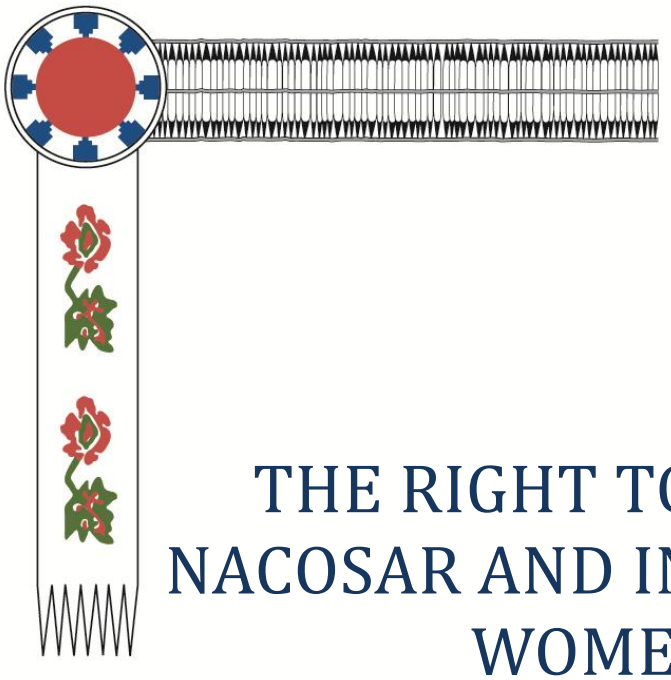

Native Women's Association of Canada

THE RIGHT TO WATER NACOSAR AND INDIGENOUS WOMEN

2010

Table of Contents

Introduction

Water is fundamental to the every aspect of the lives and life-ways of Aboriginal[1] women. From individual health and well-being to the ability to enjoy our traditional lands and territories in a manner consistent with our respective cultures, teachings, understandings and legal orders, water underlies and permeates our lives, bodies and ecosystems.

Water rights are necessary to the survival of our families, communities, cultures, languages – our space and place in the world, sacred and ordinary.

We cannot sever the linkages that exist for Aboriginal Peoples between the natural environment, culture, legal orders, language, livelihood and life-ways. When we think of the complex web that ties us in so many different ways to water, we must acknowledge that Indigenous women have experienced, and continue to experience an estrangement from water. In Canada, the history of the oppression of Aboriginal language, knowledge, law, and cultural practices has coincided with abrupt and destructive changes in the natural environment as a result of development and settlement. Examples include Canadian policies and laws intended to halt or eradicate the practice of spiritual and legal orders (including relationship to the natural environment) of Aboriginal Peoples in Canada. The notorious instance of the criminalization of the Sundance ceremony of Aboriginal Peoples in Canada from 1895 – 1951

1 In this paper, we will refer to First Nation, Métis, Inuit, and Aboriginal and Indigenous peoples. "Aboriginal" is a term that is recognized in the Canadian *Constitution Act, 1982*, which includes Indian, Métis and Inuit peoples of Canada. The term "Aboriginal" is widely used in common law, policies and programs throughout the country. More than one million people in Canada identify themselves as Aboriginal, which amounts to about 4% of the total population of Canada. "First Nation" is a term that is used to describe "status" (registered Indians under the *Indian Act*, S.C. 1985, cI-5) and "non-status" Indians. "First Nation" is also used as a name to describe communities located on reserves established pursuant to the *Indian Act*. There are approximately 615 First Nation communities in Canada. Where possible, the Indigenous name that a particular community calls itself will be used. "Indigenous" is a commonly used term in international fora, and is one that has been defined and used in a way that recognizes the nationhood and integrity of Indigenous peoples across the globe. This term will be used when discussing Indigenous legal traditions or knowledge as it is the most inclusive and provides the highest level of recognition of culture, identity and language.

created rifts in sacred relationships, community cohesion, knowledge transmission, and implementation of Indigenous legal orders.

Many in Canada are also aware of the far-reaching and profound impacts of residential schools and their legacy. The residential school era tore apart families and communities - preventing relational/familial roles and responsibilities, culture, language and customary laws from being taught to children.[2]

In the years since contact between the European settler society and Indigenous Peoples in Canada, the development and artificial alteration of the natural environment has been significant. Much of Canada's wealth has been generated by the exploitation and development of renewable and non-renewable natural resources.

Now the challenge is the debate about water rights in general – how to secure sufficient water to sustain development, economies and societies into the future. Where and how do Aboriginal women figure in the dialogue about rights and interests, particularly considering the diversity of experiences, needs and ambitions of various Indigenous Peoples?

This paper will provide a survey of law and policy relevant to Indigenous women and water internationally and in Canada, while proposing a strategic direction for future policy and advocacy.

2 See the work of the Canadian Truth and Reconciliation Commission, online at http://www.trc.ca

PART I - INTERNATIONAL CONTEXT

Genesis of the Human Right to Water – References to Indigenous Peoples

The first notion of a right to water under international law is found in the 1948 *Universal Declaration of Human Rights*[3], which was unanimously proclaimed by the UN General Assembly as a common standard for all humanity.

> **Article 25**
>
> (1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

The Declaration does not define the components of a right to water. However, it might be seen as inclusive of the right to water as it describes an 'adequate standard of living'. This may only be truly achieved with access to clean water.

In 1966, the *International Covenant on Economic, Social and Cultural Rights*[4] took this concept further:

Article 1

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

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3 G.A. res. 217A, art. 25, U.N. GAOR, 3rd Sess., 1st plen. Mtg., U.N. Doc A/810 (Dec. 12, 1948) at http://www.ohchr.org/english/law/index.htm

Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) *The improvement of all aspects of environmental and industrial hygiene*;

(c) *The prevention, treatment and control of epidemic, endemic, occupational and other diseases*;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness. (Emphasis added).

Article 25

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

Article 28

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

4 International Covenant on Economic, Social, and Cultural Rights, art 11, Dec.16, 1966, 993 U.N.T.S. 3 at http://www.ohchr.org/english/law/index.htm

In 1977 there was a UN water conference in Argentina called the Mar del Plata Conference.[5] This conference issued one of the first known resolutions regarding something akin to a human right to water. It was called *Resolution II, "Community Water Supply"*. It stated that "all peoples, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic needs". The resolution called for full international cooperation, and the mobilization of physical, economic and human resources "so that water is attainable and equitably distributed among the people within the respective countries." Shortly thereafter, in 1979, the United Nations *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW)[6] stated that it was the right of women: "[t]o enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply..."[7] Then, in 1989 the *Convention on Rights of the Child* was adopted[8]. In this *Convention*, article 6 states that there is an inherent right to life, and a requirement to ensure survival to the 'maximum extent possible'. Article 24(2), in addressing the need to combat disease stipulates that there must be "...adequate nutritious foods and clean drinking water." In the same year, an historical development for Indigenous Peoples was found through the International Labour Organization *Convention 169*.[9] Under *Convention 169*, Part II, Article 13:

> In applying the provisions [of the Convention]...governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories…which they occupy or otherwise use, and in

5 United Nations Water Conference, 14-25 Mar, 1977, Mar del Plata, Argentina, Mar del Plata Action Plan, in Biswas Asit K. (ed.) UNITED NATIONS WATER CONFERENCE: SUMMARY AND MAIN DOCUMENTS (1978).

6 Convention for the Elimination of All Forms of Discrimination against Women, art 14, Dec. 12, 1979, 1249 U.N.T.S. 13 at http://www.ohchr.org/english/law/index.htm.

7 Article 14 (h)

8 This Convention remains "one of the most widely and rapidly ratified human rights treaty in history" with 192 countries comprising States Parties to the Convention. See: http://www.unicef.org/crc/index_30229.html

9 Convention (No.169) Concerning Indigenous and Tribal Peoples in Independent Countries art.7 June 27, 1989, 1650 U.N.T.S. 383 *available at* http://157.150.195.4/LibertyIMS::/sidqOj9DN94ucKID394/Cmd%3DXmlGetRequest%3BName%3D%2364%3BNoUI%3D1%3BF0%3D1650%3BF1%3DEnglish%3BF2%3D28383%3BF3%3D%3Bstyle%3DXmlPageViewer%2Exsl.

particular the collective aspects of this relationship.

The next development of note in the area of water as a human right took place in Ireland in 1992 at the International Conference on Water and the Environment. The outcome document from this Conference is entitled the *Dublin Statement on Water and Sustainable Development*.[10] Principle 4 of that Statement reads as follows:

> …water has an economic value in all its competing uses and should be recognized as an economic good" but clarified this statement by saying, "it is vital to recognize first the basic right of all human beings to have access to clean water and sanitation at an affordable price….Women play a central role in the provision, management and safeguarding of water and sanitation and must be involved in all water-related development efforts.

In the same year, the now infamous Rio Summit took place and marked the creation of *Agenda 21 of the Rio Summit "Programme of Action for Sustainable Development*".[11] It included a separate chapter (Chapter 18) on freshwater resources:

> …water resources have to be protected, taking into account the functioning of aquatic ecosystems and the perenniality of the resources, in order to satisfy and reconcile needs for water in human activities. In developing and using water resources, priority has to be given to the satisfaction of basic needs and the safeguarding of the ecosystems.

Chapter 18, which endorsed the *Resolution* of the Mar del Plata Water Conference, also said that the right of all peoples to have access to drinking water is a "commonly agreed premise".

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10 International Conference on Water and Sustainable Development, Dublin, Ire. Jan. 26-31, 1992, *The Dublin Statement on Water and Sustainable Development*, at http://www.wmo.ch/web/homs/documents/english/icwedece.html.
11 United Nations Conference on Environment and Development, June 3-4, 1992 Rio de Janeiro, Brazil, *Agenda 21*, ¶ 18 at http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=52&ArticleID=66&l=en.

In May of 1997, the UN General Assembly adopted the *United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses.*[12] Paragraph 2 states that in the event of a conflict between uses of an international watercourse, "special regard shall be given to the requirement of vital human needs." Further, article 10(2) elaborates: "In determining 'vital human needs', special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for the production of food in order to prevent starvation."

Two years later, the UN General Assembly passed a resolution that seemed to advance and support previous positions that characterized water as a "need" or "economic good" to now characterizing water as a "right". This was the General Assembly's 1999 Resolution on *The Right to Development.* It reaffirmed that in the realization of the right to development, "the rights to food and clean water are **fundamental human rights** and their promotion constitutes a moral imperative both for national Governments and for the international community" (emphasis added).

Following closely on the heels of this Resolution was the *United Nations Millennium Declaration* (September 8, 2000)[13] signed by 147 heads of states, including Canada. This Declaration addressed eight Millennium Development Goals to be achieved by 2015, including:

Reducing by half the proportion of people without sustainable access to safe drinking water.

12 Convention on the Law of Non-Navigational Uses of Watercourses art.10, G.A. Res. 51/29, U.N. Doc. A/RES/51/29 (May 21, 1997) *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_3_1997.pdf#search=%22Convention%20Law%20Non-Navigational%20Water%20Courses%22.

13 United Nations Millennium Declaration, G.A. Res. 55/2, 4 U.N. Doc.A/RES/55/2 (Sept. 8, 2000) at http://www.un.org/millennium/declaration/ares552e.htm.

In December of 2000, the UN General Assembly proclaimed 2003 as the "International Year for Freshwater." During the International Year for Freshwater (2003), the UN General Assembly adopted the "International Decade for Action, 'Water for Life' 2005-2015" which stated that the goals of the Decade should include "a greater focus on water related issues, at all levels, and on the implementation of water related programs and projects…in order to achieve internationally agreed water related goals…"

2002 was a landmark year due to the creation of the United Nations Committee on Economic, Social and Cultural Rights' *General Comment 15* (*Covenant on Economic, Social and Cultural Rights)*[14] which states: "The human right to water is indispensable for leading a life of human dignity. It is a prerequisite for the realization of other human rights". The content of the right is described as the right to maintain access to water, to be free from interference in that access, and equality of opportunity to enjoy the right to water.[15]

There are numerous references to Indigenous Peoples in *Comment 15*. For instance, in paragraph 7, the adequate water to ensure the security of the livelihoods of Indigenous Peoples is cited. Most notably:

> 16. Whereas the right to water applies to everyone, States parties should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, including women, children, minority groups, Indigenous peoples, refugees, asylum seekers, internally displaced persons, migrant workers, prisoners and detainees. In particular, States parties should take steps to ensure that:

14 Committee on Economic, Social, and Cultural Rights, *General Comment No. 15, The Right to Water,* U.N. Doc. E/C.12/2002/11 (November 26, 2002), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 105 (2003), *available at* http://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/418/64/pdf/G0641864.pdf?OpenElement.

(d) Indigenous peoples' access to water resources on their ancestral lands is protected from encroachment and unlawful pollution. States should provide resources for Indigenous peoples to design, deliver and control their access to water;

Comment 15 also cited the implications of "Interference with the Right to Water and Consultation":

> 56. Before any action that interferes with an individual's right to water is carried out by the State party, or by any other third party, the relevant authorities must ensure that such actions are performed in a manner warranted by law, compatible with the Covenant, and that comprises:
>
> - opportunity for genuine consultation with those affected;
> - timely and full disclosure of information on the proposed measures;
> - reasonable notice of proposed actions;
> - legal recourse and remedies for those affected; and
> - legal assistance for obtaining legal remedies…

This section is very consistent with the right of free, prior and informed consent of Indigenous Peoples recognized in the *UN Declaration on the Rights of Indigenous Peoples* and elsewhere.

In November 2006, the Human Rights Council passed resolution 60/251 entitled *Human Rights and Access to Water*. The Council requested that the Office of the United Nations Commissioner for Human Rights conduct a study on:

> …the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments.

The *Report of the UN High Commissioner on Human Rights and Access to Water* was released in August of 2007, which contained the following section regarding Indigenous Peoples:

> 24. The principles of equality and non-discrimination require that no population group is excluded and that priority in allocating limited public resources is given to those who do not have access or who face discrimination in accessing safe drinking water and sanitation. In the case of Indigenous peoples, guaranteeing their access to safe drinking water might require action to secure their customary arrangements for managing water and the protection of their natural water resources, as provided for under ILO Convention No. 169 of 1989 on Indigenous and Tribal Peoples. Priority should also be given to institutions serving vulnerable groups such as schools, hospitals, and refugee camps.[16] Do you set out the relevant provisions of ILO 169 in the paper – if not, you could even include these in the footnote to this quote.

Then, on September 13, 2007 came the critical adoption of the United Nations *Declaration on the Rights of Indigenous Peoples* by the UN General Assembly. Due to the extensive and comprehensive coverage of matters related to Indigenous rights, from self-determination, to rights related to lands, resources (including water) and territories, to economic, social and cultural rights and many others, it is beyond the scope of this paper to set out all the pertinent rights contained in this Declaration in this paper. For the purposes of this paper, the following article is of central importance:

16 Note: This link between access to safe drinking water by Indigenous peoples and protection of their natural water resources has been highlighted in contributions received by Indigenous groups as part of the consultation process OHCHR carried out in relation to the study.

> Article 25: Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Canada voted against this Declaration and until recently, the Conservative government of Canada has taken the position it would not be bound by the Declaration.[17] Recently, the Conservative government of Canada has re-visited this position and indicated it intends to endorse the UN Declaration. In the 2010 Speech from the Throne, the Governor General stated as follows:

> A growing number of states have given qualified recognition to the United Nations Declaration on the Rights of Indigenous Peoples. Our Government will take steps to endorse this inspirational document in a manner fully consistent with Canada's Constitution and laws.

17 International law is not immediately binding upon states, although it may be incorporated into state law through the incorporation of such international law through an act of Parliament (legislation). However, international law can be used for litigation purposes as supporting arguments based in domestic law, and can also be used for advocacy purposes by organizations, nations and individuals within states.

The World Water Forums

1996 saw the creation and establishment of the World Water Council (WWC) and Global Water Partnership (GWP). The WWC is supposed to be a think tank on water resources matters, while the GWP is a working partnership among all entities involved in water to support countries in integrated water resources management. There is no mechanism for Indigenous representation in the World Water Council or the Global Water Partnership. Intergovernmental bodies only play a supporting role – the ones who really control the process are the large private water corporations, and the World Bank. The United Nations was also a founding member of the WWC. Aboriginal women should question how they can be honest brokers when they need to protect their own institutions and interests (in the case of States parties to the UN, their own interests regarding sovereignty etc). Maybe leave this for the section on recommendations as up to now, it has all been a summary of where things are at.

The creation of the WWC and GWP led to the First World Water Forum in Morocco in 1997, the Second World Water Forum in The Hague in 2000 and the Third World Water Forum in Kyoto in 2003.

Indigenous Peoples indicated an interest in participating in these processes, but generally were not given advance information, nor were there sufficient financial resources to allow for representative Indigenous participation. Ft: source for how you know this. However, as each Forum passed, Indigenous participation gradually increased. At the first World Water Forum, an outcome document called the *Marrakech Declaration* (1997) was created. It did not go as far as the Declarations at Mar del Plata or Rio in protecting the right to water – only recommending "action to recognize the basic human needs to have access to clean water and sanitation".

The *Ministerial Declaration of The Hague* (2000, second World Water Forum) similarly called

for recognition "that access to safe and sufficient water and sanitation are basic human needs". Five Indigenous participants were documented as contributing about the importance of water from their own cultural perspectives through a thematic session organized by UNESCO on Water and Indigenous Peoples. They produced a report that underlined the marginalization of Indigenous Peoples in the World Water Forum process and called for a more prominent role in the future.

The third World Water Forum issued the *Kyoto Ministerial Declaration* (2003). This document missed the issue of the human right to water altogether, only stating that "…we will enhance poor people's access to safe drinking water and sanitation." This is interesting considering that approximately 65 Indigenous participants were recorded as having participated at this Forum. There was more Indigenous participation at the Third World Water Forum due to a partnership with UNESCO, other Indigenous Peoples' organizations and NGOs, and the WALIR (Water, Law and Indigenous Rights).

A two-day Indigenous preparatory meeting was held, where participants discussed water issues and linked them with the agenda and program of the Water Forum. Darlene Sanderson described the impact of the third World Water Forum:

However, 60 Indigenous participants at the forum collectively created an Indigenous Peoples' Kyoto Declaration (2003). This document was not part of the final report. One solution to this inequity would be to have a World Indigenous Peoples' Forum on Water that is given equitable funding by the World Bank. [18]

18 Sanderson, Darlene supra, at 63

At the fourth World Water Forum in Mexico in 2006, the Indigenous participants again released an outcome document detailing their rights and responsibilities respecting water entitled: *Tlatokan Atlahuak Declaration*. This document recognized water as a fundamental human right, as did the *Women's Caucus Declaration* issued at the same Forum. It is interesting to note however that the Indigenous *Declaration* made no reference to gender issues or to the role of women, while the *Women's Caucus Declaration* made repeated references to Indigenous Peoples. It is recommended that future participation of Indigenous Peoples in the international for a place equal emphasis on the role of gender and women's roles in articulating rights respecting water.

At the 2006 Forum, the *Ministerial Declaration* referenced only the "critical importance" of water to addressing issues of poverty and sustainable development, amongst others. Again, the emphasis was on water and sanitation as a basic service, access to which is essentially up to nation-states to ensure as opposed to being required as a basic human right. This *Declaration* referenced women and youth as "relevant stakeholders" but made no mention of Indigenous Peoples.

In 2009, the fifth World Water Forum was held in Istanbul, Turkey. There was a significant development at this Forum in the *Ministerial Statement*, which was one of the main outcome documents:

> 15. We acknowledge the discussions within the UN system regarding human rights and access to safe drinking water and sanitation. We recognize that access to safe drinking water and sanitation is a basic human need.

However, there was no reference in the document to gender issues, or to Indigenous

Peoples. Instead, there was a broad reference to "stakeholders". In the Istanbul Water Guide, which was also an outcome document of the Forum, Indigenous Peoples were mentioned twice – both times in the capacity of taking advantage of traditional technologies and knowledge regarding water (in water management regimes). There was an Indigenous Declaration issued at the same time, which evolved from what came to be known as the *Garma Declaration*.

Although there has been some significant developments in international law around the human right to water and more specifically around the Indigenous right to water, gender as a cross-cutting issue or a priority has not happened. In fact, Indigenous women have been forgotten in the elucidation and implementation of international developments on water. Unfortunately, this is also the case within Canada and under the rubric of Canadian common law, statute and policy.

PART II - Aboriginal Rights to Water under Canadian Law and Policy

For Aboriginal Peoples, the "right to water" is not restricted to simple access to clean and safe drinking water. Rights protected by the *Constitution Act, 1982* of Canada are also of vital importance:

> **35.** (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

The rights to fish, hunt, gather & trap for food, medicine or livelihood is therefore included in the concept of the "right to water". Indigenous worldviews and knowledge necessitate a relational understanding of the role that water plays in our lives and the sustainability of the ecosystems surrounding our communities. This also includes an acknowledgement of the right to maintain cultural integrity, spiritual practices and protocols, and rights to sacred sites. What it really comes down to is the maintenance and promotion of Indigenous life-ways in a clean environment.

In Canada, the Supreme Court has recognized that all Aboriginal Peoples have a right to be consulted if development or designation of land impacts, or has the potential to impact, Aboriginal and treaty rights. This right to consultation is not limited to mere process, but may even be extended to the requirement of Aboriginal consent. The Supreme Court of

Canada has also acknowledged the concept of Aboriginal title to land – this recognition has implications for the right to govern and manage the land base of the relevant Indigenous people. Beyond the *Constitution Act of Canada,* other statutes and Canadian common law (which will be discussed in this paper) as well as many of the Canadian comprehensive land claim agreements, have mechanisms that establish either ownership and exclusive rights, or management powers over water resources. This paper will attempt to draw out this legal and political landscape, so as to understand the place Indigenous women hold and the direction that must be taken to ensure that women's interests and rights in water are realized.

First Nations Peoples

The repression and oppression of Indigenous participation and identity in Canada is best demonstration with the history and current regime of legislation governing Indians, which was initially created in 1850[19]. This legislation attempted to categorize and define who was Indigenous and how that identity would be demarcated. The *Indian Act* would later include a definition of "Indian" that was restricted to an Indian man and his children, or a woman who was lawfully married to an Indian man.[20]In 1906, the *Indian Act* was amended to define a "person" as an individual *other* than an Indian.[21]This history has had significant impacts on the shaping of Indigenous identity by external actors and institutions – and may have played a role in the proper realization and inter-generational transmission of community roles and responsibilities with respect to water in particular (for example, women's roles and responsibilities with respect to water).

19 *An Act for the Better Protection of the Lands and Property of the Indians of Lower Canada*, S.C. 1850, c.42, 13 and 14 Vic.
20 *Indian Act, 1876*, S.C. 1876, c.18.
21 *Indian Act, 1906*, S.C. c.81, s.2(c) An amendment to the Indian Act, redefining the term, was not made until 1951. The restrictions that affected women as legal "non-persons" and denied their entry into legal professions, for example, would be applied to both Indian men and women from 1869 until voluntary and involuntary enfranchisement was repealed in the *Indian Act* in 1985.

Currently, the *Indian Act* provides extremely limited powers of regulation in the ambit of water on reserves. Band councils are empowered under the *Indian Act*, to make regulatory by-laws for the health of residents and drinking water facilities.[22] However, these regulatory powers do not amount to significant enforcement in the face of a non-existent budget to cover the costs of implementing such regulations.

There is no formal, legally binding legislative or regulatory framework that oversees drinking water & waste water systems on First Nations reserves under federal law.

While the provinces and territories (through the operation of law) control water allocations to reserve lands,[23]First Nations capacities with respect to water quality and water supply or distribution has remained a "federal matter" – for example, reserve governments have had to negotiate with the federal government for funding for operations and management with respect to drinking water provision:

> …the mere fact that Canada has jurisdiction does not usually result in a legal obligation upon Canada to act. In this instance, the only federal legislative gesture has been to grant band councils authority, under the *Indian Act*, to make bylaws respecting "the construction and maintenance of watercourses ..." and "of public wells, cisterns, reservoirs and other water supplies." Breach of the bylaws can result in a fine of up to $100 or imprisonment for a term not exceeding 30 days or both, unless the Minister of Indian Affairs and Northern Development disallows the bylaw. These powers are an inadequate basis for a regulatory framework to ensure the safety of drinking water…Beginning in the 1980s, and coinciding with efforts to devolve governance activities to First Nations, Canada introduced agreements-- contracts--under which First Nations would be responsible for operating and maintaining capital facilities on their reserves, such as water treatment plants. These contracts began the introduction of non-judiciable protocols and quality guidelines. The protocols are typically based on "best- practices." However, like the contracts, the protocols provide

22 See *Indian Act*, R.S.C. 1985, c.I-5, s.81(1)(a),(f),(l).

23 Walkem, Ardith "The Land is Dry: Indigenous Peoples, Water, and Environmental Justice" In: *Eau Canada: The Future of Canada's Water*, Edited by Karen Bakker 303-319 Vancouver: UBC Press, 2007at 305: "In some cases, provinces have either refused to honour reserve water allocations and have cancelled them outright or issued licenses that reduce the water available to these lands. Provincial failure to honour water allocations included in reserve creation remains a contentious issue. In some prairie provinces, water allocations were included as part of the reserves established under treaties, and these Treaty promises have not been fully honoured. The Peigan Nation of Alberta recently settled a lawsuit against Canada and Alberta, recognizing that the reserve established for the Peigan under Treaty Six also included a reservation of water."

> no chain of lawful accountability for reserve residents to call upon, nor do they ensure a remedy if water is unsafe or the infrastructure shows signs of failure…By 1995, INAC had come to describe its role in ensuring safe drinking water "as primarily that of a funding agency."[24]

As such, First Nations communities have been largely "left to their own devices" when it comes to drinking water, with tragic results. These communities operate in a kind of limbo – the funding they receive[25]depends upon their ability to estimate their true needs, negotiate and express the challenges facing their communities to INAC (is this an established acronym already?) without the benefit of any real statutory accountability, while the provinces are under no legal obligation to ensure that provincial standards of water quality, supply and distribution are implemented on reserves. Other relevant federal departments include Health Canada and Environment Canada. Health Canada has developed *Guidelines for Canadian Drinking Water Quality*, which is supposed to address issues on water quality on reserves, while Environment Canada is responsible for a range of programs to protect First Nations (on federal and Aboriginal lands) from the effects of pollution and waste.[26]

In spite of, or perhaps as a result of this inconsistent set of policy, law and regulation, many First Nations communities in Canada have lived with and suffered from unsafe drinking water in their daily realities. First Nations communities are experiencing uranium contamination in their drinking water, brown water flowing from residential water taps, and significant cancer rates and species mutations.

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24 Macintosh, Constance "Testing the Waters: Jurisdictional and Policy Aspects of the Continuing Failure to Remedy Drinking Water Quality on First Nations Reserves" (2007-2008) 39 *Ottawa Law Review* 63 at 69-70

25 *Ibid*., at 72 notes "INAC will only agree to fund 80% of the estimated operation and maintenance costs for drinking water systems…in 2005, the Commissioner of the Environment found that the cost estimates underlying the 80% funding figure had not been updated for several years, and, shockingly, that in setting the terms of the contract '*INAC ignores whether First Nations have other resources to meet this requirement [to fund 20%] and has no means to enforce it*.'"

26 See *Canadian Environmental Protection Act* and *Fisheries Act*.

In 2005, Kashechewan First Nation was evacuated after the water supply caused impetigo and other skin diseases, and the plight of the community raised national attention. Canada then faced public criticism for the glaring disparities in the quality of life between First Nations and non-Aboriginal Canadians. As a result, approximately $330 Million has been allocated in the 2008 budget over two years to address the water crisis faced by First Nations across the country.[27] However, this will not be enough to ensure access to safe drinking water in all First Nations communities, many of which require new or up-graded infrastructure as well as training and certification. In terms of on-reserve water, as of January 31, 2010[28], there were 115 First Nations communities across Canada under a Drinking Water Advisory. Nationally, there are 761 water and 482 wastewater systems servicing five or more homes in First Nation communities (I don't know what this last sentence means or what the ramifications of these numbers are).[29]

INAC has been aware of issues regarding drinking water on First Nations for years, and since the 1990s has made various attempts to address these concerns. However, it was not until the 2006 *Plan of Action* (subsequent to Kashechewan) was created that INAC truly began to follow through on rhetoric regarding the achievement of safe drinking water for First Nations. The 2006 *Plan of Action* required that a *Protocol for Safe Drinking Water in First Nations Communities* be drafted, which was completed. INAC has so far provided three "Progress Reports" on the implementation of this Protocol, based on a short list of First Nations who qualify as what INAC characterizes as "high risk systems".

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27 See "Frequently Asked Questions" at the Government of Canada INAC website http://www.ainc-inac.gc.ca/enr/wtr/h2o/faq/index-eng.asp

28 See "Drinking Water Advisories", First Nations and Inuit Health Branch website, http://www.hc-sc.gc.ca/fniah-spnia/promotion/water-eau/advis-avis_concern-eng.php

29 See *Plan of Action for Drinking Water in First Nations Communities Progress Report*, January 17, 2008, at the INAC website http://www.ainc-inac.gc.ca/enr/wtr/pubs/prpf/pad08/pad08-eng.asp

In addition, and an *Expert Panel on Safe Drinking Water for First Nations* was struck and travelled across the country soliciting comments and concerns of First Nations on the issues around drinking water. Finally, the Standing Senate Committee on Aboriginal Peoples issued a Final Report entitled "*Safe Drinking Water for First Nations*" in 2007, which contained recommendations on how to proceed with legal reform in the area of drinking water and First Nations.

As a result of this recent activity, INAC has begun a process of creating enabling legislation with a regulatory regime for water and wastewater on First Nations reserves in Canada – they call it the *Proposed Legislative Framework on Drinking Water and Wastewater in First Nation Communities*.[30] We will return to the content of the proposed legislative framework later in the paper. As the proposed framework has recently been presented in Parliament in the form of a Senate bill, this paper will contain an Annex with a preliminary commentary and review of the content of the Senate bill. As there is significant uncertainty as to whether the bill will pass into law (due to the potential of federal election, the suspension of Parliament for summer break or other purpose, etc).

Notably, absolutely none of the federal initiatives regarding water and Indigenous Peoples in Canada appear to be inclusive of the particular knowledge(s), concerns, issues or ideas of Indigenous women. For example, there is no discussion about how to ensure gender equality in training programs for operators or other technical supports for existing and proposed infrastructure.

30 Government of Canada, Drinking Water and Wastewater in First Nations Communities – Discussion Paper: Engagement Sessions on the Development of a Proposed Legislative Framework for Drinking Water and Wastewater in First Nations Communities, Winter 2009 www.ainc-inac.gc.ca/enr/wtr/h2o/index-eng.asp

There is no acknowledgment that while much of the responsibility for decisions (such as a decision to issue a Drinking Water Advisory) rests on the shoulders of First Nations leadership, the leadership itself (i.e. band council) is often dominated by men. In gathering data about the status of various communities with regard to access to good quality and sufficient water, there are rarely indicators used that reflect the knowledge held by Indigenous women, or their status (with respect to health, socio-economic, political, cultural) in their communities.

This overview demonstrates how Canadian law and policy governing reserves and water is complex and multi-faceted. Law governing rights to water in particular, potentially held by Indigenous Peoples, is even more complex, as it involves Aboriginal and Treaty rights interacting with laws governing surrounding municipalities, natural resource management, industry, agriculture, forestry, mining, and environmental protection to name but a few.

Rights respecting or touching upon water that derive from section 35(1) of the *Constitution Act, 1982* have in the past, been limited in scope to historic and traditional uses. However, more recent case law suggests that a more flexible and contemporary interpretation may be possible. For example the Court in *R. v. Sappier, R. v. Gray*, [2006] 2 S.C.R. 686, 2006 SCC 54 [38] held per Binnie J., "I find that the jurisprudence weighs in favour of protecting the traditional means of survival of an Aboriginal community".

The Court went on to state that: "The nature of the right cannot be frozen in its pre-contact form but rather must be determined in light of present-day circumstances. The right to harvest wood for the construction of temporary shelters must be allowed to evolve into one to harvest wood by modern means to be used in the construction of a modern dwelling." (*Sappier*, [48] [52-52])

The term "survival" would surely include access to safe drinking water as much as it includes access to shelter. Certainly, survival from an Indigenous perspective should be understood to be inclusive not only of the rudimentary implements of human life, such as water, shelter, food and clothing. It must also be inclusive of the diversity of *life-ways* [might be worth defining this term when you first use it] as they are reflected in the daily realities of Indigenous Peoples. For example, the responsibility to care for and respect water is not limited to the simple category of scientifically or medically "safe" drinking water. "Safe" drinking water does not only pertain to physical health – it also must mean protecting the exercise of traditional responsibilities for water that are maintained through ceremony. For many Indigenous women in Canada, this is a very significant aspect of how they choose to participate in community and cultural life.

In expanding on this point, I must return to INAC's approach to the proposed legislative framework. INAC has proposed to "incorporate by reference" provincial/territorial regulations and standards, so as to simply extend their application on reserves in Canada. Thus, the doctrine behind the proposed framework may not be based on Indigenous values, but on federal and provincial legislative purposes.

As such, any "water rights" will be predicated and dependent upon purposes derived from statutes and regulations, and common law. The terms of these instruments and laws has more often than not been set by non-Indigenous actors and institutions, where Indigenous peoples have had little bargaining power. Considering how closely tied cultural and linguistic diversity of Indigenous peoples is to biological diversity, legal rights to water will find authority under non-Indigenous law and policy focused on a single usage (drinking water) as opposed to multiple uses and values found in culture and Indigenous legal orders.

The *Indian Act*, other federal and provincial legislation, the common law, residential schools and other assimilation projects have caused trauma and damage to the integrity of Indigenous knowledge, identity and community. Sakej Youngblood Henderson describes a source of colonialism as Eurocentrism, being a "dominant intellectual and educational movement that postulates the superiority of Europeans over non-Europeans".[31] As such, the laws and policies that have been developed to apply to Indigenous Peoples in Canada has, as a backdrop, implicit assumptions about the value of Indigenous knowledge, legal orders, and identity.

This is a common story of being "between a rock and a hard place" in the expression of Indigenous knowledge on the one hand and the protection of Indigenous relationships with the environment on the other.

In fact, Indigenous Peoples often have to "pick their battles" when it comes to the environment and their relationship to it. The most telling example is found in water. Water, as was discussed earlier, has a multitude of meanings, uses, values and faces in Indigenous community. However, for the wider Canadian society, the most identifiable crisis facing First Nations is that of access to safe drinking water. First Nations women and Indigenous Peoples in general find themselves having to advocate and express their identities and rights "where they can", and to attempt to break down barriers where they are excluded or silenced. This is why the diversity and richness of Indigenous women's voices across legal, political and social landscapes is so important. It also points to the need for those voices to employ, as much as possible, Indigenous epistemology in building relationships with Canadian actors and institutions under Canadian law.

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31 J. Sakej Henderson, "Post-Colonial Ghost Dancing: Diagnosing European Colonialism", in Marie Battiste, ed. *Reclaiming Indigenous Voice and Vision* (Vancouver: University of British Columbia Press, 2000), at 57-58.

Inuit and Métis Peoples

Inuit and Métis peoples fall outside the ambit of INAC, and as such are not beneficiaries of the progress made so far on drinking water and First Nations. For the most part, water rights of these groups are discussed and enumerated in self-government and other constructive arrangements forming a patchwork of jurisdictions across Canada. The Inuit comprise approximately 84% of the Nunavut population, and as such dominate the exercise of legislative powers beyond those prescribed under agreements that have established exclusively Inuit lands. Unfortunately, while the Nunavut Government has some relevant jurisdiction, this jurisdiction does not extend to water or certain other natural resources. So while they may be able to exercise some control over local activity, they are less powerful when it comes to interventions and developments that happen outside their territory.

Métis Peoples are at the mercy of the provinces in terms of the negotiation or recognition of their rights related to water. For the most part, Métis Peoples have very little recourse to assert a right to water in the holistic sense (as described in the introduction to this paper). The provinces and territories of Canada provide very little recognition to the Métis. While Métis may be invited to participate in various administrative or policy related activities in the various provinces and territories, merely having a seat at the table allocated to Métis does not guarantee the realization of their rights under the *Constitution* of Canada. There is one example of legal recognition of the Métis by a province. We will use this example to extrapolate the avenues of advocacy held by the Métis with respect to the right to water.

The province of Alberta passed specific legislation in 1990 for the governance of Métis Settlements in the province, which was shortly followed by related legislation.[32] The

32 See http://www.aboriginal.alberta.ca/535.cfm

legislation consists of:

- Métis Settlements Act
- Métis Settlements Land Protection Act
- Constitution of Alberta Amendment Act, 1990
- Métis Settlements Accord Implementation Act

These Acts establish the constitutional protection of 1.25 million acres of Settlement lands, the development of local government structures and systems, and provincial financial commitments. Under the *Land Policy* adopted by the Métis Settlements General Council in 1992, Métis title to land is subject to "the natural rights of light, air, water and support."[33]

A Co-Management Agreement[34] provides for the Settlements to participate in the development of subsurface resources under the Settlements, which may include groundwater (rapidly becoming an important legal, political and ecological issue for the province of Alberta). 'Co-management' refers to the sharing of rights and responsibility between government(s) and local resource users. It is essentially a process of integrating local and provincial management systems. Such a regime can range from having a seat at local government meetings (with or without a vote), participating in research activities, or achieving a substantive self-management power. In the case of the Métis in Alberta, the Co-management regime is region specific.

Métis settlements are also recognized in Alberta as local governments for the purposes of a number of provincial Statutes. This has implications for the ability of these communities

33 http://www.msgc.ca/Resources/MSGC+Library/Policies/Default.ksi
34 Unavailable on-line.

to access appropriate allocations under the Alberta *Water Act* to access clean and safe drinking water for their people. Métis people may not be able to advocate for constitutionally protected Aboriginal rights (i.e. hunting, trapping, fishing or gathering) within the provincial framework. While the province of Alberta under the *Natural Resources Transfer Agreement* of 1930 has agreed to ensure the continuing rights of Indians to hunt, fish, trap and harvest on any lands they have a right to access (Crown lands or Treaty lands), the Supreme Court of Canada in the *Blais* case (2003) found that Métis are not Indian for the purposes of such activities. However, the case of *Powley* (2003)[35] may have changed the landscape for Métis in Canada. The position of the Canadian government on *Powley* is that it does not guarantee harvesting rights for Métis across Canada – it merely established the legal test necessary to prove Métis Aboriginal rights are held. As such, the Métis are now in much the same position as other Aboriginal Peoples when it comes to the realization of Aboriginal and Treaty rights – they have to prove rights held to specific lands and resources through lengthy negotiations or litigation. The government of Canada, in responding to *Powley*, states as follows:

> Since the *Powley* decision, Government of Canada officials have held discussions with provincial, territorial and Métis representatives to establish an effective way to accommodate Métis harvesters in a safe, orderly and responsible manner. Before any new policy or initiative can be introduced, however, a series of complex issues must be resolved. At present, for instance, there is no single, reliable and consistent method in place to identify Métis harvesters across the country.[36]

Reconciling *Blais* and *Powley* may prove to be a challenge with most of the burden resting on the shoulders of the Métis. As such, Métis Peoples are left to somehow find the capacity (financial, legal and political) to meet the unique issues posed to their communities as a result of water scarcity.

35 Two Métis men, Steve and Roddy Powley killed a moose in 1993 and were charged with contravening Ontario hunting law. The men argued that section 35 of the *Constitution Act, 1982* protects the right of Métis to hunt for food. The case was appealed up to the Supreme Court of Canada, which ruled in favour of the Powleys in September 2003. In its decision, the Supreme Court found that the Métis community in and around Sault Ste. Marie, Ontario has an Aboriginal right, protected by section 35 of the *Constitution Act, 1982*, to hunt for food.

36 http://www.ainc-inac.gc.ca/ai/ofi/mrm/pwy/index-eng.asp.

List of Comprehensive Land Claims Agreements
1975: James Bay & Northern Quebec Agreement
1978: The Northeastern Quebec Agreement
1984: The Inuvialuit Final Agreement (Western Arctic)
1992: The Gwich'in Comprehensive Land Claim Agreement
1993: Sahtu Dene and Métis Comprehensive Land Claim Agreement
1993: Umbrella Final Agreement (Yukon)
1993: Vuntut Gwitchin First Nation Final Agreement & Self-Government Agreement
1993: Champagne & Aishihik First Nations Final Agreement & Self-Government Agreement
1993: Teslin Tlingit Council Final Agreement
1993: Nacho Nyak Dun First Nation Final Agreement & Self-Government Agreement
1993: Nunavut Land Claims Agreement
1997: Little Salmon/Carmacks Final Agreement & Self-Government Agreement
1997: Selkirk First Nation Final Agreement & Self Government Agreement
1998: Tr'ondëk Hwëch'in Final Agreement & Self-Government Agreement;
1999: Nisga'a Final Agreement
2002: The Ta'an Kwach'an Council Final Agreement & Self-Government Agreement
2003: Kluane First Nation—Final Agreement & Self-Government Agreement
2003: Tlicho Agreement
2005: Kwanlin Dun First Nation Final Agreement & Self-Government Agreement
2005 Carcross/Tagish First Nation Final Agreement & Self-Government Agreement
2005: Labrador Inuit Land Claims Agreement
2006: Nunavik Inuit Land Claim Agreement
2009 Tsawwassen First Nation Final Agreement
2009 Maa-nulth First Nation Final Agreement

Co-Management Regimes – Inuit, Métis and First Nation

One of the most important vehicles for the establishment of co-management regimes is the settlement of comprehensive Aboriginal claims, covering rights for Aboriginal Peoples on Crown lands within their claim territory and their involvement in the management of resources within that territory. There are other co-management regimes that are initiated by government in response to conflict or resource crisis, or by Aboriginal Peoples as a means of protecting Treaty and Aboriginal rights. Some provinces have initiated co-management regimes as a way of re-defining their relationship with the Indigenous Peoples in their regions. One of the main challenges of the establishment of co-management regimes in the area of water is the fact that such regimes attempt to integrate different worldviews.

Indigenous valuation of a resource like water is likely to be quite different from that envisioned by a municipal, provincial or territorial government. While the latter forms of governments are focused on providing for the interests of domestic, industrial and agricultural use, Indigenous Peoples may have other interests. These include an acknowledgment of rights and responsibilities held pursuant to their own legal orders, spiritual and cultural norms and protocols. It involves conceiving water as a living spiritual entity. However, these perspectives have the tendency to be made into "soft" issues when confronting a decision making process about water allocations, protections or conservation.

Yet, it must still be recognized that the proliferation of co-management regimes have provided an avenue of advocacy and limited governance of water and related resources by Aboriginal Peoples.

I will now provide a few examples of the type of power regained by Aboriginal Peoples through the comprehensive claims process in Canada. Not all comprehensive agreements contain provisions for natural resource or water management. However, many of the agreements include provision for advisory bodies to be established – these bodies, more often than not, are specific when it comes to terms and conditions of operation and participation in local management regimes or environmental assessments. With respect to water management, Aboriginal Peoples are often able to participate to some degree in licensing of water allocations or other management issues. This is generally limited to making recommendations to the relevant Minister, and as such does not provide these bodies with any significant veto powers over development proposals or uses which impact water flow.

James Bay & Northern Quebec Agreement, 1975

As the oldest and most comprehensive document regarding environmental and water

management, this Agreement contains specific provisions regarding proprietary rights to water. It distinguishes that which is the property of the Inuit or Cree, and that which is the property of the province.[37] If 50% or more of a body of water falls within the description of Cree or Inuit lands, the lake is to be considered to be part of those lands.[38]

Gwich'in Agreement, 1992

The Gwich'in Tribal Council monitors and participates in issues of resource management. It participates in the legislative and policy framework to ensure that Gwich'in interests are represented and wildlife, habitat, and harvesting rights are preserved. Title to approximately 16,264 square kilometres included all parts of waters within Gwich'in boundaries. Under Appendix C s.10, the Gwich'in were granted exclusive right of use in the same quantity, quality and flow rate - but they cannot substantially alter waters flow through their lands. Notably, the Gwich'in Agreement also recognized traditional use of water that included not only the usual Aboriginal and Treaty rights like hunting and fishing, but also "traditional heritage, cultural and spiritual purposes". However, they must still make an application for a water licence through the provincial authority. A consolation is that they are provided a role in the territorial Yukon Water Board.[39]

Beyond the specific terms and conditions surrounding Indigenous participation or management of natural resources set out in the various comprehensive agreements, some Agreements also require consultation on matters outside the scope of advisory bodies.

37 200 ft up from the high-water mark of a body of water is the basis for this distinction.
38 www.gcc.ca/pdf/LEG000000006.pdf
39 http://www.gwichin.nt.ca/LCA

Duty to Consult with Indigenous Peoples

Almost two decades have passed since the courts and peoples of Canada began developing a definition and application of "consultation". This has appeared in Canadian common law, such as decisions of an administrative (i.e. tribunals), provincial or federal nature, and of course the decisions of the Supreme Court of Canada.[40] It is not the purpose of this paper to provide an exhaustive overview of the duty to consult. However, it is useful for our purposes to understand what tools are available to Aboriginal women pursuant to this duty in terms of their participation and management of water in their regions.

As a result of the common law developments, the following entities have developed consultation guidelines:

- Federal Government (including various departments) [Interim]
- Provinces: B.C.; AB (2000); SK (2000); Nova Scotia [Interim and Protocol]; Quebec [Interim].
- We have yet to see final guidelines issued by the following provinces: ON; MB; PEI; N.B.; NFLD & Labrador.

The issue of consultation arises whenever there is a project or matter that poses a threat to Aboriginal and Treaty rights or Aboriginal title.

One example of such a threat is the potential creation of a water market in Canada. In many provinces, there are legal regimes for the licensing and allocation of water for domestic, industrial and agricultural use. There are some Aboriginal communities who have never acquired a licence or allocation, and instead access groundwater or other sources of water through arrangements with another government, such as the Canada or a

40 See for example, *R. v. Sparrow, Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), Haida Nation v. B.C. (Minister of Forests), Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), R. v. Lefthand*, amongst many others.

province. In the event that water markets are created in the various provinces and territories, it may mean the further peripheralization of Indigenous Peoples from water, the management and use of water, and the protection of traditional uses of water by Indigenous Peoples.

The sale of water, as a concept in and of itself, is something that goes against many Indigenous perspectives of how we as human beings relate to water.

Furthermore, the likelihood of Aboriginal communities having the financial resources required to enter into the market as purchasers of licences or portions of licences is very low, considering the current socio-economic status of these communities. As such, the case law on the duty to consult (such as *Haida* and *Taku River*) may kick in and require consultation with affected Aboriginal Peoples.

This point was recognized recently by the Alberta Court of Queen's Bench in the case of *Tsuu T'ina Nation v. Alberta (Environment)* [2009] 2 W.W.R. 735. The court in that case was considering the Treaty right to water, and more specifically the duty to consult of the provincial government on a water management plan for the South Saskatchewan River Basin ('SSRB'). In discussing the SSRB Plan, the court addressed the movement in Alberta to a water market, which would entail the transfer of portions or entire water licences (for a price):

> To the extent this has moved a market in water one step closer to reality, the potential for adverse impact in the future may have increased. As existing licence holders move to transfer under-utilized allocations, it would logically stand to reason that more water will be consumed, exacerbating the water shortage. That negative impact may only be partially offset by any holdbacks imposed. The Government by its own words suggests a crisis already exists. Under the SSRB Plan, the Director has the authority to allow or deny transfers, and attach conditions to those transfers which do proceed. The factors which the Director must consider are set forth in the SSRB Plan. This approval process is a potential minefield. Only time will tell whether a mine will explode.[140] While that process is not before me, the approval of any

> applications for transfers appears to be administrative in nature and may very well fall within the four corners of *Haida*.[41]

This analysis of case law raises another issue. When entering into the discourse of the courts, there are significant risks. If mistakes are made, or Aboriginal Peoples or Aboriginal women left out, it is difficult to go back and "read into" a decision the particular rights held by Aboriginal Peoples or women in particular.

Use of Rights for New Purposes

Rights around hunting and fishing (under Canada's *Constitution*) may be used to prevent the depletion of streams below levels required to maintain stream flows for fish or game. These rights may also be used to protect other aspects of the environment and the Indigenous relationship with environment through their life-ways and livelihoods.

In the recent case of *West Moberly First Nation v. B.C. (Chief Inspector of Mines)* 2010 BCSC 359, the First Nation took the province and First Coal Corporation[42] to court, arguing that development activity was threatening the survival of the already endangered Burnt Pine caribou herd. The band argued that the Crown failed to adequately consult them about the mining activity, as required under their 1899 Treaty No. 8, guaranteeing the West Moberly hunting rights in the area. The court agreed, and ordered a 90-day stay to further activity. This may be the first time that Aboriginal and Treaty rights were used to protect a threatened species. The court found the measures taken by the company and the province did not meet the duty to consult, or accommodate the West Moberly First Nation.

Indent: "I conclude that a balancing of the Treaty rights of Native Peoples with the rights of the public generally, including the development of resources for the benefit of the community as

41 *Tsuu T'ina Nation v. Alberta (Environment)* 2009 2 W.W.R. 735 at para. 138-140
42 First Coal was granted a permit in September of 2009 to extract 50,000 tonnes of area coal as a test sample, prior to a mine going into production by the end of 2010.

a whole, is not achieved if caribou herds in the affected territories are extirpated," Judge Williamson wrote in his reasons.[43]

The structure of the Canadian legal system has a tendency to parcel out different aspects of the environment to different government departments, authorities, the private sector and even private citizens. It is also a system that prioritizes economic growth at the cost of the environment and Aboriginal Peoples, who are so closely tied to the environment through their constitutionally protected rights as well as their own Indigenous legal orders. There may be opportunity in that structure for Aboriginal Peoples to assert their rights for the protection of water - not just for themselves, but for the environment – lands, air, animals, plants, etc.

Outside of Canada, it is worth noting that claims of other nations regarding the infringement of Indigenous rights through habitat destruction have also won favour before the Inter-American Commission on Human Rights (IACHR) & Inter-American Court on Human Rights.[44]

Laws, Policies and Practices of Indigenous Communities

In 1996 the Royal Commission on Aboriginal Peoples noted that the customary or traditional laws of most Aboriginal Peoples share common characteristics, including the following:

- They are usually unwritten, embodied in maxims, oral traditions and daily observances;
- They are transmitted from generation to generation through precept and example;

43 At para. 53
44 See for example *The Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, decided by the Inter-American Court of Human Rights on August 31, 2001.

- The laws are not static but continue to evolve;
- The territories of the Aboriginal Peoples are communally held, with guaranteed rights of access to every member of those tribes or Peoples;
- Lands and resources are not considered a commodity or valued in a solely economic sense that allowed for exclusive private possession and;
- Aboriginal Peoples have systems of land tenure that involved allocation within the group, rules for conveyance, and the prerogative to deny access to non-members (but not outright alienation).[45]

The courts in Canada have occasionally applied customary Aboriginal law as part of the common law of Canada. While there is no set formula for when or how customary law may be applied, it remains that Indigenous legal orders do form part of the basis for Canadian law. This might be seen as best exemplified in the historic Treaties (ensure capitalized throughout) which helped to establish the boundaries and territories of what is now Canada. Perhaps the leading case on the integration of Indigenous legal orders came in the Supreme Court of Canada case of *Delgamuukw*. In that case, the court accepted the use of oral evidence to prove the existence of Aboriginal title of the Gitksan and Wet'suwet'en Peoples.[46]There is no codified body of law that deals specifically with customary law of Aboriginal Peoples in Canada, and as such the integration of those customary laws must by operation happen at the level of those Peoples, with support from ethnography, expert testimony and other such sources. It is not within the scope of this paper to provide a fulsome discussion of the many forms Aboriginal customary or traditional mechanisms related to water governance or conflict resolution. However, it is

45 Royal Commission on Aboriginal Peoples, Final Report Volume 2, Chapter 4
46 Specifically, the adaawk of the Gitksan, and the kungax of the Wet'suwet'en which are oral histories reciting important events, traditions, laws, territories and other matters related to the houses.

recommended that Aboriginal Peoples undertake the creation of their own water policies or laws within their own communities. There may be some examples of communities that have begun the process of articulating or documenting water governance or administration, without the inclusion of women in the process or in the content of the governance structure, mandate or administration. As such, it is of vital importance that the role of women in customary law or tradition with respect to water be upheld and promoted, in spite of the existence of other inequalities experienced by Aboriginal women on a regular basis within their communities. Should talk about that group that Darleen Sanderson has initiated and the measures taken by IPs in relation to the right to water and specifically, the group of IW in Canada that have been advocating this. Also would be nice to set out the actions that IW can take, tying this together with the international and national regime you have set out above.

Conclusion

The myriad of law and policy surrounding water in Canada and in the international fora makes for a complex picture of the "right to water". When one includes the multiplicity of challenges faced by Aboriginal women, the pressing need to ensure gender equality in the dialogue of Indigenous rights to water becomes critical. In Annex "A" to this Paper, you will find a series of recommendations gleaned from the overview contained in this paper. These recommendations are targeted to Aboriginal women in Canada, and attempt to address a wide range of venues, institutions and avenues of advocacy. These recommendations are intended to outline the broad strokes of a strategy for Aboriginal women in Canada respecting the "right to water".

Annex A

Annex B PRELIMINARY COMMENTS – BILL S-11

Please be advised that more work is required to complete a comprehensive review of the First Reading of Bill S-11.

This Bill calls for the **incorporation by reference of provincial regulations** on reserve lands in Canada. As such, this legislation does not address the rights held by Métis or Inuit, or those First Nations or non-status Indigenous peoples off-reserve.

What this means is that provincial law will apply on reserve, in spite of multiple opinions to choose a different path of addressing drinking water issues on reserve (such opinions have been expressed by the Senate of Canada, the Expert Panel on Drinking Water, the Assembly of First Nations and numerous other groups, tribes, First Nations and individuals). The Bill seeks to characterize the First Nation as an extension of the provincial regime.

SHORT TITLE:

"*Safe Drinking Water for First Nations Act*" – very clearly states that it DOES NOT address a multitude of other water issues facing First Nations, including the right to access or protect water for the purposes of exercising Aboriginal and Treaty Rights to hunt, fish, gather medicine, etc.. Clearly they just want to limit it to addressing the bare minimum of bringing drinking water on reserve up to the level "enjoyed" by other Canadians under their respective provincial regimes.

However, be advised that the water management regimes in the provinces are facing major crises in water quality, shortage, supply all while demand is increasing exponentially. The provincial regimes are struggling to address the various demands on water. Industry and agriculture are often seen as being privileged in the hierarchy of "interests" or "stakeholders" in the provinces and territories. What will this mean for First Nations if they are brought under the provincial regime? Most likely, Indigenous interests will be at the very bottom of that hierarchy.

INTERPRETATION
s.2(1) definition of "first nation" includes an "aboriginal body" to be described in the schedule – what is unclear is whether this means the Bill will be an opt-in mechanism for those who have settled land claims (comprehensive).

s.2(1) definition of "first nation land" seems to limit the application of the Bill to lands that qualify as "reserve lands" under the Indian Act or that are lands held because of a land claim settlement.

This means that lands held privately or lands which are owned by the First Nation corporation or other legal entity are not subject to this Bill.
s.2(2) the "Governor in Council"[47](GOC) makes regulations that provide under the Bill that a band under the Indian Act is a First Nation and that their lands are "first nation lands" under the Bill.

What is curious about this is that it means there will be an official listing of which communities this Bill applies to and which are excluded. While there is no indication in the text of the Bill whether any NEW criteria will be applied in creating this list, we should remain aware that this may be a possibility when there are new kinds of "status lists" being created by government.

REGULATIONS:

There are twelve (12) basic areas of regulation proposed under this Bill.

There are three proposed "authorities" for creating or making these regulations: (a) the GOC, (b) the GOC *together* with the Minister of Health; and (c) the GOC *together* with the Minister of INAC and the Minister of Health.

Here is a breakdown of how the Bill sets out the creation of regulations:

s.3(1) GOC	s.3(2) GOC with Minister of Health	s.3(3) GOC with Minister of INAC and Minister of Health
Makes regulations re: drinking water and wastewater on first nation lands in the following eight (8) areas: (a) Training and certification of operators; (b) Source water protection (c) Drinking water systems (incl. wells) – location, design, construction, maintenance, operation and decommissioning (d) Trucking water (e) Waste water systems	Make regulations re: **standards** for drinking water **quality** on first nation lands These regulations will probably closely follow the Health Canada (existing) *Guidelines for Canadian Drinking Water Quality*. (Please click on the title to access the Guidelines on a website).	Make regulations re: (a) **Monitoring**, sampling, testing of drinking water on first nation lands and **reporting** of results (b) Making **remediation orders** where standards for drinking water quality are not met (see s.3(2) on the creation of these standards by GOC and Minister of Health) (c) **Emergency measures** when
(f) Collection and treatment of wastewater (g) Monitoring, sampling and testing of wastewater and reporting results (see		There is a crisis or contamination of water on first nation lands.

47 In Canada, the governor in council is the governor general acting on the advice of the federal cabinet. Orders in council and minutes of council are signed by the governor general giving legal force to cabinet decisions relating to a statutory authority (like the one in this Bill) or the Royal Prerogative.

s.3(3) for the creation on similar regulation for drinking water) (h) Wastewater treatment products – handling, use and disposal		

INCLUDED POWERS

s.4 (1) sets out what the regulations can do. Here is a list of all of them, with comments in the right hand column:

s.4(1) subsection:	Comment:
(a) specify the classes of drinking water systems and waste water systems to which the regulations apply;	Presumably they will want to be as exhaustive as possible and may include groundwater (which is commonly the most used water source on reserve). Taking as an example the water law and regulations of Alberta, we have provided some links to the Alberta regulations on drinking water: Municipal drinking water systems are regulated by Alberta Environment under the following legislation: *Environmental Protection and Enhancement Act* Potable Water Regulation Activities Designation Regulation Approvals and Registration Procedure Regulation Code of Practice for a Waterworks System Consisting Solely of a Water Distribution System Code of Practice for Waterworks Systems Using High Quality Groundwater Standards and Guidelines for Municipal Waterworks, Wastewater and Storm Drainage Systems Alberta Environmental Appeals Board Regulation
(b) confer any legislative, administrative, judicial or other power on any person or body;	This is a very broad delegation of power, which means that the feds want to limit their liability and control as much as possible. This subsection may be the place where they allow for First Nations themselves to become the delegated authority. As such, existing issues

	faced by delegated authorities (like for child welfare,) would apply here too – *experiencing a high level of service provision requirements with an insufficient budget.*
(c) Confer on any person or body the power, exercisable in specified circumstances and subject to specified conditions,	
(i) to make orders to cease any work, comply with any provision of the regulations or remedy the consequences of a failure to comply with the regulations,	The body that is the delegated authority will have the ability to enforce compliance with the regulations. Under this section, they will also be able to "remedy the consequences" which may mean take any action needed to bring work up to compliance level.
(ii) to do any work that the person or body considers necessary to recover the costs of that work	Cost recovery for compliance
(iii) to require a First Nation to enter into an agreement for the management of its drinking water system or waste water system in cooperation with a third party;	This is a way to bring the First Nation under "third party" when it comes to water and wastewater management (if they are the delegated authority). So while the rest of the Bill seems to suggest that First Nations would become the delegated authority for the purposes of the Act and regulations, this subsection provides for the appropriation of this jurisdiction by a third party.
(iv) to appoint a manager independent of the first nation to operate a drinking water system or waste water system on its first nation lands;	This may have implications for the ability of a First Nation to employ a member as a manager of the systems
Main Money Subsections:	
(d) fix, or prescribe the manner of calculating, the fees to be paid to any person or body for the use of drinking water or of a wastewater system	This is referencing the fees paid to use water, by any household or business who turn on their tap. So this Act envisions charging First Nations members for water the way it happens off reserve.
(e) fix the rate of interest to be charged on the amounts owing under the regulations;	Self-explanatory.
(f) subject to subsection (2), establish offences punishable on summary conviction for contraventions of the regulations and set fines or terms of imprisonment or both for such offences;	Offences to be established. Not yet set out.

(g) establish a system of administrative monetary penalties applicable to contraventions of specified provisions of the regulations and set the amounts of those penalties;	Administrative fines or penalties.
(*h*) confer on any person the power to verify compliance with the regulations, including the power to seize and detain things found in the exercise of that power;	This may mean that previous First Nation experience with seizure of items, equipment or other chattels may change with respect to water or wastewater systems. In the past, a Band Council Resolution or other form of permission was required to be issued by the First Nation government to allow for seizure pursuant to legislation or regulation.
(*i*) confer on any person the power to apply for a warrant to conduct a search of a place;	This has implications for the ability of a band council to control who has access to the reserve lands, and facilities located on reserve. Also, this just says "a place" which implies that it might be ANY place on "first nation lands" which may include a home or residence.
(j) confer on any person the power to audit the books, accounts and records of persons to whom or bodies to which powers are conferred by the regulations;	Audit powers.
(k) require the collection, recording and reporting of information relating to the quality of drinking water or to waste water;	We have seen the sheer volume and demand for reporting and recording of information or data related to other delegated authorities such as child welfare delegated authorities. Often, the struggle is to complete the work required under legislation to deliver services, with human resources and financial resources stretched to the limit to accommodate reporting or recording requirements.
(*l*) prescribe rules respecting the confidentiality, or the disclosure, of any information obtained under the regulations;	This may mean that a First Nation has little or no say in how the information collected is shared or disseminated. If it is classified as public, it is accessible for litigation purposes.
m) prescribe rules of procedure for hearings to be held in relation to a drinking water system or waste water system, including rules for the issuance of subpoenas to require the appearance of persons and the production of documents and rules requiring that evidence be given under oath;	It seems that this Bill envisions an appeal or administrative process as part of compliance and enforcement. This has important implications for the sovereignty of a First Nation with respect to justice and administration.
(*n*) prescribe the obligations of any person or	The main word to note here is "prescribe".

body that exercises powers or performs duties under the regulations, and specify the penalties that apply in the event of the breach of those obligations;	There will be no consultation carried out on the obligations of the delegated authority under the Bill and regulations.
(*o*) subject to paragraphs 10(1)(*a*), (2)(*a*) and (3)(*a*) and section 11, set limits on the liability of, and establish defences and immunities for, any person or body exercising a power or performing a duty under the regulations;	Limitations on liability will be of paramount importance for First Nation delegated authorities. Please carefully note that a limitation on liability does not at all reflect the Treaty relationship between Treaty First Nations and the Crown. In fact, this Bill totally reneges or rejects that Treaty relationship in the context of water and wastewater. So the Bill seeks to characterize the First Nation as an extension of the provincial regime.
(*p*) require permits to be obtained as a condition of engaging in any activity on first nation lands that could affect the quality of drinking water, or any activity governed by the regulations, and specify the terms and conditions of those permits and provide for their issuance, suspension and cancellation;	Right now, the permit procedure under the Indian Act is cumbersome and difficult to process. This section has SEVERE ramifications for the ability of First Nations to engage in economic development, housing and other infrastructure activities. This permit system may become a way of stonewalling First Nation development and growth.
(*q*) deem a first nation, for the purposes of this Act, to be the owner of a drinking water system or waste water system located on its first nation lands that have not been allotted under subsection 20(1) of the *Indian Act* or designated under subsection 38(2) of that Act;	If First Nations are deemed owners, they also carry all the liability with none of the protection. There are limitations on liability provided for the delegated authority who runs the facilities, but a First Nation will have to take out insurance, and potentially tax their citizens to ensure they have the money to provide for instances of liability.
(*r*) provide for the relationship between the regulations and aboriginal and treaty rights referred to in section 35 of the *Constitution Act, 1982*, including the extent to which the regulations may abrogate or derogate from those aboriginal and treaty rights; and	This is the BIG RED FLAG of the entire Bill. This subsection allows the government of Canada to unilaterally re-interpret the Aboriginal and Treaty rights, and abrogate or derogate from those Treaty Rights as is convenient for the application of this Bill. As such, this subsection CANNOT BE ALLOWED TO BE INCLUDED IN THE FINAL VERSION OF THIS BILL.
s) require that an assessment of the environmental effects of drinking water systems or waste water systems be undertaken in circumstances where the *Canadian Environmental Assessment Act* does not apply, and establish a procedure to be followed in	The Canadian *Environmental Assessment Act* is the only one that asks for First Nation involvement in a substantive way; if it is up to the various provincial regimes, which are often not seen as the proper "jurisdiction" for Indigenous participation in Environmental

such assessments.	Assessments, it may result in the exclusion of First Nations under this subsection. It is unlikely that a wholly different or separate environmental assessment process will be established under the Bill's proposed regulations.

s.4(2) requires that provincial law applies to contraventions under the Bill.

s.4(3) states that the "regulations may incorporate by reference laws of a province, as amended from time to time, with any adaptations…considered necessary". Although INAC has stated at past meetings that the drafting of the regulations process is the one that would engage in the deepest consultation, it is of concern that it will be the exact opposite situation in practice. The concern is that for the sake of delivery of services immediately, to address outstanding drinking water issues, the government of Canada will seek immediate incorporation by reference and fast track the application of provincial regimes on reserve. It remains to be seen whether they will engage in the consultation processes required by law – as so far, they have not with respect to wastewater regulations under Environment Canada and the drafting of this Bill S-11.

s.4(4) states that there might be provincial exemptions of specified First Nations. From an initial reading of the Bill, they may be referring to those First Nations who have land claim settlements.

s.5 allows the Ministers of INAC and Health to engage a "body" like a corporation, cooperative etc to administer and enforce the regulations. It may also mean a First Nation, although that is not specified here. Nor are First Nations made the "first choice" of body to engage as the administrator.

s.6 basically allows the government of Canada, in the creation of this Act, to OVERRIDE existing land claims agreements unilaterally. This includes the terms of land claims agreements, and the changes that occurred to other legislation (such as natural resource management legislation, and LIMITATIONS ON LIABILITY.