151] LaForest at 200.

Riparian rights "are those rights to water which were recognized by the common law as a 'natural incident to the right to the soil itself',… derived from possession of land adjacent to water."[152] They are property rights.[153]

Riparian rights include: right of access to the water; rights to drain surface water from adjacent land into the water body; rights to natural flow of water; rights to quality of water; rights to use the water; and rights to accretion (changes in shape of water body and thus the bordering land).[154]

- Right of access means the landowner can go to the shore, and from the shore to the centre of the body of water, along the entire length of his land that borders the water.

- Right of drainage means the landowner can drain water deposited on his land by natural means (snow, rain) into the adjacent water body (but he can't pollute the water body in so doing).

- The right to water flow includes four rights: flow in its natural course; preventing someone else from permanently extracting water; preventing someone else from blocking your flow of water from your land; preventing you from altering the flow from your land to someone else's land. The right to flow is subject to reasonable uses and takings (beyond de minimus).

- The right to quality of water means the right to its natural character or quality and the right to not have it polluted (to the point where it would interfere with substantial enjoyment of land or personal comfort).

- The right to use the water is for two purposes. First, for "domestic" purposes (such as drinking, cleaning, watering livestock), and the taking of water for these purposes is relatively unrestricted. Second, for "extraordinary" purposes (beyond domestic use, and generally for commercial purposes such as irrigation, hydro generation, etc.) but the taking for these purposes is limited by the requirement to not substantially alter the quantity or quality of the water (i.e., "reasonable" use[155]).

- The right to accretion means the right to own land that was once under the water, if it becomes exposed or is built up over the water-line, through the normal and gradual action of the water flow.[156] The flip side of accretion, is of course, the effect of erosion.

In Ontario, there is no statutory vesting of property in or rights to use water itself, in the Crown; riparian rights continue to govern.[157] Thus, in Ontario existing riparian rights are not abolished

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[152] Bartlett at 49-50, citing Robert Clark, ed., Waters and Water Rights (1967-76: Indiana, Allen Smith & Co.) at 5. 51.1.

[153] LaForest at pp. 200-233.

[154] Kenneth Tyler, "Indian Resource and Water Rights", in [1982] 4 CNLR 1 at 20; see also LaForest at pp. 200-233. .

[155] David Percy, The Framework of Water Rights Legislation in Canada (Calgary: The Canadian Institute of Resources Law, 1988) at pp. 73-74 where he states that it is more likely that courts will adopt the "reasonable use" limit (versus the greater limit of "natural flow").

[156] Tyler at 20-24.

by statute (or given to another private party or the public), but they can be regulated by statute, analogous to land-use regulation. The Ontario Water Resources Act (regulates takings of water over 50,000 litres per day, and other uses) is one such statute – it creates an administrative and supervisory scheme over water.[158] "The overriding principle is that a permit [to take water] will not be granted if it would interfere with the existing uses of riparian owners."[159] Environmental or conservation statutes affecting or pertaining to water or wildlife in or on water, and fisheries acts are other types of such statutes. They run alongside, and in a sense are designed to help ensure the proper and fair execution of, riparian rights.

Statutes can also authorize interference with the exercise of riparian rights (eg: permitting corporations, private parties or municipalities to construct and operate certain works that affect water). Generally, statutes are interpreted to ensure as little interference as possible with the property and riparian rights of others.[160] Statutes can authorize what would otherwise be a "nuisance" at common law, again subject to as little interference with others' rights as possible (practical feasibility, not theoretical possibility).[161]

4. Common Law Public Rights

Public rights are held by the public at large (i.e., not government rights), and are the rights to navigation, to float logs and other property, and to fishing. In Canada, public rights may not exist automatically, and may have to be established by prescription, dedication or statute.[162] Public rights are said to be grounded in the British Magna Carta and the common law emanating therefrom (the Magna Carta provisions respecting water were designed in large part to protect the public from abuses of the Crown in taking water or obstructing others from using water).

No public rights can be exercised on water bodies totally enclosed within private property (i.e., "private water bodies").

Navigation rights can be exercised on any waters (tidal or non-tidal) that are navigable in fact[163] and that are not private water bodies, no matter who owns the waterbeds and who holds the riparian rights to the water body. The right of navigation is a paramount right that can limit all other water rights so long as the navigation itself is practiced in a reasonable manner (and see comments below on how this right should be understood in the context of aboriginal title lands).[164] That is, all navigable waterways must be used in such a way as to not prevent or unduly obstruct navigation, subject to explicit legislation by the federal Crown which permits

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[157] Alastair Lucas, Security of Title in Canadian Water Rights (Calgary: Canadian Institute of Resources Law, 1990) at 20.

[158] Lucas at 20.

[159] David Percy, The Framework of Rights Rights Legislation in Canada (1988: Calgary, The Canadian Institute of Resources Law) at 78.

[160] LaForest at 217.

[161] LaForest at 222.

[162] Caldwell v. McLaren (1884), 9 App. Cas. 392 at 405 (PC).

[163] See Coleman v. Ontario (AG), [1983] OJ No 275 for a discussion as to what is navigable in fact and in law. If a body of water is capable of floating craft or logs, it is navigable in law. The judge here spends a great deal of time attempting to determine whether a commercial purpose for or benefit from the navigation (or floating) is required to prove navigability in law (given past precedent on this point), and decides that it is not.

[164] Tyler at 16.; Friends of Oldman River Society v. Canada (Minister of Transport), [1992] 1 SCR 3 at paras. 68-70.

obstructions to or effects on navigation (especially where the federal Crown owns the waterbed, since in so obstructing it cannot interfere with any rights to the waterbed which might be held by the province or a private party).[165]

Rights to float logs and other property including canoes and other small craft can be exercised on all waters that are navigable at law (that is, they are not wholly private water bodies). The right of floating is not a paramount right, and must be exercised concurrently with riparian rights, taking all reasonable means to not interfere with riparian rights (and vice versa).[166] Where the right to float is exercised on waters that are also navigable, generally the right to navigation trumps, and all reasonable means must be taken to not interfere with navigation.[167]

The weight of authority is that public fishing rights can only be exercised in Canada in tidal waters.[168] Otherwise, the right to fish vests solely in the owner of the waterbed. If the Crown is the owner of the waterbed, then the Crown can permit the public to fish there (i.e., such permission, generally by legislation or regulation, must first be given).[169] Thus, in Canada, where the surrounding circumstances would not suit the presumption of ad medium filum such that the bordering landowners do not own the waterbeds (eg: Great Lakes and other large lakes[170]), and the Crown holds the title to such waterbeds, the Crown can grant to the public the right to fish there.

In the *Reference re BC Fisheries*, 1914, the Privy Council held: "The fishing in navigable non-tidal water is the subject of property, and according to English law must have an owner and cannot be vested in the public generally."[171] Further, where a party owns the fishery (has the right to exclusive fishing), this imports ownership of the waterbed. That is, exclusive ownership of the fishery is treated as evidence of ownership of the waterbed.[172]

The first colonial fisheries act (An Act Respecting Fisheries and Fishing, passed in 1857) granted rights to public fishing in the province of Upper Canada but not where this would affect private rights (i.e., private ownership of the waterbed was maintained and respected).[173] The 1868 federal Fisheries Act (31 Vict. C. 59, 60) purported to extend public fishing rights to unsurrendered aboriginal lands. When Ontario passed its own fisheries legislation in 1885, and later in 1892, this dual set of fisheries laws at both the federal and provincial levels led to a reference to the Supreme Court of Canada in 1894, to determine which level of government had jurisdiction over what. The Court held that any public right in navigable non-tidal waters was subject to exclusive rights granted to private persons.[174] The Privy Council upheld, ruling that public rights were subject to pre-existing private rights, and that the federal government's

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[165] LaForest at 190.
[166] Tyler at 17; LaForest at 192-93.
[167] LaForest at 195.
[168] LaForest at 196.
[169] LaForest at 196.
[170] Walters at 317 citing Bloomfield v. Johnston (1863) IR 8 CL 68.
[171] Reference re BC Fisheries at 173.
[172] Blair, No Middle Ground at 67 citing The Queen v. Robertson at 119.
[173] Peggy Blair, "Taken for Granted: Aboriginal Title and Public Fishing Rights in Upper Canada", in (2000) Ontario History Vol. XCII, No. 2 at p. 41.
[174] Reference re Ontario Fisheries (1895) 26 SCR 444 at 459 and 533.

jurisdiction over "sea coast and inland fisheries" under the Constitution Act, 1867 did not remove these private rights.[175]

Public rights are regulated by the applicable Crown (see division of federal and provincial Crown powers in Appendix C). The federal Navigable Waters Protection Act (no obstruction to navigable waters without a permit), Fisheries Act (no harm to fish or fish habitat without a permit), and other statutes apply.

[175] Reference re Ontario Fisheries, [1898] AC 700 (PC).

C. ABORIGINAL & TREATY "WATER RIGHTS"

Following is an outline of the arguments as to how the law should properly be understood, and following each argument, a synopsis of how the law is actually understood or applied at present. All of this is analysed in more detail below.

How aboriginal rights pertaining to water should be regarded:

- The so-called assertion of British sovereignty over aboriginal peoples (i.e.; the right to govern aboriginal peoples on their lands, exercising their rights) was not valid as there was no basis in law at the time for this. Only British *title* to certain aboriginal lands was acquired through treaties, and almost none of these lands were lakebeds of the Great Lakes Thus, in all respects relating to unsurrendered or reserved title lands, and in respect of all rights of aboriginal peoples to live by their own cultures and to govern themselves in so doing (including in regard to fishing, hunting, and all other harvesting), neither the federal nor provincial governments have any right to govern.

  This is not how Canadian law currently perceives the situation, and thus having this perspective accepted in Canadian law (if it ever were to be) will take time and effort. In the interim, the fact that this argument has merit could be used in negotiating with governments about developing recognition of rights.

- If British sovereignty can be perceived as legitimately asserted in respect of lands held under aboriginal title, allowing some degree of governance and regulation of these lands by Canadian governments, then Canadian governments and courts today must apply the law and facts as they existed when such title was considered to have been recognized by English common law. To do anything else is a violation of *English* law. British imperial law itself regarded aboriginal peoples as governing themselves (in their own territories exercising their own rights) in distinct and separate units. They were not subject to the same British colonial (or "municipal"[176]) law as was applied to settlers. Further, British colonial law adapted to the unique North American (later, Canadian) situation under the "particular or local custom" rule, which would and should recognize these unique aboriginal rights as defined from the aboriginal perspective. Where aboriginal peoples considered themselves to have held title to the waterbed, or exclusive rights to the waters, and this title can be proved to have not been surrendered or extinguished (including on reserves), then it exists today.

  Canadian courts appear to accept that aboriginal title does include title to waterbeds of non-navigable waters where historic exclusive occupancy of the waters can be proved, but have been reluctant to accept it existed in *non-tidal navigable* waters (and even more so, in tidal waters) after introduction of English common law. This reluctance is not based on a proper understanding of the law at the time, and should be corrected.

[176] The reference to municipal law in this context has the meaning applied in the field of international law, and it means domestic law.

- All aboriginal title lands (including reserves) carry paramount rights (akin to US doctrine) to *use of* water *feeding and bordering* the lands. These are akin to but greater than riparian rights (which are shared rights "reduced" by the rights of other riparian owners), where aboriginal uses are paramount over (not reduced by) the interests of non-aboriginal users of the water. Even though aboriginal title was perceived as part of the British/Canadian common law, and riparian rights were also a part of this law, given the purpose of s. 35 of the Constitution to reconcile the assertion of British sovereignty with the fact of pre-existing self-governing aboriginal societies, these rights should be considered paramount. Only the narrowest (and least accurate and least just) interpretation of the law would result in application of bare riparian rights to aboriginal title and reserve lands bordering a shoreline. Riparian rights themselves can lead to significant power to prevent the taking and diverting of water by others.

  Canadian law currently favours the narrowest interpretation for reserve lands (i.e.: they come with riparian rights where the reserve extends to the water's edge) but this issue is evolving and if law is properly applied, should evolve toward paramount rights to use of water.

How Canadian governments should interact with these rights (once properly defined):

- Section 91(24) of the Constitution provides the federal government with exclusive jurisdiction to govern in respect of "Indians, and lands reserved for Indians" (two separate heads of authority). Section 88 of the Indian Act (a federal law) gives certain provincial laws the force of federal law if they meet certain criteria. In this way, these provincial laws can apply to affect rights held by aboriginal people – otherwise, they could not.

- Section 88 of the Indian Act does not give provincial law federal force so as to make it apply to "lands reserved for Indians". Only the federal government may regulate or infringe rights in respect of Indian reserve lands and unsurrendered aboriginal title lands. Water is an aspect of "land", and thus rights to the waterbed and rights akin to riparian rights are land or "property" rights. Thus, only the federal government may regulate in respect of such Indian water rights, on reserves, and on unsurrendered aboriginal title lands. Provincial governments may not so regulate and any provincial regulation that purports to limit or affect such water rights should be ultra vires the province as unconstitutional.

  It is unsettled in Canadian law whether s. 88 of the Indian Act gives federal force to provincial law (thus allowing such law to apply) in respect of aboriginal title and reserve lands. Rights to water and waterbeds are generally considered land or property rights, but Canadian law has barely dealt with the issue of such rights as held by aboriginal peoples, nor has it dealt much with which level of Canadian government can regulate in respect of such water rights.

- In respect of "Indians" (aboriginal peoples), only the federal government can regulate or infringe treaty rights, because s. 88 of the Indian Act does not give federal force to provincial laws that are inconsistent with *treaty* rights. Further, s. 88 of the Indian Act is unconstitutional to the extent it allows provincial governments to regulate *aboriginal*

rights, or infringe on these where such infringement would impair the status or capacity of aboriginal peoples as peoples. These rights are at the very core of "Indianness", and thus within the exclusive jurisdiction of the federal government pursuant to s. 91(24) of the Constitution.

The law seems more weighted toward prohibiting any provincial infringement of any treaty right, except in the prairie provinces which are in a unique situation given the *Natural Resources Transfer Act* as noted below. As for any ability of provincial governments to infringe aboriginal rights, courts have held this is permissible, but the Supreme Court of Canada has not yet considered all the implications of this, especially in regard to s. 88. A case to be argued before the Supreme Court of Canada in the near future, *Morris*, might provide some clarity once decided.

- Any government that intends to infringe aboriginal and treaty rights must justify the infringement. Whether or not only the federal government is permitted to so infringe, the test for justifying infringement (by any government) of rights in relation to water must be very strict. Water feeds all aspects of life (the lifeblood of Mother Earth), and of "society" or social organization (navigation or mobility, health, culture, economy, and the ability to self-govern in respect of these). Rights to a quantity and quality of water sufficient to sustain life and society are prerequisite to and necessary for virtually all other aboriginal rights and treaty rights. Given this, rights to water and rights directly reliant on water should be prioritized over any other private rights (and, possibly, co-exist with certain public rights, such as to navigation).

  Since the law in respect of water rights is inconsistent and in flux, so too is the law in regard to justifying infringement of such rights. Again, if such law properly applies facts and properly respects the nature of aboriginal rights, "reconciling" requires a very high threshold for justification.

1. Ownership of Waterbeds Arising from "Aboriginal Title"

If assertion of British sovereignty was not legitimate as applied to aboriginal title lands, then English common law should never be applied in respect of such lands, and only the indigenous people's own laws should apply. The incidents of title, including ownership of applicable waterbeds and exclusive use of the waters over them, would be as defined by indigenous law, subject to proof of the boundaries.

However, even if British sovereignty can be perceived as legitimately asserted in respect of lands still held under aboriginal title, then Canadian governments and courts today must apply the law and facts as they existed when such title was considered to have been recognized by English common law. To do anything else is a violation of *English* law.

Generally aboriginal peoples view land and water in unity, and thus aboriginal title to lands – be they under water or not – should be dealt with consistently.[177] And the Supreme Court of Canada appears to consider aboriginal title to lands under water and lands above water to be the same. In

[177] Report of the Royal Commission on Aboriginal Peoples (Ottawa: Minister of Supply and Services, 1996) at p. 448.

Delgamuukw the Court stated that title may be proved by showing "regular use of definite tracts of land for hunting, *fishing*, or otherwise exploiting its resources".[178] In *Calder*, the Court held that aboriginal title is "a right to occupy the lands and enjoy the fruits of the soil, the forests, and of the *rivers and streams*".[179]

This is consistent with English common law which treated lands covered by water the same as lands above water. This treatment was accepted in Canada. In the *Reference re Ontario Fisheries* case, Ontario argued (without opposition) that lands transferred to the province pursuant to s. 109 of the Constitution "means as much land covered by water as land not covered by water."[180]

It was clearly accepted that aboriginal peoples held title to waterbeds (or, arguably, to the waters themselves), as there were explicit surrenders of ground covered with water, or waters themselves, in treaties in Ontario.[181] These were all fairly limited in scope (i.e., specific harbour areas or fishing and harvesting areas), but on the US side, the treaties included large areas of the Great Lakes waterbeds. Further, the Royal Proclamation of 1763 reserved "Hunting Grounds" for the Indians to which no Crown could take title unless and until such areas were first surrendered by the Indians by treaty. "Hunting Grounds" has repeatedly been held by courts to include fisheries, thus confirming that aboriginal title extended to waterbeds.[182]

Modern treaties routinely protect aboriginal title to waterbeds.[183] American courts have recognized pre-existing aboriginal title to waterbeds, including under Lake Superior.[184]

Treaties signed at or near the turn of the last century appear, when purportedly surrendering a tract of land, generally appear to surrender waters (and waterbeds) within the boundaries of these lands. Where fishing rights are explicitly maintained in land surrendered, there would be little need to reserve this right if the aboriginal party retained title to the waterbeds throughout the territory (since title to waterbeds carries with it the exclusive right to fish). This indicates that the Crown recognized that aboriginal peoples held such title to waterbeds and that it had to be surrendered before the Crown could assume title.

However, the Crown has recently argued[185] that aboriginal title to the waterbeds of the Great Lakes and other navigable waters in Ontario could not exist after the assertion of British

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[178] Delgamuukw at para 149.
[179] Calder v. AG of BC, [1973] SCR 313, 34 DLR (3d) 145 at 174.
[180] Reference re Ontario Fisheries, [1895] 26 SCR 444 at 492.
[181] Blair, Taken for Granted at 34-36, referencing several treaties or surrenders from 1792 to 1891.
[182] See, for example: R. v. Denny, [1990] 2 CNLR 115 (NSAD); R. v. White and Bob (1965), 52 DLR (2d) 481n (SCC). There are several other cases, cited in Blair, Taken for Granted, at fn 10.
[183] See RCAP Report at 723 (Inuvialuit), 724 (Nunavut), 727 (Yukon Umbrella Agreement), 730 (Sahtu Dene and Metis and Gwicj'in); Labrador Inuit Land Claims Agreement (AIP) (Canada: 2003) at 52 (includes title to seabed).
[184] Idaho v. US, 121 S.Ct 2135 (2001) (USSC holding that a substantial portion of submerged lands in issue were beneficially owned by the Coeur d'Alene Tribe); People v. LeBlanc, 399 Mich. 31, 248 N.W.2d 199 (1976) at 205-7 (Supreme Court of Michigan held that a Chippewa tribe originally had aboriginal title to a portion of Lakes Superior and Michigan)
[185] See Ontario Superior Court court file no. 01-CV-189329, Walpole Island First Nation v. AG Canada and Her Majesty the Queen in Right of Ontario; Ontario Superior Court court file no. 03-CV-261134 CM1, Chippewas of Nawash Unceded First Nation and Saugeen First Nation v. AG Canada and Her Majesty the Queen in Right of Ontario. These are claims to the waterbeds of portions of certain Great Lakes and other

sovereignty and application of British/Canadian common law – and thus cannot exist today. Even though there is clear evidence that such title existed and the Crown recognized this in its treaty-making and other processes, the Crown argues that once aboriginal title became part of the English common law such title could no longer be held in waterbeds of any navigable waters, or at the very least in the Great Lakes.

The Crown position is based on this argument: British imperial law distinguished between only tidal and non-tidal waters (such that only in non-tidal waters could ownership of the waterbed exist, and exclusive fisheries exist). But this was adapted to circumstances in North American such that the law for tidal waters was applied to non-tidal waters that were also *navigable*. And since Magna Carta prevented any private fisheries in and any private ownership of the waterbeds under tidal waters, it also prevented same in Ontario navigable waters. Thus, there could be no aboriginal title or exclusive fisheries in these waters.

The Crown's argument is seriously flawed and ignores the law. First, there is good case law that states that most Ontario non-tidal waters, both navigational and non-navigational, were treated as non-tidal waters in which waterbeds could be owned and exclusive fishing rights held. That is, they were *not* treated as *tidal* waters in which no private rights could be held. In the *Ontario Fisheries Reference*, the Supreme Court and Privy Council held that any public right in navigable non-tidal waters was subject to exclusive rights granted to private persons.[186]

Second, the Crown's position ignores the fact that earlier treaties (both on the British/Canadian side and the US side) in the Great Lakes Basin explicitly included surrenders to waterbeds and waters, or specifically reserved these, indicating the acknowledgement of the Crown that aboriginal peoples held title to these as a necessary aspect of their territory.[187] Further, where treaties did not specifically surrender title to waterbeds under water bodies outside the geographical demarcations or limits of lands surrendered in a treaty, and where such waters had been exclusively occupied or used by the aboriginal party, the legal requirement to interpret treaties in a broad, generous and liberal manner in favour of the Indians would lead to the conclusion that title to these waterbed had not been surrendered.

Third, British law does not state that there could not be ownership to waterbeds in tidal (or navigational) waters; rather, it states that this was not to be *presumed*. It could, however, be *proved* to exist.

Fourth, as Walters cogently argues, British imperial law, and colonial law applying the "local custom" rule, required that the common law in North America adapt to the fact that there were indigenous peoples here with distinct societies occupying and dependent on the Great Lakes (and other waters) and its fisheries. Thus, British law was not to be considered as applicable to indigenous peoples the same way as it was for settlers. If British imperial law applied, such law

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water bodies, on the Canadian side. The defendants moved to strike these claims, and their motion was defeated. They sought leave to appeal and were denied.

[186] Reference re Ontario Fisheries (1895) 26 SCR 444 at 459 and 533; [1898] AC 700 (PC). See also Keewatin Power Co. v. Town of Kenora (1908), 16 OLR 184 (CA); The Queen v Robertson, [1874] 6 SCC 53; Reference re BC Fisheries, [1915] AC 153 (PC).

[187] Walters, Blair

considered indigenous peoples as distinct units, different than settlers, within the Empire.[188] If British North American colonial common law applied as adapted to the particular customs and circumstances in North America, it adapted to the fact of unique indigenous societies and their rights. Under imperial law, aboriginal title would have been recognized as unique to aboriginal peoples and their ways of life, their survival based on and tied to the lands and waters. Aboriginal title to the waterbeds and rights to exclusive fisheries would have been recognized.[189] Under colonial law, the particular circumstances of and in relation to aboriginal peoples in and around the Great Lakes would have been recognized. In both cases, waterbeds were clearly part of aboriginal peoples' territory – including in the Great Lakes.

Walters reviews certain cases of New Zealand which recognize that although "the common law of England" entered New Zealand with British sovereignty "it came as part of European law, and not as a body of principles to be applied in ascertaining and interpreting the Maori customs and usages…"[190] This and other cases found aboriginal title in waterbeds of navigable non-tidal waters and possibly in tidal water as well.[191] "These propositions support the idea that, under either the imperial or municipal [colonial] models of aboriginal rights, public rights in navigable waters did not fully vest until native rights were extinguished, and the scope of native rights was determined by looking at native custom in isolation from English common law concepts."[192] In Canada, common law as applied to settlers was not applied the same to aboriginal title lands – at least until aboriginal title was surrendered.

Fifth, there are a number of examples of waterbeds and exclusive fisheries that were indeed reserved to aboriginal people in treaty in the Great Lakes Basin.[193]

Sixth, there is good evidence that title to the waterbed of parts of Lakes Erie and Huron, Lake St. Clair, the St. Clair River and the Detroit River remains vested in Walpole Island First Nation as descendants of the Three Fires Confederacy, and that other waterbed areas of Lake Huron remain vested in the Saugeen and Nawash First Nations.[194]

Clearly, any inherent title to waterbeds possessed by an aboriginal people would still exist (providing it can be proved), unless it was explicitly extinguished before 1982, in the following cases: where aboriginal parties did not sign treaty; where treaties did not entail surrender of lands

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[188] Further, the doctrine of continuity, an aspect of imperial law, holds that "upon a sovereign's conquest or acquisition of a new territory, imperium over that region passed to the new sovereign, but the underlying dominium, whether usufructuary in nature or in fee simple, was left unaffected." David Bloch, "Colonizing the Last Frontier" in (2005) 29 American Indian Law Review 1 at 18 citing Worcester v. Georgia 31 US at 547. Imperium means right to govern; dominium means title to land.

[189] And was in fact recognized: see references to treaties in this section.

[190] Re the Bed of the Wanganui River, [1955] NZLR 419 at 416 (CA) as cited in Walters at p. 346, who also cites other cases.

[191] AG v. Ngati Apa (2003) 3 NZLR 643 (CA).

[192] Walters at 346.

[193] Walters, Blair

[194] See Walters; Blair, Settling the Fisheries; Blair, No Middle Ground for some of the extensive evidence. See also the statements of claim in Walpole Island First Nation, Bkejwanong Territory v. AG Canada and Ontario, Superior Court of Justice court file no. 00-CV-189329, and in Chippewas of Nawash Unceded First Nation and Saugeen First Nation v. AG Canada and Ontario, Superior Court of Justice court file no. 03-CV-261134 CM1.

or specifically certain waterbeds; or where title to any waterbeds or maintenance of exclusive fishing grounds was reserved.

In respect of reserves, title to waterbeds would exist. "Over ninety percent of the reserve lands in Ontario … were set apart pursuant to treaty or agreement"[195] out of the traditional territory of the aboriginal people. The Supreme Court of Canada has held that the interests in aboriginal title lands and reserve lands are the same.[196] This has been acknowledged in certain agreements between governments and bands, whereby control structures placed by governments on waterbeds on reserves were recognized as being owned by the band.[197]

In all Ontario non-tidal waters, such title would include all the incidents of ownership, including rights to exclusive use and occupation, including exclusive fisheries.

There is some question as to whether waters over such waterbeds (held today under aboriginal title), would even be subject to public rights of navigation and floating, which too were English common law rights applicable to settlers. If aboriginal title provided for such public rights, then they exist. If aboriginal title did not include such public rights, then arguably they still exist if such rights are necessary to the sovereign status of Canada (i.e., for security and similar reasons). There is nothing inconsistent as between private rights (to waterbeds, or to fish) and public rights (to navigate or float, for example).[198]

Thus, there is strong argument (and evidence supporting it) that Canadian cases which have refused to consider aboriginal title or have denied exclusive fishing rights in navigable non-tidal waters are wrong (they failed to follow, apply and understand the actual law as it developed). Blair persuasively demonstrates how two such cases, *Nikal* and *Lewis*, are wrong in law.

2. Ownership of Waterbeds Arising From Ad Medium Filum Rule

This rule likely has limited application to aboriginal title lands. First, if the general common law in British North America did apply to aboriginal title lands, then there is conflicting authority as to whether the rule applies to non-tidal navigable waters in Canada. There is also authority (and some conflicting authority) that the presumption, if it applied at all to non-tidal navigable waters, did not apply to the Great Lakes and other large bodies of water. Second, it is likely more accurate that the general common law as applied to settlers in British North America did not apply to aboriginal title lands. These were properly regarded under British imperial law and under the "local custom" rule of British colonial law as being outside the general common law.

The point is that such the ad medium filum presumption is not necessary to show aboriginal title to waterbeds. Nor does it matter to aboriginal title if the presumption did not apply. It is a presumption only – and is applied absent proof or without requiring proof of title to the waterbed.

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[195] Bartlett at p. 22

[196] Guerin.

[197] See, for example, the agreement between province of Alberta and Peigan Band regarding Indian ownership of diversion works on the Old Man River on the reserve.

[198] See The Queen v. Robertson. If, then, unsurrendered aboriginal title could co-exist with public rights at common law, then aboriginal title exists as of 1982. Neither the common law, nor s. 35 of the Constitution are the source of aboriginal title or rights, but provide a manner of interpreting and understanding those rights in relation to the rights of others.

Under British common law, title to waterbeds could be proved even where the presumption did not exist (including in tidal waters). Where it can be proved that aboriginal title to a waterbed did exist, and was not surrendered or extinguished, then there is nothing in British or Canadian law preventing the recognition of such title today.

Specifically for reserve lands, the US Supreme Court held that an Indian reservation composed of islands in Alaska was deemed by implication to include the submerged land (waterbeds) surrounding the islands, especially since the purpose of the reservation was to enable the Indians to "become self-sustaining…", such that exclusive use of the fisheries over these waterbeds was required.[199] Note that these are *tidal* waters, where the ad medium filum presumption has never been applied under English common law. The Supreme Court of Canada has stated: "It is extremely difficult to separate out the fishery from either Indians or the lands to be reserved to Indians."[200]

Thus, it has been recognized that title to waterbeds can exist even where the ad medium filum presumption does not apply. Aboriginal title to waterbeds should be held to exist where it can be proved, whether or not the ad medium filum presumption ever applied.

3. Rights to Use of Water (regardless of ownership of waterbed)

Where aboriginal title lands and reserve lands exist, this should mean that the title to waterbeds inside and bordering the lands exists, which carries exclusive rights to water therein (see above). Wherever aboriginal title exists in any waterbeds, it carries such exclusive rights (possibly subject to certain public rights).

But even where aboriginal title to waterbeds does not exist or is not recognized, it is submitted here that a proper reading of Canadian law and facts should lead to the conclusion that all aboriginal title lands above water (including reserves) carry paramount rights to *use of* water *feeding and bordering* the lands.

These rights to use are of a similar nature to riparian rights, but broader in scope. The nature of riparian rights relates to natural quantity and quality of water, and maintaining same, which is precisely what aboriginal rights in respect of water do and acknowledge.[201]

Riparian rights are rights to "equal" sharing of the same water source by all riparian owners (those with lands bordering the same water way). Even though aboriginal title was perceived as part of the British/Canadian common law, and riparian rights were also a part of this law, given the purpose of s. 35 of the Constitution to reconcile the assertion of British sovereignty with the fact of pre-existing self-governing aboriginal societies from whom so much has been taken (often without colour of right), the doctrine of paramount rights should apply.

The US doctrine holds that uses for tribal reservations are *paramount* over other users of the same water source (i.e., not equally shared).

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[199] Alaska Pacific Fisheries v US, 248 US 78 (1918) at 89.
[200] R. v. Jack, [1980] 1 SCR 294 at 308.
[201] Bartlett at 56.

In the US, Indian water rights are rights of use; as in the English common law, there is no "ownership" in the water per se. In the US, aboriginal water rights on reserves are governed by the prior appropriation principle, or paramountcy of rights, through the implied-reservation-of-water rule known as the "Winters doctrine"[202]. This doctrine holds that a right to water is implicit in the creation of reservations, given the purpose for which they were created. They were created to "civilize" aboriginal people into a more non-traditional settled lifestyle less reliant on traditional pursuits (often more reliant on agriculture), and to create "an economically self-sufficient place of residence"[203]. More recently, this purpose has been expanded to mean furthering the goal of Indian self-determination.[204]

Further, the size of reserves rendered it far more difficult to rely only on traditional pursuits for sustenance, provoking the need for the tribe to turn to other pursuits for economic survival. Water is a necessary precondition for all such pursuits. This creates a right to a sufficient quantity of water for all present and future purposes (i.e., not just to support traditional pursuits)[205]. These purposes do not have to have been foreseen or foreseeable when the reserve was created, and can include projects that provide employment or other social benefits, or decrease dependence.[206]

Rights are prioritized based on "prior appropriation", or when a party first established a use of or reliance on the water (i.e., when water first "appropriated"). Prior rights of Indian reservations must be satisfied before any other party may access the water source. Where a reservation is created as the result of a treaty or otherwise carved out of traditional aboriginal territory, the "priority date" is time immemorial, from which Indians "had command of … the waters"[207] – at least for traditional uses of the water. Treaties do not grant rights to the aboriginal people, but instead confirm and *reserve* the existence of an inherent right practiced since time immemorial.[208] For other (non-traditional uses) of the water, it may be that the priority date is when the reservation was created. The better view is that since reservations were created out of title (inherent right) and title carries with it a right to self-determine how the lands and waters will be used, the priority date of all uses of water on or for a reservation should be time immemorial. For reservations established by executive order and not part of the traditional lands of the Indians, these same Winter's principles apply.[209]

Aboriginal water rights apply to groundwater as well as surface water "which arise on, border, traverse, underlie, or are encompassed within Indian reservations".[210] These water rights also probably apply to quality as well as quantity, to protect against impairment that would infringe on the right to have and use the water, or that would infringe on a right to fish or hunt.[211]

Paramountcy or priority of the aboriginal right means that the tribe can take all the water it needs for present and future uses (often determined by courts as some allocation of gallons per minute)

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[202] Winters v. US, 207 US 564 (1908).
[203] Felix Cohen, Handbook of Federal Indian Law (Charlottesville: Michie-Bobbs-Merrill, 1982) at p. 584.
[204] US v. New Mexico, 438 US 696 (1978).
[205] Arizona v. California, 373 US 546 (1962).
[206] Cohen at 589-90, citing case law.
[207] Winters at 576.
[208] US v. Adair, 723 F.2d. 1394 (1983).
[209] US v. Walker River Irrigation District, 104 F.2d. 334 (1939). See also Arizona v. California.
[210] Cohen at 585.
[211] Cohen at 587 citing case law.

before any other party can take water from the same source. Thus, in times of water shortage there is no pro rata reduction of the aboriginal right or quantity.[212]

> In determining water rights for Indian reservations, courts are not to engage in balancing the competing interests of Indian and non-Indian users. Fulfilling the purposes of the reservation may result in economic hardship or may even leave non-Indian interests without a water supply at all. Those problems may be addressed by Congress subject to constitutional limitations [including the fiduciary duty owed by the federal government to Indians, which has been held to require the government to exercise all available powers to protect water necessary to satisfy Indian needs[213]]; they cannot justify an "equitable apportionment" or reduction of Indian water rights by the judiciary.[214]

"Presumably, then, First Nations and other Aboriginal peoples [in Canada] would have the water rights necessary to implement projects for which reserved land was intended, as well as the ability to protect the quantity (and, potentially, the quality) of water flows."[215]

In other words, there are a number of very good reasons why the paramount rights doctrine should be considered applicable in Canada. To be coherent, consistent with other case law about water in a non-aboriginal context, and consistent with principles applied to understanding and respecting aboriginal rights, Canadian law must hold that paramount water rights attach to waters feeding and bordering *reserves and aboriginal title lands*, akin to the doctrine in the US

- Canadian courts, including the Supreme Court of Canada, have consistently adopted principles enunciated in American jurisprudence in aboriginal and treaty rights cases[216], including principles in the Winter's doctrine.

- Reserves in Canada were created for similar assimilationist purposes as in the US. The creation of reserves was generally to encourage adoption of non-traditional (European) pursuits, while continuing traditional pursuits and uses of lands and waters (both on reserve and off) as a means to reconstitute but then sustain communities.[217] For example, the Robinson Treaties referred to reserves "for the purposes of residence and cultivation", and fishing/harvesting rights were retained.[218]

- In *Burrard Power*, the Privy Council was asked to decide whether a conveyance of public lands in BC to the federal government included water rights, and it held that it undoubtedly did. The Court stated that if the Province by legislation (after the conveyance) could resume jurisdiction over waters in these lands, it could resume possession of the lands themselves, thus defeating the whole purpose of the conveyance.

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[212] Cohen at 578.
[213] Lane v. Pueblo of Santa Rosa, 249 US 110 (1919).
[214] Cohen at 587.
[215] Gary Meyers, "Environmental and Natural Resources Management by Indigenous Peoples in North America: Inherent Rights of Self-Government, Part II" (Australia: Reconciliation and Social Justice Library, website), at 20-21.
[216] Bartlett at 10. Note that there are certainly differences between US and Canadian law in respect of the status of aboriginal peoples, but there are also a number of similarities in legal reasoning.
[217] Bartlett at 20.
[218] Bartlett at 22-28; see also Blair, Taken for Granted. Both reference numerous treaties and their language.

Water rights cannot be severed from the land.[219] By this, the Court recognized that appropriation of water rights in land must be sufficient to fulfill the purpose for which the land was set apart. This is akin to the US Winters doctrine, and if applied fairly to reserve lands in Canada, which were set apart for the purpose of enabling the aboriginal community to self-sustain in an adapted way (some combination of "Euro-Canadian" ways and traditional ways), then it should mean that water rights attached to such lands are paramount.

- Where reserves are formed out of treaties, and where there was no express reservation of water rights, given the above, there would be an implied reservation of paramount water rights. The implied reservation of paramount water rights was indeed the understanding of the Canadian Department of Indian Affairs in 1920 (about a decade after the Winters decision in the US). A policy document states:

> I am satisfied that the courts in construing the treaties between the Crown and the Indians under which reserves were set apart would follow the view already taken by the American Courts that there must be implied in such treaties an implied undertaking by the Crown to conserve for the use of the Indians the right to take for domestic, agricultural purposes *all such water as may be necessary, both now and in the future development of the reserve from the waters which either traverse or are the boundaries of reserves*.[220]

- In Canada, courts have often recognized that certain reserves were established predominantly as fishing stations or to protect the continued ability of aboriginal people to sustain themselves through the pursuit of fishing.[221] In a BC case about reserved water rights, the court issued an injunction restraining the construction of a marina in waters off the reserve, where this would interfere with the reservation in the applicable treaty of a right to fish.[222]

- Reserves in Canada are generally significantly smaller than in the US (and are generally not able to support self-sustaining communities from this land alone), which further sustains an argument that paramount water rights must attach in order to enable bands to be as self-sustaining as possible "The settlement or extinguishment [in non-reserve traditional lands] of aboriginal title demands that a substantial construction be given to water rights attaching to reserve lands…"[223]

- If the above principles are applied, it should not matter whether the reserve was created through a treaty or by some other means. It is the purpose for which the reserve was created that counts. Thus, even though text in executive orders and the like creating

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[219] Burrard Power Co. v. The King, [1911] AC 87 (PC).
[220] As. Williams to Scott, July 27 1920, PACRG 10 Vol 3660 File 9755-4, as cited in Bartlett at 36.
[221] See Pasco v. CNR, [1986] 1 CNLR 34 (BCCA), where the court upheld an injunction against CNR to prevent building a rail line along the Fraser River, as this interfered with reserve water and fishing rights and the reserve had been established in part to preserve the aboriginal salmon fishery. See also Jack v. R., [1980] 1 SCR 294 at 308 where Dickson J stated: "lands were to be reserved for Indians for the purpose of permitting them to continue their river fishery at the customary stations."
[222] Saanichton Marina Ltd. v. Claxton (1987), 18 BCLR (2d) 217 (BCSC); aff'd (1989), 36 BCLR (2d) 79 (CA).
[223] Bartlett at 17.

reserves is "sparse" (usually with no reference either way to water or water rights), the implied reservation of water rights should still hold.[224]

- The Supreme Court of Canada has articulated a doctrine of "priority rights" to harvest, which if properly applied could and should lead to the application of a doctrine of priority to water (wherever water is required to exercise such rights).[225]

- The Supreme Court of Canada has applied a liberal approach to determining which activities and needs are reasonably incidental to the right at issue.[226] Certainly, it can easily be shown that a sufficient quantity of water is necessary for (i.e., reasonably incidental to) self-sustaining cultural, economic and other purposes on aboriginal title or reserve land.

- In Canada, aboriginal title provides for use of the lands (and waters) for any purpose (traditional or not) as long as it does not defeat the very relationship the aboriginal party has with the land. Also, it has been clearly stated by the Supreme Court of Canada that the aboriginal interest in reserve lands is the same as in aboriginal title lands. This further supports the idea that water rights should be applicable and paramount in respect of both traditional and non-traditional uses of water by the aboriginal party on all such lands (at it is in the US).

Clearly, there is enough evidence to establish that in virtually all cases of aboriginal title lands and reserve lands in Ontario, paramount rights to use of water feeding and bordering these lands exist.

It has been persuasively argued that provincial laws cannot infringe on water rights attached to reserve lands, as this is akin to regulating in respect of "lands reserved for Indians", which is prohibited by the Constitution and s. 88 of the Indian Act.[227] As such, any provincial or provincially regulated interests in water on or adjacent to a reserve should not be valid. If riparian rights, which are rights to use water, are property rights, then so do would rights to use water that are similar in nature to but broader than riparian rights.

Reserve water rights in the US have provided tribes a significant amount of power to take and use water, and to stop others from taking, diverting and using water when this would infringe the tribe's water rights; courts have broadly construed the purposes of reserve creation. In one case, the court struck a regulation allowing diversion of water which adversely affected a downstream Indian reservation.[228] In another case, the pumping of groundwater by a private landowner on his own land was stopped by the court when evidence showed that this was depleting the water supply on federally reserved land, and the court accepted that all this water comprised one hydrologic system.[229] Since the purpose of a reservation is to develop a self-sustaining

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[224] Bartlett at pp. 37-38.
[225] Sparrow.
[226] See R v. Sundown, [1999] 1 SCR 393.
[227] LaForest, Water Law at 46.
[228] Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252 (DDC 1972).
[229] Cappaert v. US, 426 US 128 (1976), applying to a non-Indian federal reserve, but the principle would apply to an Indian reservation as well (since it is held that these are also federal reserves).

community, where fishing is required to do this, the court held that the reservation included exclusive rights to fish in adjacent waters (exclusive, to protect present *and future* needs).[230]

Others have (years ago) submitted that under Canadian law, water rights are connected to land and cannot be severed, and thus aboriginal title and reserve land carries with it riparian rights.[231]

> Indian bands are riparian landowners. LaForest declared that riparian rights were possessed by whoever lawfully occupied riparian land…. The Indian Act declares that "reserves are held by Her Majesty for the use and benefit of respective Band for which they were set apart", and provides for the beneficial entitlement of the Bands…. This recognition of the Indian beneficial interest confirms the notion of Indian bands as riparian landowners and holders of riparian rights.[232]

However, as stated here, a stronger case can be made now (especially since s. 35 of the Constitution was enacted) that while something akin to the nature of riparian rights applies to all such lands, the scope is much broader and in fact these rights should not be considered equally shared but paramount.

4. Other Rights Dependent on Water

The focus here is on fishing rights, but generally the principles applicable to these would be applicable to other aboriginal rights dependent on water.

a. Exclusive Rights: Courts Have it Wrong

Where title to waterbeds remains, it includes exclusive rights to use the waters, including for fishing, arguably subject to some rights of others. Further, it should be possible to establish exclusive fishing rights even outside title, if this is the right that was held and had never been surrendered or extinguished. The federal government has no jurisdiction to grant public fishing rights in such areas.

The Supreme Court of Canada held that in BC[233] the ad medium filum presumption does not apply to navigable waters, then went to deny the bands rights to exclusive fisheries, seemingly holding that the only way to hold such rights is through Crown grant – which is incorrect. The courts completely bypassed the analysis of aboriginal title to waterbeds -- which is a freestanding basis for waterbed ownership that has nothing to do with Crown grants – and the incidents of such title including exclusive use of the waters for fishing.

> The court has so far rejected the notion of exclusive aboriginal fishing rights, reasoning that a public right to fish in tidal [meaning here, by the court, the same as "navigable"]

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[230] Alaska Pac, Fisheries v. US, 248 US 78 (1918). See also Menominee Tribe v. US, 391 US 404 (1968) where the court held that treaty words establishing a reservation "for a home, to be held as Indian lands are held" included hunting and fishing rights.

[231] Burrard Power Co. v. The King, [1911] AC 87 (PC) at 94-95 and 52-53.

[232] Bartlett at 50-51 citing the Indian Act s. 18.

[233] R v. Nikal, [1996] 1 SCR 1013; R v. Lewis, [1996] 1 SCR 921.

> waters has existed since the time of Magna Carta, and was not abolished even by the entrenchment of aboriginal rights in section 35(1) of the Constitution Act, 1982.[234]

It is submitted here (and has been thoroughly argued by others[235]) that such judgments are wrong, for the following reasons:

- They ignore or misapply past binding cases and common law in relation to navigable non-tidal waters in Canada – that private rights could be held in the waterbeds and that exclusive rights to fish ran with such ownership.

- They ignore the fact that the Crown was never legally permitted to take ownership of waterbeds where these had never been surrendered. Such surrender was an absolute requirement to any removal of "private" rights of aboriginal peoples who held title. It was an absolute requirement to any ownership by the Crown of waterbeds, which was required before the Crown could grant public rights of fishing to others.

- The Court, rather than looking at the law, considered policies of the governments which had arisen over the years, and treated these as creating some sort of quasi-law which the court then applied to justify abrogation or infringement of aboriginal rights. But these government policies were themselves extra-legal and discriminatory, and no discriminatory measures should be used to justify the continuation of discrimination.

- They are inconsistent with their own judgments in other cases which found a commercial, and thus an exclusive, right to fish held by the aboriginal party.[236] A commercial right to fish imports an exclusive right because, logically, one would have the right to fish to the limit of what one could catch, and then sell or trade – which is, theoretically, everything.

Instead, the court found an aboriginal "priority" right to fish (see below). Priority allocation (akin to paramountcy) of fishing rights and resources might be appropriate where both title to waterbeds and exclusive fishing rights have been surrendered. But in waters over or within unsurrendered or reserved aboriginal lands, fishing rights would be exclusive. And if exclusive fisheries existed at the time of treaty making, retention in the treaty of rights to fish "in the waters as they have heretofore been in the habit of doing" (Robinson Treaties of 1850) would continue exclusive fishing rights.

The first colonial Fisheries Act was passed in 1857 and it provided public fishing rights in the province of Upper Canada subject to the *limitation that this was not to affect private property*.[237]

However, the 1868 federal Fisheries Act, which repealed the 1857 Act, was based on a policy to favour non-aboriginal fishing interests over aboriginal rights. "As non-Aboriginal interest in the fisheries grew, the position that Aboriginal peoples had no greater right in fisheries than other members of the public quickly developed, supported by a series of rather erroneous legal

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[234] Walters at 301.
[235] Walters, Blair.
[236] Gladstone.
[237] Blair, Taken for Granted at 41.

opinions obtained from the solicitors general of Upper Canada."[238] These legal opinions ignored the state of facts and the law of the time (as stated above).

The *Robertson* decision of the Supreme Court of Canada in 1874 clearly pointed to the invalidity of any policy or legislation which purported to grant public fishing rights in areas where exclusive title or rights existed. It held that where such private rights existed, the federal minister had no authority under the Fisheries Act or otherwise to grant rights to others to fish there. The Court noted that ownership of the fisheries was evidence of ownership of the waterbed.[239]

The *Reference re Ontario Fisheries* case confirmed that the province could not grant any public fishing rights in unsurrendered Indian lands. In its arguments, Ontario had acknowledged that it could only assert jurisdiction over "beds of [waters] which do not belong to the Dominion and are not Indian lands."[240] The case also confirmed that neither government could grant any public rights of fishing where exclusive or private rights remained. If "private" rights are interpreted to mean rights not held by the Crown and thus to include aboriginal rights (including title), then this case also means that where aboriginal peoples held title to waterbeds, and/or exclusive rights to fish, neither Crown had any jurisdiction to impede on such "private" rights.

The 1897 Ontario Fisheries Act (60 Vict. c. 9) recognized that the Ontario government at least had no right to so impede, stating in s. 4(2):

> Provided, nevertheless, that nothing contained herein shall prejudicially affect any rights specifically reserved to or conferred upon Indians by any treaty or regulation in that behalf made by the Government of Canada nor shall anything herein apply to prejudicially affect the rights of Indians, if any, in any portion of the Province as to which their claims have not been surrendered or extinguished.

Where legislation or governmental actions were premised on or intended to further discriminatory policies or beliefs held by either government, these cannot be used to legitimate extinguishment or infringement of aboriginal rights. "In Upper Canada, the policies which developed [and led to the passing of the 1868 federal Fisheries Act along with several other government actions including in regard to aboriginal fishing rights in the Great Lakes] were intended to permit non-aboriginal fishermen to monopolize Indian fishing grounds, and to exclude aboriginal fishermen from competing with non-aboriginal fishermen for economic reasons."[241] Several cases and pieces of legislation have been premised on discrimination, and misinterpretation of British law and its applicability to *aboriginal* peoples in Canada.[242]

b. Non-Exclusive but Priority Rights (that rely on quantity and quality of water to be exercised):

(i) Governing Rights

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[238] Blair, Taken for Granted at 42.
[239] The Queen v. Robertson (1874), 6 SCC 53.
[240] Blair, Taken for Granted at 46.
[241] Blair, No Middle Ground at 559.
[242] See Walters and Blair (all papers).

Since water is necessary to all life and all aspects of social organization, water in sufficient quantity and quality to exercise self-government or self-determination is a prerequisite right. Courts and the federal government have recognized the right of self-government as an inherent right of aboriginal peoples protected by s. 35 of the Constitution.[243] This certainly supports the application of the paramountcy doctrine (above) for water use. Beyond this, it is submitted that where harvesting and other rights are directly dependent on water to be exercised, there comes with this a right to govern in respect of how that water is used and managed. If the water use is exclusive to the aboriginal party, then the right to govern in regard to water management is exclusive. If the water use is paramount, then the right to govern requires consent of the aboriginal parties for other uses that could or would harm this aboriginal water use. If the water use is shared, then the right to govern would require being a direct part of the decision-making scheme in relation to the water.

(ii) Water as Prerequisite or Incidental Right

Since reserves are notably smaller in Canada than in the US, there is an argument that paramountcy of aboriginal rights to use of water should attach to *any* waters necessary for carrying out another aboriginal and treaty right (wherever such right can be exercised – not just on reserve or aboriginal title land). It was clearly contemplated in treaty-making that aboriginal peoples would retain their rights to hunt and fish outside the reserve, in order to be able to sustain their economies and ways of life. In Treaty 3 for instance (as in many treaties), it states that the Indians "shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered".

In a major US case about reserved water rights, the Court held that such a paramount right emanated (in that case) from the right to hunt and fish reserved in the treaty. The priority date was not the date of creation of the reservation, but back to time immemorial (since the treaty confirmed and retained or reserved a pre-existing inherent right).[244] Thus, paramount water rights attached to treaty rights to fish and hunt. The right in that case was exercisable in waters in and adjacent to the reservation. But again, since reservations in the US are much larger than in Canada – paramount water rights in Canada should attach to treaty and aboriginal rights off reserve where such rights can otherwise be exercised.

The relationship between the quantity and quality of water, and the ability to exercise aboriginal and treaty rights, has been recognized elsewhere. In a US case about a treaty right to fish, the Court held: "one of the paramount purposes of the treaties in question was to reserve to the tribes the right to continue fishing as an economic and cultural way of life. It is equally beyond doubt that the existence of an environmentally-acceptable habitat is essential to the survival of the fish, without which the expressly-reserved right to take fish would be meaningless and valueless."[245] Further, as stated above, the Supreme Court of Canada has accepted that practices and needs incident to the aboriginal (or treaty) right itself are also protected (thus, water necessary for the practice of other rights should be protected as incidental or prerequisite to such rights).

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[243] Campbell v. BC (AG) (2000), 79 BCLR (3d) 122 (SC); Eastmain Band v. Gilpin, [1987] 3 CNLR 54 (Que. CSP); see also Federal Policy Guide, Aboriginal Self-Government, issued by the Department of Indian and Northern Affairs.

[244] Adair

[245] US v. State of Washington [No. 2] 384 F.Supp. 312 (1974) at 205.

In Canada, the Supreme Court of Canada has held that there is a "priority" of aboriginal fishing rights. This should, if properly applied, lead to paramount rights to use of the waters required for fishing. However, it has not led to such results and, as stated above, this is a misreading of past law and facts. .

> In 1996, the Supreme Court of Canada handed down seven judgments relating to aboriginal fishing rights. These cases developed the doctrine of aboriginal priority, according to which the government is obligated to give precedence to aboriginal communities when allocating rights of access to fisheries.[246]

Thus, courts allocate priority as follows: (1) conservation; (2) aboriginal fishing; (3) non-aboriginal commercial fishing; (4) non-aboriginal sports fishing.[247] Further, even though conservation holds priority over the aboriginal fishing right, conservation must be implemented so as to minimally impair the right.[248] Applied literally, this should in most cases be sufficient to ensure aboriginal paramountcy to use of the water,, but in reality, governments and courts have too often allowed the interests of non-aboriginal parties to delimit the content of the "aboriginal fishing right" in the first place. This is clearly wrong.

Sometimes the priority principle is properly applied. "Substantial documentation exists on the historic use by Aboriginal peoples of certain areas such as the Great lakes for domestic and commercial fishing in the pre-settlement period."[249] The Supreme Court of Canada has recognized aboriginal commercial fishing rights, and has noted that this would indeed impact on common law public fishing rights.[250] A commercial fishing right amounts to an exclusive fishing right, since there is no "internal" limit as would apply if it were a right to fish for food (limited by how much one needs to eat).

However, often enough what should be considered a paramount right has been mischaracterized as something less. Courts have sometimes been reluctant to characterize a right to fish as a "commercial" right, and instead have limited it to a right to fish for food, social and ceremonial purposes, or for sustenance.[251] This is a fact-specific inquiry. Where the court finds that historically the right was exercised for "subsistence", they have not permitted the right to be modernized to mean for commercial purposes. This is flawed reasoning. Subsistence would often include trade for other necessities or goods, both to sustain and to improve one's lot in life. Trade can and should be understood in the modern context as "commercial". Rather than direct barter, today we earn money to sustain and improve our lot in life. There is no logical difference. This flawed reasoning is also not consistent with the Court's determination that aboriginal and treaty rights ought not be frozen in time, and that they can evolve.[252]

In *Marshall*, the Court determined that the treaty right to fish entitled the Mi'kmaq to earn a moderate livelihood from fishing, because the treaty contained a promise from the Crown to

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[246] Walters at 301.
[247] Woodward at 5-30.
[248] Woodward at 13-22.
[249] Blair, Taken for Grnated at 32.
[250] R. v. Gladstone, [1996] 2 SCR 723 at paras. 28, 30, 59, 67 and 82.
[251] Sparrow at 1099.
[252] This is supported by the Court of Appeal in R. v. Marshall, [2003] NSJ No. 361 (a different case than the Marshall case cited next).

provide "truck houses" so the Mi'kmaq could sell fish.[253] Why is it that aboriginal peoples here are restricted to a "moderate" livelihood, when non-aboriginal peoples engaged in commercial fishing would not be so restricted? This is discriminatory.

Restrictions on or denial of access to traditional fishing and hunting grounds or areas where the right can be most efficiently exercised, closed seasons, or prohibitions on certain methods of carrying out the practice – have all been found to be infringements of aboriginal harvesting rights.[254] Further, where a licencing scheme is discretionary and the legislation does not contain guidelines as to how the discretion is to be exercised, it will be an infringement.[255]

But remember, under Canadian law some infringements are permissible if they can be justified by governments. And here court decisions have limited the priority rights doctrine again. Courts have held in the context of aboriginal commercial fishing rights, any goal that furthered the good of the community as a whole, talking account of both aboriginal and non-aboriginal interests, was a compelling enough objective to support justification for infringement.[256] It is submitted that this weak test is not in keeping with the purpose of s. 35 of the Constitution, or with facts and past law. Only after full satisfaction of the aboriginal right, properly considered as broad and related to self-sustainability and self-governance as a people, has been fully satisfied, should any other competing interest be permitted.

Clearly, given the importance of water to all rights, and the importance of cultural and societal rights (including the rights to hunt and fish) to the survival and self-determination of aboriginal peoples as peoples, there is no excuse for anything but a high threshold for justification of infringement.

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[253] R. v. Marshall, [1999] 4 CNLR 161 (SCC).
[254] See, for example, R. v. Alphonse, [1993] 4 CNLR 19 (BCCA); R. v. Catarat, [2001] 2 CNLR 158 (Sask CA); R. v. Bombay, [1993] 1 CNLR 92 (Ont. CA).
[255] R. v. Nikal, [1996] 3 CNLR 178 (SCC).
[256] Gladstone.

D. ANNEX EFFECTS ON WATER RIGHTS

Clearly, any regime that permits (under certain conditions) the taking or diversion of large amounts of water could have profound effects on all aboriginal and treaty rights to or dependent on water. These threats or potential effects are all the more pronounced given the following facts:

- There are current significant threats to basin water and ecosystems now.
- There is a serious lack of knowledge and understanding of what is needed to keep the water and ecosystems viable.
- There are several problems with the Annex regime itself: too permissive, too narrow (does not address water quality), possibly subject to application of trade rules (which could require water exports or large takings), decision-making subject to too much discretion and abuse (many key terms not defined, weights US governments over Canadian provincial governments).

1. Rights Affected

Direct rights to water include:

- Ownership rights (of the waterbed, or perhaps exclusive/ownership rights to fisheries)
- Use rights (paramount rights, or at the least, riparian rights)

It bears repeating: water is the source of all life, and all society. In this sense, the right to a sufficient quantity and quality of water is prerequisite to the exercise of virtually all other rights. These dependent rights include:

- Self-governance (ability to govern in respect of health, navigation and mobility, culture, economy)
- Any particular right comprising "self-governance" or self-determination (rights to practice elements of culture, including rights to fish, hunt, harvest; and rights to land on which to practice and govern culture)

The weight of evidence, and the weight of law, support the contention that aboriginal and treaty rights to and in respect of water in the Great Lakes Basin are significant and strong. The "weight of law" holds that s. 35 of the Constitution (constitutionalizing such rights) is designed to reconcile the (tenuously grounded) assertion of British sovereignty, with the pre-existence and continued existence of indigenous societies living of and with the lands and waters to survive as peoples. Only when proper respect is accorded the status of indigenous peoples, and proper regard had for what has been taken from them over the years without colour of right, will such reconciliation itself be constitutional. It requires proper application of law and facts that existed when certain rights were determined to have become part of British/Canadian law, and enlargement of this law where necessary to reflect the constitutional status of these rights today. Thus, the weight of evidence and law support the following:

- Aboriginal title to waterbeds in the Great Lakes Basin, including the Great Lakes themselves, remains where it was not surrendered (which is the case for the vast majority of the Canadian side of the Lakes), or where it was reserved. Proper understanding and application of law at the time of assertion of British sovereignty and for years thereafter leads to the conclusion that the Crown understood such aboriginal title could only be released through surrender. No application of English common law defeats such title. Neither British imperial law, nor British colonial law adapted to the unique circumstances in North America permit any other conclusion.

- Aboriginal rights to use of water feeding or bordering aboriginal title and reserve lands should properly be regarded as paramount rights; paramount over the rights of other users.

- All aboriginal and treaty rights (being inherent rights – existing from time immemorial) ought to be presumed or provable through testimony from living memory, and only rebutted when the Crown is able to offer sufficient proof otherwise (onus shifts).

- Where the exercise of other aboriginal rights is dependent on a sufficient quantity and quality of water, if any infringement of such rights is permissible, the threshold for justifying such infringement must be set very high.

- In respect of all rights to or dependent on water, above, there comes with this a right to govern in respect of how that water is used and managed. The content of that right depends on the degree of exclusivity or sharing in respect of the water.

2. Annex Regime Effects and Role of Aboriginal Peoples

The Annex Regime itself, as a decision-making regime, violates:

- Direct rights to water (ownership of waterbed and exclusive rights thereto; paramount rights to use water feeding or bordering aboriginal title or reserve lands)

- Other aboriginal rights dependent on water.

In regard to *development* of the Annex Regime, there has been little if any bona fide and meaningful consultation with aboriginal peoples, in violation of Canadian law.

In regard to the *operation* of the Annex Regime, once the Annex agreements are approved, they have the potential to violate both aboriginal rights to water and other aboriginal rights dependent on water. If any proposal for water withdrawal is approved, there could be serious consequences in respect of waterbed ownership, use of water, and reliance on water to exercise other rights. The provisions of the Annex Agreement and Compact in respect of consultation with aboriginal peoples are wholly insufficient. Both in regard to *development* and *operation* of the Annex Regime, aboriginal parties have not been included as decision-makers. This is contrary to a proper application of law in Canada.

For reasons set out below, it is clear that aboriginal parties must have a direct decision-making role both in regard to development and approval of the Annex regime (or some replacement

regime) itself, and in respect of all decisions made under the regime that could impact their rights to water or rights dependent on water.

If the water use is exclusive (incident to title or otherwise) to the aboriginal party, then the right to govern in regard to water management is exclusive. If the water use is paramount, then the right to govern requires consent of the aboriginal parties for other uses that could or would harm this aboriginal water use. If the water use is shared, then the right to govern would require being a direct part of the decision-making scheme in relation to the water.

Consent Required:

- Title to waterbeds: Title to and exclusive use in respect of significant areas of waterbeds in the Great Lakes Basin exists by proper application of law. If this is subject to public rights of navigation and floating, and possibly other rights of Canada incident to maintenance of sovereignty, then such aboriginal parties must consent to any regime set up to govern water quantities in the Basin. Where any action or decision taken under the regime (i.e., water taking proposal) could negatively impact (above the de minimus level) water quantity in respect of waterbeds held by aboriginal peoples, then their consent to any such action is required. The Supreme Court of Canada held that, in respect of the duty to consult: "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."[257] Cleary, significant potential impacts to water rights that flow from title, could have far more profound effects than 'hunting and fishing regulations'.

- Paramount rights to use of water: Even where exclusive title does not exist, or is held not to exist, there is a strong case that aboriginal rights to use water that feeds and borders title and reserve lands are paramount rights. Where other aboriginal rights are central to the survival and self-determination of aboriginal peoples as peoples, and these depend on water, rights to water should again be considered paramount or at least fundamentally important. Paramount rights lead to the conclusion that consent, again, is required.

Direct Decision-Making Role Required:

- Riparian rights: Even if it is held that aboriginal peoples with lands bordering water bodies in the Basin do not hold paramount rights to the use of such waters, they would hold riparian rights. These rights are shared with others, and require, among other things, the maintenance of natural quantity, flow and quality of the water. Aboriginal peoples are "peoples" with status well beyond that of private persons, and with rights unique to their status. This status, plus riparian rights, plus the importance of water to survival and to all other rights, necessitates that aboriginal parties have a direct decision-making role in the approval and operation of any regime governing water in the Basin.

- Priority harvesting rights: We know that essentially all aboriginal peoples in the Basin hold as an essential and integral aspect of their culture, survival and self-determination, the rights to fish, hunt and otherwise harvest. Even the Supreme Court of Canada's "priority allocation" rule in respect of fishing (and other harvesting rights) should, read in

[257] Delgamuukw at para 168

context with other case law, require a direct decision-making role in approval and operation of any water quantity regime.

- Rights Asserted and Not Proved: In *Haida*, the Supreme Court of Canada held that even where rights are asserted and not yet proved,[258] where the claim is strong, the right important and the potential infringement significant, the aboriginal party should be consulted at the strategic planning stage (i.e., as the scheme is being developed). Add this to the requirement that all consultation must be in good faith with the objective of substantially addressing the concerns of the aboriginal party, and the requirement that the Crown must accommodate the aboriginal party in the exercise of the right, and one ends up with *co-management*. Yet again, such aboriginal parties require a direct decision-making role in both developing/approving and operating any regime governing water quantity in the Basin.[259]

3. Annex Regime Ultra Vires the Province

As has been stated elsewhere in this paper, current law arguably holds that the province cannot, by virtue of the constitutional division of powers and s. 88 of the Indian Act legislate over aboriginal lands and land rights. Waterbeds are lands. Riparian or paramount rights to use of water, are *property* rights that run with and cannot be severed from the land. Thus, the province arguably has no jurisdiction to legislate where this would negatively affect aboriginal title and reserve lands (including any waterbeds in or attached to such lands) or rights to use of water that feeds or borders title or reserve lands.

As has also been argued elsewhere in this paper, where any rights to or dependent on water are treaty rights, the province (at least in Ontario) cannot legislate so as to infringe these rights (since s. 88 makes provincial laws subject to any treaty). The weight of law and commentary holds to this view. In respect of aboriginal rights, binding case law holds that these fall squarely within the core of Indianness, which is within exclusive federal jurisdiction under the Constitution. To the extent that s. 88 of the Indian Act permits provincial laws of general application to infringe aboriginal rights to the point of impairing the capacity or status of the aboriginal people to continue to be a people, it is submitted that this is unconstitutional.

While the Annex Agreement is not legislation per se, it is intended to precede legislation or legislative amendments in Ontario (to implement the Agreement). There is a strong argument that such legislation if and when passed would be ultra vires the province to the extent it has the effects above. Applying these principles, there is also an argument that the province has no jurisdiction to enter into the Annex Agreement itself, at least without Canada.

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[258] As with the claims of Walpole Island First Nation, Saugeen and Nawash First Nations to waterbed title in parts of the Great Lakes.

[259] It is beyond the scope of this paper to explore whether aboriginal peoples in Canada have a right to be consulted by American parties to the Regime when decisions are to be made by such American parties and such decisions could impact Canadian aboriginal water rights (since many impacts will not remain on one side of the border). But the establishment and operation of any regime that threatens important, fundamental aboriginal rights the way the Annex Agreement could, and that has been developed and intends to operate without much consultation in the US with aboriginal peoples in Canada, is arguably in violation of *Canadian* law.

If the Annex Agreement itself (both its development and its future operation) is or would be in violation of aboriginal rights to govern or have a decision-meaning role in respect of water rights (which are, again, rights equivalent or incident to land), then either the province has no jurisdiction to enter into the Annex Agreement without Canada, or if it does, this amounts to prima facie infringement the justification for which would be hard to support.

4. Conclusion

Aboriginal rights to and dependent on water in the Great Lakes Basin are profound. Canadian governments and sometimes courts have repeatedly misunderstood and misapprehended such rights. Certain judicial pronouncements are mistaken, as they misapply relevant facts and law when such rights were first considered as part of English law. If facts and law are properly applied, a direct decision-making role, and in some cases, consent, in development, approval and operation of any Annex regime is required.

Not only are rights profound, but threats are profound. Threats to the integrity of the Basin probably affect indigenous peoples more than anyone because their lives and ways of life are intimately tied to the lands and waters through a special stewardship relationship with Mother Earth. Where go the lands and waters, so too go the essence and cultures of many indigenous peoples. These threats comprise one of the greatest assimilative forces against indigenous peoples in the Basin in this century – following on the tail of many other abuses and stripping of rights and dignity. Unless and until Canadian jurisdictions truly respect this fact and act with honour and in accordance with the weight of evidence and law, the water regime as currently proposed for the Basin cannot be considered legitimate.

APPENDIX A

COMPONENTS OF ANNEX REGIME

The entire Great Lakes water and environment legal regime is a convoluted mix of international and bi-national agreements, statutes in both countries at the federal and state/provincial level, a Canada-Ontario agreement, a US federal-Basin states agreement, an agreement between the two provinces and eight states in the Basin, an agreement between these eight states (from west to east -- Minnesota, Wisconsin, Illinois, Indiana, Michigan, Ohio, Pennsylvania, New York), and many other instruments.

It is beyond the scope of this report to deal with this water regime in its entirety. Mention is made here of its vastness and complicated nature in order to indicate that the Annex Regime, as described here, is but one part of the Great Lakes water regime. Issues of water quality and water quantity have been to a great extent segmented and separated. Water quality is the purview of the Great Lakes Water Quality Agreement (WQA) and related instruments, while water quantity is the purview of the Annex Regime. Many see this fragmentation as a serious flaw, and the failure to govern quality and quantity in the same regime should be kept in mind when judging the quantity regime (Annex) alone.

Set out here are the main elements of the Annex legal regime. The focus of this paper will be on the Annex Agreement (between Ontario, Quebec and the eight US Great Lakes states), and the Annex Compact (between the eight US Great Lakes states). The entire regime is premised on the concept or belief shared by the US and Canada that Great Lakes water is a “public resource”, held in trust for the public by the respective Great Lakes governments.

1. The 1909 Boundary Waters Treaty

The Treaty is between Great Britain and the US, signed in 1909. It governs both Canada and the US in regard to all waters (from shore to shore of that water body) that flow along or across the border between Canada and the US, including the Great Lakes (but Lake Michigan which is entirely in the US).

The 1909 Treaty applies mostly to water quantity/flow/levels, but also to water quality. The main provisions are as follows:

General:

- Article I: All navigable boundary waters shall remain free and open for navigation for the purposes of commerce.
- Article VII: The International Joint Commission (IJC) is established, with three commissioners appointed by the US President and three appointed by the Crown (first UK, then Canada). Decisions are made by a majority of the Commissioners (and if there is a tie, the parties will attempt to come to a resolution or to redefine the issue for the IJC’s approval).
- Article IX: The parties will refer disputes affecting the rights and interests of either about boundary waters, to the IJC and the IJC shall examine and report on its recommendations (not binding).

- Article X: Both parties can agree to jointly refer a matter of dispute to the IJC for a conclusion (which the parties can agree will be binding) or recommendations.

Water Quantity/flow/levels:

- Article II: Each country has exclusive jurisdiction and control over the waters on its side of the boundary (including their use and diversion), but if new interference or diversion of waters from their natural channel on one side results in injury on the other side of the boundary, the injured party has legal remedies for this (unless the parties agree that this provision will not apply).
- Article III: No further or other uses, obstructions or diversions of boundary waters are allowed unless both parties and IJC approve.
- Article IV: Neither Party can construct dams or other works affecting boundary waters on their side of the boundary that cause the level of waters on the other side to raise above natural levels unless the IJC approves (or unless the Parties otherwise agree).
- Article VII: The IJC is to decide on cases submitted to it under Articles III and IV. The IJC's decisions shall be governed by the following principles:
    - Each party shall have equal and similar rights in the use of the waters on its side of the boundary (the "equal division" principle).
    - Uses of the water are set in the following order of precedence/priority: domestic and sanitary purposes [includes drinking water]; navigation; power [includes hydro power] and irrigation. No use that materially conflicts with or constrains a use higher in the order of precedence will be allowed.
    - The IJC can allow temporary diversions that conflict with equal division of the waters, can make its approval conditional on remedial or protective measures to be taken, and in cases involving changes in water levels from dams and other construction must ensure that adequate protection and indemnity for the other side be a condition of approval.

Water Quality:

- Article IV: "Boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health of property on the other [side]."

2. The 1985 Great Lakes Charter

After several diversions had already been undertaken, new proposals surfaced for further large withdrawals. This led to the GL Charter between the two provinces and eight states in the Basin. It is a non-binding gentlemen's agreement. It outlines a series of principles for collective management of the Great Lakes, and calls for notice to and consultation with all such jurisdictions for water-takings over 5 million gallons a day (averaged over a 30-day period).

Its stated purposes are to: conserve the levels and flows of the Basin waters; to protect and conserve the environmental balance of the Basin ecosystem; to provide for cooperative management of the waters; to protect present developments in the region; and to provide a secure foundation for future development and investment in the region.

Water-takings were defined as two types: diversions, which are transfers (by pipeline, channel, canal, etc.) of water out of one Great Lakes watershed into another (either in or outside the Basin); and consumptive use, which is water withdrawn or withheld and assumed to be lost and not returned (due to evaporation, use in manufacturing, or other processes).

The Charter notice, consultation and consent provisions were to be implemented following development by a committee of a set of procedures which were then to be approved by each signing jurisdiction. Because this agreement was and is non-binding, there was no legal obligation created by the Charter to engage in this consultation and consent.

The Charter's implicit concern over larger water-takings and intent to see cooperative management in regard to takings, led the US Congress to pass the Water Resources Development Act of 1986 (WRDA). It requires the Governors in each of the eight Great Lakes states to give unanimous approval to any proposed out-of-basin diversion or export of water from the Great Lakes Basin (in other words, each governor/state has a veto). However, no Canadian jurisdiction had to be consulted under WRDA, and neither WRDA nor the Charter created or referenced any standard by which water-taking proposals would be assessed.

3. The 2001 Charter Annex

Little was done to implement the Charter. In 1998, Ontario granted a permit to the Nova Group (based in Sault Ste. Marie) for withdrawal of 60 million gallons of water per year from Lake Superior for export to Asia. This created a public outcry of concern about bulk water takings, and led the IJC to review this issue (Ontario rescinded the permit to Nova Group but it was feared this type of proposal could come forward in the future). It was determined that something more than the Charter was needed to protect and manage the Great Lakes water supply.

The 10 jurisdictions formed the Water Management Working Group to consider what more was needed. The two provinces and eight states signed the Annex in 2001, as an addendum to the 1985 Charter. Like the Charter, the Annex is a non-binding gentlemen's agreement.

The Annex states that the parties commit to develop a new, common standard to be applied to new water withdrawal proposals from the Basin. The standard is to be a resource-based conservation standard. It is to be based on the principles of: preventing or minimizing water loss through return flow and conservation; no significant adverse impacts to water quantity or quality; improvement to the waters and resources; compliance with relevant laws.

The Annex states that within three years the parties are to develop a Basin-wide binding agreement and other arrangements to further the principles above in relation to water taking. There was to be ongoing public consultation in regard to development and implementation of such agreement(s). In the meantime, WRDA was amended in 2000 to require the eight states to consult with Ontario and Quebec in respect of two things: to develop and implement a common conservation standard for water withdrawals from the Great Lakes Basin; and in respect of all withdrawal proposals subject to WRDA (using the 1985 Charter notice and consultation process to do so).

4. Annex Agreement & Compact

Three years later, in June 2004, two agreements under the Annex were submitted to public review.

One is a non-binding agreement, called the Great Lakes Basin Sustainable Water Resources Agreement (the "Annex Agreement"). It is between the eight states and two provinces. It says that the parties will seek legislative, regulatory or other changes that may be required to give effect (in their respective jurisdictions) to this Agreement, but this cannot be enforced (contrary to the promise made in the 2001 Annex to create an agreement *binding* on all ten jurisdictions). To be binding in Canada, the federal government would have to be a signatory to and ratify the agreement, pursuant to its exclusive jurisdiction to enter treaties with foreign powers (s. 132 of the Constitution). There is no indication that the Canadian federal government intends to become involved in this way, and has not been invited to do so. Both Ontario and Quebec would have to pass provincial laws to implement their obligations under the Agreement (in Ontario, this is likely to be a new water taking permit regime under the Ontario Water Resources Act). In that sense, the Agreement obligations would be binding on Ontario, but only as long as such provincial law is in place (and Ontario could override or amend such laws as it sees fit under its local jurisdiction). The US states intend the Compact (below) to implement their obligations under the Agreement.

The second agreement is a binding compact, the Great Lakes Basin Water Resources Compact (the "Annex Compact") between the eight US states. The US federal Congress must approve the Compact for it to become "interstate" law. The Congress could alter (significantly, or in minor ways) the Compact at this stage. Neither the Canadian provinces nor the Canadian federal government are parties to the Compact.

The content of the Annex Agreement is much the same as in the Compact, and thus only where the Compact differs will these items be outlined in the Compact section.

5. Annex Agreement

a. Preamble principles:

- Public resource: waters are public, and states and provinces are trustees or stewards
- GL waters are part of a single hydrologic system
- Sustainable development (both environmental and economic sustainability)
- Cooperative management
- Agreement applies to GL Basin, which is the watershed of the Great Lakes and St. Lawrence River upstream from Trois Rivieres, within the jurisdiction of the Great Lakes states or provinces (Compact defines this as what is within the jurisdiction of the states only).

b. Water-Taking Classification System

Water-takings are defined as "withdrawals", which is taking of water by any means, from surface or groundwater in the Basin. There are two types of withdrawals:

- diversions: transfer of water from one GL watershed to another GL watershed to another watershed outside the GL basin.

- consumptive use: the portion of water withdrawn or withheld from GL Basin that is lost or not returned (due to evaporation, incorporation into products or other processes).

Consumptive use is the lost portion of water withdrawn by whatever means, including by diversion. Diversions and other withdrawals could result in none, some, most or all of the water returned (or, on the contrary, lost), to the watershed from where the water was originally taken. Thus, there could be a portion of a diversion that becomes "consumptive use".

All withdrawals of both types are classified by how many gallons per day, as averaged over a 120 day period, are taken.

The agreements assume that any entity (person, corporation, organization, municipality, etc) that wishes to withdraw water from the Basin, will seek and require approval to do so. Only proposals for new or increased withdrawals are subject to the approval system in the agreements (i.e., existing diversions and uses are not subject to any scrutiny under this system).

The agreements establish a two-tiered approval system for such withdrawal proposals.

- Smaller proposals are to be handled locally (i.e., by the local state or provincial government in the jurisdiction from which the proposal originates, which is called the Originating Jurisdiction (OJ)).

- Larger proposals, over the "threshold" for regional review (i.e., over s certain number of gallons per day to be withdrawn), are to be subjected to regional review.

Smaller water withdrawals: over 100,000 gallons per day (and diversions of over 100,000 gallons but less than the "regional threshold" of 1 million gallons). These are not subject to regional review. However, each jurisdiction is supposed to approve these proposals only if they meet the "standard".

Larger water withdrawals: diversions over 1 million gallons a day; consumptive use over 5 million gallons a day. These are the "regional thresholds". At this level, they are supposed to be subjected to review by the regional body. Again, these are only to be approved if they meet the "standard".

c. Standard

With minor variations, the standard for local review by the OJ alone (smaller takings), and for regional review (larger takings) are the same. Proposals for water takings are only to be approved if they meet the standard, which has seven criteria:

- Alternative: there is no reasonable water supply alternative in the relevant watershed, including conservation and efficient use of water.

- Reasonable quantity: withdrawals limited to quantities considered reasonable for the purposes for which the withdrawal is proposed.

- Return flow: all water withdrawn from the GL Basin must be returned to the Basin less an allowance for consumptive use (the portion lost and not returned) of the applicable water use sector. Returns are to be made to the watershed in the GL Basin from which the water was taken (if taken from a tributary to a Lake, it is preferred if returned to that tributary, but must at least be returned to the watershed of that Lake). Note: where review only at OJ level (less than regional threshold), OJ can grant exemption of return flow requirement, for diversion less than 250,000 gallons per day that are for public water supply uses in areas less than 12 miles from basin boundary and where adequate quantities of potable water are not available there.

- Impacts: withdrawals cannot result in significant adverse impacts (cumulative or individual) to quantity or quality of water or water-dependent-natural-resources in GL Basin.

- Conservation: withdrawal proposals must include a conservation plan (to implement economically feasible and environmentally sound measures to minimize withdrawal or consumptive use). Note: for reviews at local level only (i.e., less than regional threshold), the requirement is for these measures to be implemented, and not just for a plan to be included that sets out these measures.

- Improvement: withdrawal proposals must include an improvement plan (to implement measures to improve physical, biological or chemical integrity of water and water-dependent-natural-resources anywhere in GL Basin). Note: OJ can determine whether this criterion is met (i.e., not for regional body to determine) for diversions up to 3 million gallons a day. Note: this requirement does not apply to diversions reviewed at local level only (i.e., less then regional threshold).

- Compliance with law: withdrawal must be implemented in compliance with all applicable state, provincial, federal laws and regional interstate, inter-provincial and international agreements.

This "standard" is a minimum standard; parties shall seek to adopt measures in their jurisdictions that are no less restrictive than this standard (and can adopt more restrictive or more stringent standards).

Exemptions from standard:

- water taking for use in short-term non-commercial project for firefighting or humanitarian purpose

- water taking for supply of vehicles (ships, vessels, aircraft)

- water withdrawn to package in containers 20 litres or less for human consumption anywhere (i.e., bottled drinking water), where packaging is done in the GL Basin, is considered a consumptive use (that is, it is only subject to regional review when goes over 5 million gallons per day threshold). If such water is packaged in bigger containers, and to be taken for consumption/sale outside Basin, withdrawal is considered diversion.

- standard and regional review does not apply to withdrawals by Illinois as authorized by US Supreme Court in the legal matter Wisconsin et al v. Illinois et al.

The procedures Manual, attached as appendix to the Agreement, is a guide on how to apply the standard to proposals for water-taking.

d. Local Review

This type of review would be done by the OJ according to that jurisdiction's laws and policies, but if meeting its obligations under this agreement, such laws and policies must at minimum apply the Standard in the agreement. Such withdrawal applications in Ontario would be subject to the Ontario Water Resource Act requirements, and depending on the nature of the proposal, possibly as well to the Ontario Environmental Assessment Act and/or the Canadian Environmental Assessment Act.

e. Regional Review

This type of review is to be done:

- for all proposals over the regional threshold amount (diversion over 1 million gallons a day; consumptive use over 5 million gallons a day; combined diversion and consumptive use over 5 million gallons a day).

- for a proposal from the same applicant (or for the same use or diversion) within 10 years of an earlier approval, if the total (not just the latest increment) brings it above the regional threshold.

- if the OJ voluntarily wishes regional review even if the regional threshold is not met

- if a majority of the regional body members vote for a regional review for a proposal that could be regionally significant or precedent-setting

The regional body conducting the review is composed of 10 people: the two premiers and the eight governors in the Basin, or their designates.

The regional body issues a "declaration of finding" as to whether or not the proposal for water-taking meets the standard. This declaration is not binding and ultimately the OJ will issue an approval or permit or not.

The regional review process is as follows:

- OJ determines whether the water-taking application (for water coming from that jurisdiction) meets the threshold for regional review or not.

- If regional review is triggered, OJ provides notice of proposal to regional body, which contains all information needed to evaluate whether it meets the standard, including the OJ's technical review of the proposal (OJ's thorough analysis of proposal to allow determination as to whether it meets the standard)

- Any member of regional body can conduct its own assessment of proposal, and majority of regional body can require regional body to undertake independent expert assessment of proposal, which should occur within 60 days of receiving proposal.

- Public is to be provided notice of proposal and opportunity to comment in writing on proposal, and public meeting is to be held in OJ. All pertinent documents to be publicly accessible (subject to confidentiality needs). Parties shall seek to provide opportunity for public comment for proposals subject to local review only.

- For proposals subject to both local and regional review, "appropriate consultation will occur with Tribes or First Nations in the OJ in the manner suitable to the individual proposal and the laws and policies of the OJ." For proposals subject to regional review, regional body will provide notice of the proposal to all Tribes and First Nation in GL Basin, which can then comment in writing to regional body on whether proposal meets the standard. The notice will also inform Tribes and First Nations of the public meeting in the OJ (above) which they can attend.

- The regional body shall forward any comments it receives on the proposal to the OJ, and shall consider all such comments before issuing declaration of finding.

- Regional body shall meet within 90 days of receiving OJ's technical review, to consider the proposal and all comments and assessments received. It will seek to get consensus among all members, and if so, issue one declaration of finding as to whether proposal meets the standard or not. If no consensus is reached, declaration will include different findings.

- The OJ shall consider declaration of finding before deciding whether to approve proposal or not.

f. Information Sharing

- Each party is to submit a report to regional body that details its water management programs that implement the Agreement, and is to update this report annually. The regional body is to review the reports and declare whether the party's management programs meet or do not meet the requirements of the Agreement.

- Each party is to have a program that requires all water-users of more than 100,000 gallons per day to report their uses (diversions, consumptive uses, withdrawals) annually.

- Each party is to develop a list of all diversions and withdrawals over 100,000 gallons per day, withdrawal approvals issued, and the capacity of existing water systems (things that limit capacity of water use). Information on approvals and capacity is to establish a baseline of what is an "existing" diversion or consumptive use, and thus what would be a new or increased diversion or consumptive use to which the Agreement applies. This information is to become part of GL shared database.

- Parties to coordinate collection of scientific information to assess impacts (individual and cumulative) of withdrawals, and what groundwater is in Basin.

- Parties will assess cumulative impacts in each GL watershed of all withdrawals, every 5 years, when there is a further 50 million gallons of water lost in that watershed since last assessment, or when any party requests this.

g. Other

- Any party can withdraw from agreement with 12 months written notice; agreement still applies to remaining parties.

- Provisions of Agreement come into force over staggered time period:

    - When last party to do so has implementing legal procedures in place locally: regional reviews and OJ reviews for diversions begin

    - One year after the date right above: the provision of information from each party of existing water taking approvals and capacities (to establish baseline for existing diversions and consumptive uses)

    - Four years after the date right above: assessment of cumulative impacts (i.e., none will be assessed until this trigger date, and possibly not for some time after that)

    - Five years after the date right above (or when the last party to do so has implementing legal procedures in place locally – whichever is sooner): OJ's required review and regulation of all withdrawals locally over 100,000 gallons a day.

    - One year after the date right above: each party to have water management programs in place that meet the requirements of the Agreement.

5. Compact

Another layer of decision-making (in addition to the local/state review and decision, and the regional review) is created by the Compact: the Council review. The Great Lakes Basin Water Resources Council is composed of the eight governors. All eight must approve any diversion over the regional threshold, and any change to the standard. Six governors must approve any consumptive use over the regional threshold. All other decisions are to be made by simple majority.

In other words, any proposal subject to regional review under the Agreement, must also be reviewed by the Council (at the same time in some concurrent process). The Council review process will seek written comment and possibly provide for a public meeting. In addition, for all Council reviews, "consultations will occur with all federally recognized tribes in the originating state …. organized in the manner suitable to the individual proposal and the laws and polices of the originating state." All federally recognized tribes in the GL Basin will receive notice of any proposal for Council review, informing them of the opportunity to provide written comment, and meetings or hearings if any. The states and Council shall consider all comments received.

Under the Agreement, the declaration of the regional body is not binding on any party, and the OJ makes the final determination of approval. Under the Compact, the Council decision is binding on the eight state parties, and a state cannot approve any proposal unless the required approval is first delivered by the Council. Further, the Compact states that no state party can approve a proposal that is subject to local/state review only (i.e., below regional threshold) unless it meets the standard.

The OJ state is required to monitor implementation of any proposal approved in its jurisdiction, and may take all enforcement actions necessary to ensure compliance with the approval and the Compact. Any person aggrieved by any action taken pursuant to the Compact is entitled to a hearing before the Council (to seek Council or state action to remedy the situation), and is entitled to judicial review in the courts. Any person or the Council itself can sue a person in court for withdrawing water without getting the required approval first.

Seven of the Council members can petition a court to suspend a state's right to vote on the Council if the court finds that the state is in violation of its duties under the Compact. The Compact can be terminated by majority vote of the state parties, and all rights established under it continue.

The Compact cannot be construed to affect the laws of the state parties relating to common law water rights. The Agreement exempts the existing diversion in Illinois (the Chicago diversion) from its ambit; while the Compact also exempts any increases to this that might be authorized by the US Supreme Court.

6. Canada's and Ontario's Implementing Legislation

Both Canada and Ontario share constitutional responsibility for protecting the Great Lakes, because "environment" is not mentioned in the Constitution, and various aspects of it or affecting it (such as fisheries, navigable waters, property rights) are split between the two levels of government. This has, in many cases, caused confusion, lack of accountability and lack of coordination.

Canada's and Ontario's standards and thresholds for water taking are tougher than that in the Agreement and Compact. Canada and Ontario both prohibit diversions and bulk water takings out of the basin. Ontario requires a permit for, and thus regulates, any taking over 50,000 litres (close to 12,000 gallons) per day. In November 1999 the Canada-Wide Accord on Bulk Water Removals was released.

What this means is that, under the Annex regime, where Ontario is the OJ (the jurisdiction from which the application for water withdrawal originates), Ontario makes the ultimate decision as to whether the application will be approved or not. Ontario's local standards, and Canada's standards, will not affect decisions made by US states when any of these are the OJ. So looser standards under the Annex, Compact or in any individual state will determine how decisions are made on the US side of the border.

a. Canada: International Boundary Waters Treaty Act and Regulation

This Act was passed and put into force by the Government of Canada in 1995 to confirm Canada's obligations under the 1909 Treaty. The Act was amended in 2001 to prohibit bulk water taking from a water basin, subject to certain exceptions. The Regulation under the Act was passed in 2002 to define bulk water taking and exceptions to this. Most of the Act recounts and confirms the provisions of the Treaty. The Act only applies to Canada and cannot govern the US.

Regulation:

- Regulation defines bulk water taking, and sets out exceptions. Bulk water taking is taking of water outside its water basin: in any amount by diversion (pipeline, canal, tunnel, etc.); and in amounts of more than 50,000 litres per day if taken by other means. Any water taking (other than by diversion) less than 50,000 litres per day, or taken as part of a manufactured product (including bottled water), is not a "bulk water taking" and is permitted. The prohibition in section 13 of the Act (below) does not apply to anything that is not a bulk water taking (as defined above), and does not apply to a non-commercial use for firefighting or humanitarian purposes.

Act:

- Sections 11 and 12: Require a licence to be issued by the federal Minister of Foreign Affairs for any use, obstruction or diversion of boundary waters on the Canadian side that affects or is likely to affect the natural level or flow on the other side of the boundary, or for any construction (of dam, obstruction, etc) that would or would likely raise the water levels on the other side.
- Section 13: No person can use or divert boundary waters by taking water outside its basin. This prohibits only bulk water taking as defined in the Regulation, and does not include the exceptions to that.
- Section 15: Sections 11, 12 and 13 do not apply to uses, obstructions or diversions already in existence before those sections came into force (2001) – they only apply to new uses, obstructions or diversions or significant changes to existing ones.
- Section 20: The Minister may enter into an agreement or arrangement with one or more provinces about the activities specified in sections 11, 12 or 13.
- Section 21.1: "Nothing in this Act shall be construed so as to abrogate or derogate from the protection provided for existing aboriginal or treaty rights of aboriginal peoples of Canada by the recognition and affirmation of these rights in s. 35 of the Constitution".
- Section 22: Makes violation of sections 11, 12 and 13 an offence and sets maximum penalties.
- Section 26: The Minister can apply to a court for an injunction to stop or prevent the commission of an offence under the Act.

b. Other Relevant Federal Statutes

Following is a list of some federal statutes that apply to or affect environmental management of the GL Basin.

- Fisheries Act (cannot harm fish habitat or release substance deleterious to fish unless have permit to do so)
- Canada Water Act (management of water resources, including conservation and utilization, including through agreements with provinces where applicable)
- Navigable Waters Protection Act (cannot obstruct navigable waters unless have permit to do so)
- Species At Risk Act (to identify and protect endangered and threatened species from various activities)
- Canadian Environmental Assessment Act (assesses projects that would have environmental impact and over which the federal government has some jurisdiction, such that Minister can decide whether to approve or not)
- Canadian Environmental Protection Act (standards for release, transport and use of various pollutants)

c. Ontario's Legal Regime

Ontario, like Canada, has created a ban on diversions of water outside the basin from which it is taken. A regulation of the Ontario Water Resources Act states that: No person shall use water by transferring it out of a water basin" (Reg. 285/99 s. 3). However, this prohibition does not apply to water used in the basin to manufacture a product which is then transferred outside the basin.

Following is a list of some Ontario statutes that apply to or affect environmental management of the GL Basin.

- Ontario Water Resources Act (restrictions on and permits for uses and takings of water)
- Permit to Take Water Program (in development)
- Source Water Protection Act (in development)
- Safe Drinking Water Act (standards for improving or ensuring safe drinking water from various sources)
- Nutrient Management Act (manages nutrient use and discharge from agriculture)
- Environmental Assessment Act (assesses projects that would have environmental impact, so Minister can decide whether to approve or not)
- Environmental Protection Act (standards for release, storage and use of various pollutants)

7. The Great Lakes Water Quality Agreement

The Great Lakes Water Quality Agreement (WQA) is the agreement designed to address or implement Article IV of the 1909 Boundary Waters Treaty concerning water quality: "Boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health of property on the other [side]." The WQA was first signed by the federal governments of Canada and the US in 1972, and renewed in 1978. It was amended in 1987 by broadening its scope and adding new Annexes to address emerging or recently discovered threats to the Great Lakes environmental quality.

The WQA has 15 articles setting out principles, objectives, programs to implement the objectives, and an administrative structure. These are followed by 17 Annexes which deal in more detail with specific types of threats or measures to address them.

Key terms or concepts of WQA include:

- Water quality ifs focus, which is defined as "chemical, physical and biological integrity". Does not focus on ecosystem management and how environmental impacts from all sources (air, land, groundwater and surface water) are all interrelated.
- Focuses on toxic substances and other forms of pollution, and their reduction.
- Key objective of "virtual elimination" of "persistent toxic substances".
- Measurement of success (sufficient reduction or elimination of pollution) is ability to use water for "beneficial uses", which are to be defined for specific parts of the waters (not all waters will have the same desired beneficial uses). These include: fisheries, wildlife consumption, recreation and swimming, drinking.
- There are standards for:
    - Addressing types of pollutants anywhere in Basin
    - Addressing types of pollution sources (activities such as agriculture, non-point sources, etc) anywhere in the Basin
    - Managing types of geographic areas (specific areas of concern –most harmed, and lakewide management for open waters of each lake)
    - Management practices (monitoring, research, etc).
- Many if not most of the WQA must be implemented by the federal governments working in concert with provincial or state governments. Reference to the "parties" (federal governments) usually means the parties in conjunction with the other governments.

APPENDIX B

ISSUES AND CONCERNS WITH ANNEX REGIME

A number of *key issues or concerns* with the Annex regime have been expressed, which can be categorized as follows:

- ***Too permissive***: Allows or opens door to too much water-taking, through various gaps, omissions, exemptions and uncertainties – and this could lead to serious environmental and other damage. The Annex regime is premised on permission to withdraw as first step, and regulating the situations in which this can occur as second step. Many propose that the premise should be prohibition on withdrawals as first step.
- ***Too narrow***: doesn't address water quality, and doesn't tie quantity together with quality.
- ***Violates Trade Law***: Subject to challenge under trade agreements, and if challenges successful, would require equal treatment of and access to Great Lakes water to those outside of Basin (perhaps even buyers overseas), and inability of Great Lakes governments to curtail withdrawals.
- ***Decision-Making Regime Unfair or Ineffective***: Agreement not binding; Canadian provinces outnumbered with little say; public participation weak and no enforcement role; virtually no effective participation by indigenous peoples; creates bureaucratic overlap, confusion and possibly conflict.

The *alternative solutions* being offered include:

- Outright ban or prohibition on further diversions and larger withdrawals.
- A "no net loss" position: all withdrawals must be added together, and there must be at least as much water returned to the Basin, or more likely to the watershed from which it was taken (more withdrawals are allowed if this balance is maintained). Added to this should be a requirement for ecosystem integrity.
- A Basin-wide water quality and quantity protection and restoration plan must be developed (integrated, focused on conservation and using less, rather than on finding ways to take more).

The above and other solutions could be *implemented by various means*, including:

- Amendments to Boundary Waters Treaty
- An entirely new agreement and regime which deals with both water quantity and quality together
- Amendments to Great Lakes Water Quality Agreement and regime to incorporate more directly the water quantity issues
- Serious amendments to, overhaul and strengthening of the proposed Annex agreements
- No further agreements, and call upon each state to prohibit further diversions and larger withdrawals as Canada, Ontario and Quebec have done (i.e., accomplished through political pressure and voluntary action).

1. Too Permissive

Problems with the Annex agreements that could lead to too much water being withdrawn from the Basin or its components, include the following:

- The "improvement" criterion in the standard allows a party proposing a major water withdrawal to "offset" the effects of the withdrawal with some project to improve the environment somewhere else in the Basin (which could include funding a sewage treatment plant, planting trees, attempting to restore a fishery etc). This effectively puts a price tag on the water, making it more likely that major withdrawals would be approved if there is some resource improvement plan included in the proposal. It creates a balance sheet of costs and benefits; however, the benefits would not directly offset or weigh against the costs (it is akin to comparing apples and oranges). Since the improvement could occur anywhere in Basin, this ignores the need to respect the integrity of each ecosystem.

- The thresholds for withdrawals that are to be regulated and subject to approval are far too high (regional review at 1 million gallons for diversions and 5 million gallons for consumptive uses; local reviews at 100,000 gallons). This allows smaller takings to fall through the cracks, and cumulatively these could add up and do a lot of damage.

- The agreements are weaker than the WRDA standard which requires unanimous approval of all eight states for any diversion (whereas the agreements only require this for diversions over 1 million gallons a day). The agreements are weaker than the Boundary Waters Treaty which has a standard of "no effect" on water flow and level across the border (whereas agreements have standard of "no significant effect").

- There is a serious lack of information now about how much water is in the Basin, how much is required for ecosystem integrity, how much is currently being withdrawn and used, the potential effects of climate change on water flows and levels, and many other things. Permission to withdraw yet more water is too risky and defies the precautionary approach.

- Lack of information and understanding means it will be very difficult if not impossible to determine and understand the effect of "cumulative impacts" from all withdrawals and uses. On top of this, the proposed intermission between attempted assessments of cumulative impacts is too great (much could change in the interim).

- There are no limits on: overall or total quantity of water that can be withdrawn from Basin; duration of water withdrawal permits or uses; purposes for which water can be withdrawn; or geographic region that could use the water withdrawn.

- The threshold amounts of takings (1 or 5 million gallons for regional review, and 100,000 gallons for local review) are measured by taking the average estimated over 120 days of withdrawals. This means that withdrawals that take a lot of water in a smaller period of time (one month, for instance) would average out at much lower amounts when this is spread over 120 days. Several takings, including and especially for agricultural purposes,

would thus not be subjected to review and approval and would slip through the cracks. Again, these can cumulatively add up.

- The return flow requirement (water withdrawn must be returned after used) is too loose and ambiguous. What does it mean to say that some portion (the "consumptive use" portion) does not have to be returned, as determined by "consumptive use of the applicable water use sector"? What if a lot of water is being wasted and not returned now in that sector (for example, in agriculture)? Further, a proposal to take 3 million gallons a day for agricultural irrigation, in which 70% is lost (consumptive use), means that 2.1 million gallons would be consumptive use and .9 million would be a diversion, putting the proposal below the threshold for regional review on either count.[260]

- There are a number of ambiguous terms in the agreements, which leave the door wide open for subjective discretion and abuse. These include: improvement (the resource improvement plan), conservation (the conservation plan and measures), "significant" impact (how much is too much), "reasonable" (no reasonable alternative to the withdrawal, and reasonable quantity for the purposes).

- There are a number of exemptions from application of the standard or review, which create a number of gaps through which numerous withdrawals would fall:

    - All existing diversions and uses are exempt from the agreements
    - Communities or municipalities partially in the Basin are considered totally in the Basin and applicable watershed (meaning a diversion of water to them, from the watershed which they border, is not considered a diversion at all – which is defined as water out of that watershed).
    - Any increase in diversion in Illinois authorized by the US Supreme Court is exempt
    - No return flow of water is required for diversions less than 250,000 gallons a day for community within 12 miles of Basin using water for public water supply.
    - The 120-day average exempts a number of takings
    - The "bottled water" exemption (water bottled within Basin in container 20 litres or less is considered a "consumptive use" and thus only subject to the much higher threshold for regional review of 5 million gallons a day)
    - The "humanitarian" purpose exemption (there are concerns that ongoing conditions of low water supply in southern US states would qualify as a humanitarian purpose and allow major water withdrawals to feed these thirsty states).

2. Too Narrow

Many of the concerns expressed above in regard to the agreements being too permissive, could or would result in environmental problems, including with the water quality and with effects on all those species and systems that depend on a viable water supply.

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[260] Steven Shrybman, Great Lakes Basin Sustainable Water Resources Compact and the Diversion of Great Lakes Waters, legal opinion for the Council of Canadians, October 2004, p. 14.

The Great Lakes waters and Basin are already under serious threat from pollution, industrialization, urban sprawl and a number of other factors. To build a regime (the Annex) around the premise that further withdrawals are permissible is taking too great a risk, especially as we do not know now just how and how much the ecosystems and their components are being affected by current stresses.

There are concerns that return flow of water will of course not be exactly the same water as was taken, and might contain foreign species. Foreign invasive species are already causing serious damage in the Basin.

Generally, since water quantity and quality are innately co-dependent and interrelated, many believe they must be dealt with together in one agreement or regime, and not segmented and fragmented.

3. Trade Law Issues

A number of legal analysts express concerns that the Annex regime implicitly treats water withdrawals and diversions for use in or near the Basin differently than for uses outside or well outside the Basin, and that this would invite application of trade agreements and rules. They express doubt in Canada's position (shared by the IJC and the US) that water in its "natural state" is not a tradable good and thus not subject to these trade rules. Such trade rules require, in a nutshell, equal treatment as between domestic and foreign markets (buyers, sellers and users) and between domestic and foreign investors. If such rules were to apply to the Annex regime, the mechanisms in the Annex agreements that have the effect of different treatment could be struck, opening the door to more withdrawals and fewer protections and safeguards for water quantity and the environment.

The major Annex regime mechanism that implicitly treats diversions and withdrawals for use in or near basin differently than for use out of or farther from the Basin, is the "return flow requirement" (requiring all water taken to be returned, less some allowance for consumptive use). It would be mechanically or physically impossible or impracticable for water taken far away for use, to be returned to the Basin, and less difficult for such return where the withdrawn water is to be used near its source. Suppose, for example, that water was taken for hydro-electricity production in areas bordering one of the Great Lakes. It would be possible for such water to be piped or otherwise flowed back into the Lake once it had served its purpose of turning turbines to produce electricity. However, if the water is piped some long distance, how would it be returned in any viable fashion? Theoretically, it could be piped back through another pipeline, but this is likely to be prohibitively expensive.

There seems little doubt that this dual treatment was intended by the drafters of the Annex agreements, particularly the Great Lakes state governors, who perhaps would wish to approve diversions for and to communities within their states but just outside the Basin, but not allow diversions to southern US states or elsewhere. Pressure is already being exerted now by some communities near the Basin for Great Lakes water to feed their public water systems.

It is worthwhile to point out, however, that while the return flow requirement might result in differential treatment, there are other aspects of the Annex regime that tend to result in more equal treatment as between in and out of Basin water uses. One such aspect is the exemption from

return flow for "consumptive use applicable to the water use sector" for which the water taken is to be used. The bottled water sector arguably results in all such water being treated as consumptive use, since it is all "consumed" by humans, and thus no water would have to be returned. Such water could be shipped anywhere. The consumptive use level for irrigation purposes is likely about 70 percent, meaning that only 30 percent of the water taken needs to be returned.[261]

The second such aspect is the "improvement" criterion of the standard. This allows someone who wishes to divert or otherwise withdraw a large amount of water to offset its effects by proposing to improve some other aspect of the Basin environment, no matter where such improvement would be located in the Basin. This opens the door to approval for large withdrawals, by permitting them to be offset in this way. On the other hand, this improvement criterion effectively commodifies water, by allowing it to be traded for an "improvement" of some other sort, and this opens the door to invocation of trade rules, which apply to commodities (and services and investments).

Trade regimes exist under NAFTA and the WTO, as well as pursuant to US law which prohibits trade discrimination as between states.

Lawyer Steven Shrybman states that under NAFTA and the WTO:

> Water export controls are prohibited subject only to limited exceptions that have proven unreliable as a means for defending environmental and conservation measures that fail to respect the constraints imposed by international trade disciplines. Even more problematic are NAFTA requirements which preclude Canada from denying US investors and service providers [for instance, US companies or multi-nationals with facilities on the Canadian side of the Basin] the same access to Canadian water it allows Canadian companies, communities and residents. … Consider the fact that under both US and international law, water in its natural state has been considered a commercial good. Moreover, a very large portion of Canadian water resources might readily be seen as having entered into commerce because it is being used for a great variety of commercial purposes – such as power generation, irrigation, and industrial production…. Under the National Treatment and proportional sharing rules of NAFTA, it is virtually impossible for Canada to restrict water exports once they are underway.[262]

NAFTA is not the only threat. Members of the EU are pushing to extend the General Agreement on Trade in Services (GATS) to water supply services, and the GATT could apply to water as a good (although a good or product under the GATT is not defined, but one could consider that it is something this is produced). However, as Shrybman points out, it is far more likely that a challenge to the Annex regime will arise through the NAFTA foreign investor rules rather than through the GATT/GATS/WTO regime. It is likely economically unfeasible (at least at the present time – although this could well change as fresh water becomes scarcer) for water to be

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[261] The International Water Uses Review Task Force, protectin of the Waters of the Great lakes Three year Review: Report Prepared for the International Joint Commission, November 2002, section 3.

[262] Steven Shrybman, "Asserting Sovereign Control Over Water Resources in the Era of Free Trade", in National Symposium on Water Law, a National Environmental Law Conference, March 2003, pp 1-2.

diverted or shipped overseas. It is much more likely that foreign-owned corporations, both in Canada and the US, will seek Great Lakes water for their operations outside the Basin[263].

Further, it is also likely that water-starved southern US states, in which population is exploding and urban sprawl is running rampant, would also stand in line to withdraw Great Lakes water. The state, or municipalities in the state, could launch a challenge to unequal treatment under the Annex regime, through the US legal doctrine against interstate trade discrimination.

Other legal experts disagree that such challenges, under NAFTA, the WTO, or US interstate law, would be successful.[264] Valid conservation purposes can be used, in some circumstances, to justify otherwise unequal treatment under trade law.

4. Unfair and Ineffective Decision-making Regime

First, the Annex Agreement is not binding. This is a problem in and of itself, as there are no legal enforcement mechanisms should any party decide to break the agreement. It will ultimately be up to each local jurisdiction to decide what it will do, and up to the Council of eight states to decide what they can do for the larger withdrawals. This gives the US states much greater effective power under the Agreement (and pursuant to the Compact) than the Canadian provinces.

Each of the two Canadian provinces are given one vote of ten at the regional review level of the Agreement. While each US state can exercise a veto against any other state under the Compact (the Compact runs parallel to the Agreement), neither Ontario nor Quebec has a veto against any state, the Council or each other. American interests trump, and provincial or Canadian interests are severely reduced and outnumbered. This is especially problematic given that it is likely that the greatest pressure for water withdrawals is likely to come from the US (both in Great Lakes states from communities outside the Basin, and from southern water-starved US states). Shrybman calls this approach American unilateralism, and states that it is at odds with customary international law in regard to international watercourses, which sets standards of mutuality and mutual protection of each party's interests.[265]

Further, the Annex regime would create another layer or system (in fact, at least two new levels – the Council under the Compact, and the regional body under the Agreement) of decision-making in an area where there are already several layers and systems, especially when water quality and quantity are considered together. What is needed is not more systems and layers that continue to fragment and convolute the issues and decisions, leaving room for conflicts, gaps and overlaps (which tend to lead to stalemates, confusion and atrophy). Needed is a cohesive, integrated decision-making regime.

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[263] Steven Shrybman, Great Lakes Basin Sustainable Water Resources Compact and the Diversion of Great Lakes Waters, legal opinion for the Council of Canadians, October 2004, p. 8.

[264] See, for example, John Terry and Andrea Unikowsky, "Application of the NAFTA and the GATT to Water", in National Symposium on Water Law, a National Environmental Law Conference, March 2003; Daniel Tarlock…

[265] Supra note 5 at p. 18. Shrybman references the UN International Law Commission's Draft Articles on the Law of the Non-Navigational Uses of International Watercourses which purports to codify customary law on this issue. The principles of "equitable and reasonable use" of the water, and the obligation not to cause appreciable harm, he states may be considered cornerstones of this law.

Concerns have been expressed that public participation in the Agreement is weak, and that there are no mechanisms for the public to enforce the Agreement against their respective governments or to bring suit thereunder (there are such mechanisms in the Compact). There have been several complaints thus far that public participation at this stage, of developing and critiquing the terms of the agreements, has been limited by the governments.

Finally, there has been virtually no effective participation by indigenous peoples to date in this process, and very little is contemplated for the operation of the Annex regime. The Chiefs of Ontario and other aboriginal parties approached the Ontario government back in September 2004 to seek bona fide and meaningful consultation in regard to the Agreement. Ontario has stated that it did not feel it was legally bound to consult with aboriginal peoples at this stage about the development of the Agreement itself because the Agreement itself would not affect treaty or aboriginal rights (instead, aboriginal peoples would be consulted in regard to each application for water taking under the operation of the Agreement). However, Ontario has also indicated that it would invite the participation of aboriginal peoples at this stage, but has limited this to "talking at" aboriginal peoples. A few public informational meetings have been held, and a "stakeholder" advisory panel has been created. But the Ontario government has offered no resources to enable aboriginal peoples to become informed about and prepared for providing input. Thus, the views and concerns of aboriginal peoples have not been met.

Aboriginal peoples are granted no governmental status or decision-making role under the Agreement's regime. They are to be consulted only, and consultation is limited to that which is considered appropriate by and in the local jurisdiction, and to written comment and an invitation to a public meeting in regard to applications for water-taking.

APPENDIX C

GOVERNMENTAL POSITIONS & JURISDICTION

Neither waters per se, nor the environment, are completely allocated to the jurisdiction of either Canada or the provinces under the Constitution. They have shared responsibility and power to legislate and govern in regard to these broad areas. Given the nature of the Great Lakes waters (transnational), the importance of the waters to the environmental, economic and social stability, viability and thus security of Canada as a whole, Canada's existing binational and international obligations (pursuant to the Boundary Waters Treaty and other agreements), and Canada's enumerated and residual powers under the Constitution, there is a strong argument to be made that Canada must be a party to the Annex Agreement and must ratify whatever agreement is eventually finalized.

It is beyond the scope of this paper to analyse this issue, but aboriginal peoples should be aware the Annex Agreement is non-binding because neither Ontario nor Quebec possess the constitutional authority to enter into a binding agreement with US states in regard to Great Lakes waters and environment. One wonders why such a non-binding arrangement would be tolerated by Canada to begin with – especially given what is at stake, and especially because other binding options (such as amending the Boundary Waters Treaty, or setting up an appended regime under it) are available.

1. Canada's Position and Jurisdiction

a. Position

Canada has expressed a number of important concerns with the Annex regime, but to date has not insisted on becoming a party or signatory to the Agreement. It is quite possible that Canada must become a signatory party, given Canada's constitutional obligations.

In 2001, the Government of Canada presented a written submission to the Council of Great Lake Governors about Canada's position on the then-proposed Charter Annex.

Canada expressed "serious concerns" about the proposed standard for allowing water-takings, and about the relationship between the Annex and the Boundary Waters Treaty. Canada supported the IJC recommendations in its 2000 report entitled "protection of the Waters of the Great Lakes".

In regard to the standard, Canada stated it is too permissive, and could "compromise the ecological integrity of the Great Lakes Basin by the cumulative impacts of diversions" and by "opening the door to long-distance, large-scale removals out of the basin". Canada stated that in-basin and out-of-basin uses should be treated differently (eg: not providing same opportunity or "rights" for those who seek to move water out of the basin). In Canada's opinion (shared by the US federal government and the IJC), this different treatment would not amount to discriminatory treatment subject to sanction under international trade agreements, because water in its natural state is not a tradable commodity and is instead subject to the sovereign control of nation-states.

In regard to the effect on the Boundary Waters Treaty, Canada expressed concern that decisions made under the Annex regime (i.e., approvals of certain diversions or other takings) could compromise the ability of Canada and US to meet their obligations under the Treaty in regard to preventing impacts on water flow and level on the other side of the border. The Annex regime creates a different set of decision-making structures and mechanisms, and it is unclear how these would affect the Treaty decision-making process and the role of the IJC.

This submission, above, was a strong statement of concern. In January 2005 the Government of Canada made another submission, this time in regard to the proposed Annex Agreement and Compact, which is arguably as strident in concerns about the standard being too permissive, but taking a different approach in regard to concerns about the relationship with the Boundary Waters Treaty.

In the latter submission, Canada continues to express concerns that the agreements are too permissive, "as there is no maximum level for water withdrawals", and the agreements "do not afford a sufficient level of protection". Canada states that the "improvement" criterion in the standard should not be allowed to offset harm caused by water withdrawals, and that proposed withdrawals should first receive environmental assessments where appropriate. Canada expresses concern about the exclusion of existing diversions and withdrawals from the agreements' ambit, and the omission of any reference to effects from climate change on water levels.

Further, Canada calls for greater public participation at "all stages of assessment, review and implementation, including with First Nations".

In regard to the Boundary Waters Treaty and the Great Lakes Water Quality Agreement, Canada now takes the position that these are unaffected by the Annex agreements, as "[a]ny project that affects the natural level or flow of boundary waters will require independent approval by the IJC or a special agreement by the governments of Canada and the Untied States as specified in the Treaty." This appears to suggest that Canada will assert its jurisdiction under the Treaty (and call on the IJC to assert its jurisdiction) if any withdrawal project is approved under the Annex regime which in Canada's opinion would affect water level/flow in the US. However, we do not know if the US government would do the same.

b. Jurisdiction

Following are the key enumerated heads of the Constitution which fall within the authority of the federal government, relating to regulation of waters:

- 91(2). The regulation of trade and commerce.
- 91(9). Beacons, buoys, lighthouses.
- 91(10). Navigation and shipping.
- 91(12). Seacoast and inland fisheries.
- 91(13). Ferries between a province and any British or foreign country or between two provinces.
- 91(24). Indians and lands reserved for Indians.
- 91(27). The criminal law.
- 95. Agriculture (shared with provinces)

- 108. The public works and property of each province, enumerated in the Third Schedule to this Act, shall be the property of Canada (includes: canals, with lands and water power connected therewith; public harbours; lighthouses and piers; steamboats, dredges, and public vessels; rivers and lake improvements; lands set aside for general public purposes)
- 132. Treaty-making power.

Further, the federal government has "residual power" to make laws for the Peace, Order, and Good Government of Canada, in relation to all matters not assigned exclusively to the provinces. This has been held to include matters of "national concern". National concern has been held to include marine pollution because of its inherently extra-provincial and international character.[266] It would surely also include water levels and flows in transprovincial and transnational waters, and perhaps even in intra-provincial waters where this would affect or threaten the integrity of the environment.

Pursuant to Canada's treaty-making authority under s. 132 of the Constitution, Canada must ratify the Annex Agreement if it is to be binding in and on Canada and the provinces.

Due to Canada's constitutional responsibility for Indians and lands reserved for Indians, where such lands would be threatened by changes to water levels and flows, Canada arguably has the duty to legislate to prevent or minimize this.

2. Ontario's Position and Jurisdiction

a. Position

Ontario recently stated that it would not sign the Agreement as is, and has ostensibly taken at least an interim position of "no net loss",[267] although it is not known how firm this position is or what it really means. Ontario is engaged in a process of considering (with some stakeholder and public input) options in regard to:

- limits on diversions (total prohibition; prohibit larger diversions and no net loss for smaller ones, no net loss for total of all diversions, agreement as is)
- limits on and processes for consumptive uses (whether local, regional or Council review or some combination)
- application and scope of improvement and conservation criteria in standard
- application, cap for, and review of cumulative impacts
- regional review thresholds

Ontario also seems to take the position that it must continue to be involved in the Annex development process, as this will give Ontario a voice at the table and perhaps the ability to influence the states to develop some stronger measures. However, Ontario is but one voice of ten

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[266] R. v. Crown Zellerbach Canada Ltd. [1988] 1 SCR 401.
[267] Minutes of Great Lakes Charter Annex Inaugural Meeting of the Annex Advisory Panel, December 15, 2004.

in the Annex regime, and it is not known whether or to what extent its views will affect those of others.

b. Jurisdiction

As stated above, the responsibility for waters and the environment are shared between the federal government and the provinces.

Following are the key enumerated heads of the Constitution which fall within the authority of the provincial governments, relating to regulation of waters:

- 92(5). The management and sale of public lands belonging to the province.
- 92(8). Municipal institutions in the province.
- 92(10). Local works and undertakings other than: shipping lines, canals, and others connecting the province with other provinces or extending beyond the province; works declared by Canada to be for the general advantage of Canada or two or more of the provinces.
- 92(13). Property and civil rights in the province.
- 92(16). Generally all matters of a merely local or private nature in the province.
- 95. Agriculture (shared with Canada).
- 109. All lands, mines, minerals and royalties belonging to the provinces, and all sums payable for these, shall belong to the province in which they are situate or arise, subject to any trusts or other interest other than of the province in the same.
- 117. Provinces shall retain their public property not otherwise disposed of by this Act subject to the right of Canada to assume any such property required for the defence of the country.

The above constitutional powers do not give Ontario enough authority to enter into a binding agreement with US states in regard to transnational waters and environment, at least without Canada. The Annex Agreement is non-binding for this reason. Why, then, are Ontario and Canada even considering this arrangement when there are other binding options (to which Canada would have to be a party).