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December 2, 2013

Honourable Minister Mary Polak
Ministry of Environment, Province of British Columbia
P.O. Box 9047
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Victoria, BC V8W 9E2
Email: ENV.Minister@gov.bc.ca

Dear Minister Polak,

RE: WATER SUSTAINABILITY ACT LEGISLATIVE PROPOSAL

Please find enclosed a legal report titled, *Legal Analysis of the Legislative Proposal: Water Sustainability Act*. This report was prepared by Arbutus Law Group at the request of, and with direction from, the BC Assembly of First Nations.

The analysis is divided into four sections. The first section provides a snapshot of the current institutional, jurisdictional and legal framework for water governance in Canada. This is followed by a more detailed description of the existing legislative framework in British Columbia, under the *Water Act,* and an examination of the implications for First Nations with respect to the governance of fresh water resources. The third section of the report explores the political context in BC, in particular, provincial commitments to reconciliation and shared decision making established under the *New Relationship*. The final section includes a summary of the proposed legislative framework and a legal analysis of the potential implications for First Nations.

The following is a summary of the main points under the "seven key areas" for improvement as outlined in the attached analysis:

1. **Protecting Stream Health and Aquatic Environments:** The development of rules and standards for protecting stream health and aquatic environments must be developed with First Nations and must reflect constitutionally-protected Aboriginal title and rights, and treaty rights. Regretfully, the proposed WSA does not include provisions for serious consultation with First Nations, nor does it provide opportunity for shared decision-making. Rather, the proposed WSA suggests that the province will continue its practice of unilaterally imposing provincial standards and decision-making processes.
2. **Considering Water in Land Use Decisions:** The legislative proposal does not include any mention of engaging First Nations on the determination of "water objectives" that will be used to guide decision-making under the WSA. This silence in the proposal suggests that the Province will continue to engage in unilateral decision-making on a strategic level. This is inconsistent with the legal duty of the Crown to consult and accommodate First Nations during strategic planning

processes, given the potentially serious impacts on Aboriginal rights and title and treaty rights. Moreover, it is inconsistent with the primary commitment of the *New Relationship* to engage on a government-to-government basis on issues of mutual interest and concern, including land and resource use planning, management and decision-making.

3. **Regulate and Protect Groundwater Use:** According to the proposal, all existing groundwater uses (with the exception of domestic wells) will be granted water licences based on their historical use of water. This approach to groundwater regulation is particularly problematic given the fact that the current use of groundwater in BC is not ecologically sustainable. By accepting existing wells as a guaranteed basis for a water licence, the proposed WSA will be locking into an unsustainable use of groundwater. This approach to groundwater regulation continues the Crown's practice of legitimizing historical denial of Aboriginal rights and failing to consider First Nations' interests in strategic planning processes. There is potential, where water is scarce, that all sources will be allocated, leaving little room for the accommodation of First Nations' claims. The proposed continues to assert unilateral jurisdiction to regulate and control access to groundwater including the authority to provide third parties with access to water resources.

4. **Regulate During Scarcity:** Planning for and responding to situations of drought and scarcity require direct engagement with First Nations and an incorporation of traditional ecological knowledge. However, the proposal falls short in this regard and makes little mention of Aboriginal interests or governance in the planning and response to situations of drought and scarcity. While there may be opportunities for First Nations to collaborate with the government, the public and stakeholders in the development of Water Sustainability Plans, the current proposal does not speak to how decision-making will be shared or how different interests will be balanced in the planning process. More detail is needed in forthcoming legislation and regulation.

5. **Improve Security, Water Use Efficiency and Conservation:** The proposed legislation will include a requirement that all water users use water beneficially. The understanding of "beneficial use" is not clearly defined in the proposal. The definition of "beneficial use" in the *Water Act* very narrowly defines beneficial use to be exclusively about the private use of water and thus affirms existing allocations. In doing so, this effectively excludes unlicensed users and uses, including First Nations and environmental flow needs. Again, the approach continues the Crown's practice of legitimizing historical denial of Aboriginal rights and failing to consider First Nations' interests in strategic planning processes. A broader definition of "beneficial use" (that takes into account, for example, Aboriginal rights to water, social benefits, efficiency and stream health) would clarify that a water license carries with it basic responsibilities to steward water resources and may facilitate legislative flexibility in addressing changing social and environmental needs through the reallocation of water resources.

6. **Measure and Report Large-Scale Water Use:** It appears that important details with respect to monitoring and evaluation will be established in the regulation development process. The regulation development must be undertaken in real consultation and collaboration with First Nations.

7. **Enable a Range of Governance Approaches:** While the expansion of planning provisions outlined in the proposal opens the door for possible delegation and sharing of responsibility for some water-management activities or decisions, the current proposal only provides a partial framework for ensuring that those most impacted by local water management issues will have a say in either initiating planning provisions or ensuring appropriate watershed-based solutions

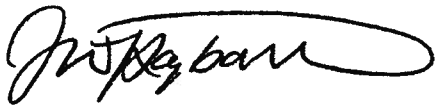
are available and made enforceable by law. More detail is needed in forthcoming legislation and regulation, including a clear articulation of accountability mechanisms and areas of responsibility, and a clear statement about what financial resources will be available for the performance of these duties. The proposal continues to assert provincial jurisdiction and suggests the potential for the province to delegate governance authority to third parties without any requirement to consult with First Nations. This delegated approach maintains the fundamental flaw of assuming that the province has sole jurisdiction over water and thus the authority to delegate water resources where there is a reasonable basis for Aboriginal jurisdiction.

Overall, we are concerned that the legislative proposal could result in non-First Nations interest-holders having priority over First Nations interests in water resources. There is no legislative requirement or process to meaningfully involve First Nations in the allocation of water resources or in the process of granting water licenses. Also, we are concerned by the failure of the provincial government to develop a coherent and legally sound legislative regime that meets its constitutional responsibility to Aboriginal people. The proposed WSA contradicts fundamental principles of the duty to consult and accommodate in accordance with contemporary case law. While the proposal pays "lip service" to both its legal obligations and political commitments under the *New Relationship*, the proposal and the process leading up to it does not reflect meaningful government-to-government relationships nor does it create opportunities for shared decision-making in strategic level planning. Rather, the proposal continues the longstanding assertion of provincial jurisdiction and fails to meet its legal obligations.

The attached analysis is based upon the legislative proposal and, as such, is limited in that we have not yet seen a draft of the actual proposed legislation or regulations. Despite this limitation, it is hoped that the attached report will identify where additional work is needed to strengthen the proposed Act and meet the Crown's legal and political obligations with respect to First Nations as the legislative process moves forward.

Legislation enacted in the province, and any ensuing regulations, that has the potential to affect First Nations' Aboriginal title and rights, including treaty rights, must be developed in conjunction with First Nations and it is hoped that this analysis is strongly considered and that our concerns are reflected in the forthcoming draft legislation.

Respectfully,
BRITISH COLUMBIA ASSEMBLY OF FIRST NATIONS



Jody Wilson-Raybould
Regional Chief

Encl.\

cc. Lynn Kriwoken – Director, Water Protection & Sustainability
Ted White - Manager, Water Strategies & Conservation

Arbutus
LAW GROUP LLP

REPORT FOR BC ASSEMBLY OF FIRST NATIONS

Legal Analysis of the Legislative Proposal: *Water Sustainability Act*

November 13, 2013

Report prepared by Micha J. Menczer, Kathryn Deo and Sarah Malan

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PART I: BACKGROUND

A. Purpose and Overview

This report was prepared for the British Columbia Assembly of First Nations (BCAFN) and is based on research conducted by Arbutus Law Group LLP in October and November of 2013. The report is intended to provide useful information and tools for the BCAFN in the context of the *Water Act* modernization (WAM) process currently underway in British Columbia (BC). More specifically, the report presents a legal analysis of the legislative proposal for the new *Water Sustainability Act* (WSA), released by the government on October 18, 2013.

The analysis is divided into four sections. The first section provides a snapshot of the current institutional, jurisdictional and legal framework for water governance in Canada. This is followed by a more detailed description of the existing legislative framework in British Columbia under the *Water Act* and an examination of the implications for First Nations with respect to the governance of fresh water resources. The third section of the report explores the political context in BC, in particular, provincial commitments to reconciliation and shared decision making established under the New Relationship. The fourth section includes a summary of the proposed legislative framework and provides a legal analysis of the potential implications for First Nations.

This analysis is based on the legislative proposal released by the government in the form of a generally stated discussion paper. Note that this is not a detailed section-by-section analysis of the WSA as there is not yet a draft of the actual proposed legislation or regulations available for review. This limits the ability to assess and make specific comments on the proposed legislative framework. Despite this limitation, it is hoped our report will identify where additional work is needed to strengthen the proposed Act and meet the Crown's legal and political obligations with respect to First Nations as the legislative process moves forward.

B. *Water Act* Modernization and the *Water Sustainability Act*

In BC, the *Water Act* is the primary water governance mechanism in the province.[1] Enacted in 1909, the *Water Act* was designed with the intent of facilitating settlement and ensuring economic certainty for colonial industrial and agricultural development. However, in recent years, the *Water Act* has come under increasing criticism for its failure to effectively address contemporary water management and governance challenges faced in BC.

In an attempt to address these critiques, the Office of the Premier released a comprehensive plan, *Living Water Smart*, in December 2009 outlining a new approach to modernize water governance and management in the province.[2] The goals of modernization have been articulated by the province as fourfold: (1) protect stream health and aquatic environments; (2) improve water governance arrangements; (3) introduce more flexibility and efficiency in the water allocation system; and (4) regulate ground water use in priority areas and for large withdrawals.

Following the release of *Living Water Smart*, the provincial government published a Public Discussion Paper in February 2010, outlining its proposed changes to the *Water Act.*[3] In March and April 2010, the

[1] *Water Act*, R.S.B.C. 1996, c. 483.
[2] Government of British Columbia, *Living Water Smart*, online: <http://livingwatersmart.ca/water-act/>.
[3] Government of British Columbia, *The Water Act Modernization Discussion Paper*, online: http://livingwatersmart.ca/water-act/discussion-paper.html.

government sought input on its proposed legislative changes from First Nations, interest groups and the general public. Interest at this stage was extensive and as a result, the government initiated a second stage of public engagement, releasing its Policy Proposal on the new *Water Sustainability Act* in December 2010 and seeking input again from First Nations, interest groups and the general public over the course of the winter and spring of 2011. By the close of 2011, three information sessions had been held specifically for First Nations, nine information sessions held for the general public and approximately 2,200 written submissions were accepted in response to both the Public Discussion and Policy Paper.[4]

On October 18, 2013, the government commenced yet another stage of public engagement with the release of *A Water Sustainability Act for BC: A Legislative Proposal*.[5] The proposal identifies and discusses WAM in the context of seven "key areas":

1) protection of stream health and aquatic environments;
2) consideration of water in land use decisions;
3) regulation and protection of groundwater;
4) regulation of water during times of scarcity;
5) improving security, water use efficiency and conservation;
6) measuring and reporting large-scale water use; and
7) providing for a range of governance approaches.[6]

It is significant to note that the government has identified this as the third and final opportunity for First Nations, interest groups and the general public to provide input into the proposed legislative changes. According to the legislative proposal, all submissions received by the government by November 15, 2013 will be reviewed and considered as the Ministry prepares a final draft of the new WSA for submission to the Legislative Assembly for debate and final approval in the spring of 2014.

PART II: WATER GOVERNANCE IN BRITISH COLUMBIA

The BCAFN has identified water governance as a critical element of its nation-building strategy. As noted in the BCAFN *Governance Toolkit*, "[the] most important issue for our Nations is who owns the water and who has the right to determine access to the water for all the possible uses".[7] To get at the root of these questions, the following discussion will examine the institutional, jurisdictional and legal framework for water governance in BC.

A. Canadian Federalism: Constitutional Allocation of Jurisdiction

The governance of freshwater in Canada is currently driven by a wide array of laws, regulations, policies and international obligations. Since Confederation, the federal and provincial governments have asserted ownership and responsibility for the governance and management of freshwater ecosystems within Canadian boundaries. However, there remains considerable debate over federal, provincial and

[4] A summary of all the submissions and background information are lodged on the Water Act Modernization web page, online <http://livingwatersmart.ca/water-act/>.
[5] Government of British Columbia, *A Water Sustainability Act for BC: A Legislative Proposal*, online http://engage.gov.bc.ca/watersustainabilityact/.
[6] *Ibid* at viiii.
[7] British Columbia Assembly of First Nations, Governance Toolkit, online <http://www.bcafn.ca/toolkit/governance-bcafn-governance-tool-3.31.php> at 445.

First Nation roles in the governance and management of water due to the way water flows across jurisdictions and the complex constitutional allocation of water management powers.[8]

The *Constitution Act, 1867,*[9] divides responsibility and distributes power between provincial and federal governments. As a result, both federal and provincial governments hold significant and shared constitutional powers over water. This division of powers gives provinces the primary role for the governance and management of water within their jurisdictional boundaries. First Nation claims to jurisdiction are obviously not addressed in the *Constitution Act, 1867* and need to be considered separately.

Provincial Jurisdiction

The roots of provincial jurisdiction over freshwater lies in the provincial ownership of resources and the explicit legislative rights established in s.92 of the *Constitution Act, 1867*. These constitutional sources effectively give provinces the primary role for the governance and management of water throughout Canada. Key provincial legislative powers include: the power to make laws concerning property and civil rights (92(13)); jurisdiction to regulate local works and undertakings (92(10)); ownership of natural resources (92A); jurisdiction over municipalities (92(8)); and matters of a merely local or private nature (92(16)).

As a result of this allocation of constitutional powers, provincial governments are primarily responsible for regulating and protecting water quality[10], regulating drinking water systems and making water use and allocation decisions.[11] Moreover, provinces are constitutionally entitled to allocate their waters for private uses by granting water rights to private parties.[12]

In BC, the *Water Act* is the primary water governance mechanism in the province.[13] Through the *Water Act*, the provincial Crown asserts exclusive ownership and jurisdiction to all fresh water resources in BC,

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[8] See generally J. Owen Saunders and Michael M. Wenig, 'Canadian Water Management and the Challenges of Jurisdictional Fragmentation' in Karen Bakker, *Eau Canada: The Future of Canada's Water* (Vancouver: UBC Press, 2007) 119-142 [Saunders & Wenig]; See also Paul Muldoon and Theresa McClenaghan, 'A Tangled Web: Reworking Canada's Water Laws' in Karen Bakker, *Eau Canada: The Future of Canada's Water* (Vancouver: UBC Press, 2007) 245-263 [Muldoon & McClenaghan].

[9] *Constitution Act, 1867,* (U.K), 30 &31 Vict.,c. 3, reprinted in R.S.C. 1985, App.II, No.5. [*Constitution Act, 1867].*

[10] It must be noted that responsibility for drinking water is partly shared with the federal government with respect to drinking water on reserve lands. This will be discussed in detail later in this Report.

[11] Muldoon & McClenaghan, *supra* note 8 at 251.

[12] These systems of allocation vary across the country. In Western Canada (Manitoba, Saskatchewan, Alberta and British Columbia) water rights are allocated on a prior allocation or first-in-time-first-in-right basis (FIT-FIR). The FIT-FIR system establishes a hierarchy of water use in which earlier licensees take priority over more recently granted licensees.

[13] Currently, the regulations under the *Water Act* include the following: the *Water Regulation* which provides for procedures for the acquisition of a water right, calculation and payment of fees and rentals and the activities that may be conducted within a stream or a stream channel; the *Ground Water Protection Regulation* which regulates activities such as well drilling, pump installation, groundwater protection and alteration and closure of wells; and the *British Columbia Dam Safety Regulation*, which addresses, in part, the construction, maintenance and operation of dams. In addition to the *Water Act,* other statues directly govern water in BC today including*: the Water Protection Act* (1995) which prohibits large inter-basin transfer and the bulk removal of water from BC; the *Fish Protection Act* (1997) that provides additional mechanism to strengthen the protection of fish and fish habitat in the consideration of water allocation decisions; and the *Drinking Water Protection Act* (2001) - includes provisions to enhance the protection of BC's drinking water supplies. Other water related provincial legislation includes the *Environmental Management Act, which* established the Environmental Appeal Board as an independent body to hear appeals under the *Water Act* and other environmental legislation. A series of other enactments, including the *Water Utility Act, Oil and Gas Activities Act, Forest and Range Practices Act, Environmental Assessment Act, Dike Maintenance Act, Drainage Ditch and*

including ground and surface water.[14] The *Water Act* provides for the allocation and management of surface water through licenses, short-term use approvals and approvals for changes in and about streams. In addition, it authorizes the creation of water reserves, the development of Water Management Plans and establishment of Water Users' Communities. The current Act also provides protective measures for wells and groundwater, along with provision for offences and penalties.

While surface and groundwater is vested in the provincial Crown, this ownership is subject to Aboriginal rights and title claims protected under section 35 of the *Constitution Act, 1982* (the "*Constitution*"). In BC, most Aboriginal rights and title claims to water have not been specifically recognized in Court decisions and are not factored into the existing water allocation scheme under the water licensing regime. The exception here, of course, is Nations governed under modern treaty agreements – all of whom, with the exception of Tsawwassen, provide for a specific water reservation under provincial law. This will be discussed in greater detail later in this Report.

The right to use water in BC is granted through the *Water Act's* prior allocation or first-in-time, first-in right (FIT-FIR) regime. This means that in order to use water in BC, a user must first obtain a license from the Ministry of the Environment, Water Stewardship Division.[15] Generally, licenses are appurtenant (legally attached) to a particular piece of land[16] and must be held for a purpose defined in the *Water Act,* namely: domestic use, waterworks, mineral trading, agricultural (irrigation) use, industrial use, power, hydraulicking, storage, conservation, conveying and land improvement.[17]

While the government has broad discretionary powers under the *Water Act* to refuse, amend or grant all or part of an application for a water license, once a license is actually issued and the licensee abides by the license and legislation, the government has a very limited ability to change the water allocated under that license.[18] Once approved, the licensee acquires the exclusive right to use water.[19]

Dikes Act and Parks Act are also key pieces of legislation that potentially impact the cross-jurisdictional nature of freshwater resources in BC.

[14] Groundwater is defined in the *Water Act* as: "water below the surface of the ground". Surface water is not explicitly defined in the Act, but it is reasonable to deduce that surface water refers to water above the surface of the ground.

[15] Currently, there are over 43,000 licenses on more than 17,000 water sources in British Columbia The Ministry of Environment now restricts water licensing on more than 25 percent of provincial sources, mostly in the South Okanagan and east coast of Vancouver Island. See Oliver Brandes and Deborah Curran, "Water Licences and Conservation: Future Directions for Land Trusts in British Columbia" *POLIS Project on Ecological Governance* (May 2008), online: http://www.polisproject.org/node/281 at I [Brandes & Curran, 2008]

[16] Also, it should be noted that only specified users may make license application, including the owners of land owners of mines, municipalities, improvement or development districts, water users communities, Crown, water districts, BC Hydro and holders of a certificate of convenience under the *Public Utilities Act* or *Water Utility Act.* See section 7 of the *Water Act.* Also, note that the "owner" of land means a person who is entitled to possession of, or a substantial interest in, land a mine or undertaking. This may include a person who holds a long term lease that grants a right of possession to land. Conversely, this means that a person cannot apply as a landowner for a water license that will be attached to another person's land, unless they have a right of possession or substantial interest in the land.

[17] See section 15(2) of the *Water Act.* The licensing system does allow for a limited use of water to be allocated without a license – this includes water used for firefighting, domestic use or mining purposes. See s.42. However, there remains a potential that unrecorded water will be subject to a license in the future and as a result, most water uses obtain licenses to secure use rights.

[18] For example, the comptroller or regional water manager may increase or decrease the amount of water authorized only if it appears that the volume was erroneously estimated when the license was issued. Similarly, licenses may be suspended or cancelled only if the licensee fails to comply with the terms of the license, *Water Act* and regulation, or orders made by the comptroller, water manager or engineer. In addition, licenses may be revoked if a licensee does not beneficially use the water as authorized by a license and for the purpose set out in the license for three consecutive years. Note that this "use-it –or-lose-it" provision is rarely used.

[19] It should be noted that water licenses automatically transfer to new owners when land, mines or undertakings are sold. See section 16 of the *Water Act.*

However, these use rights are not absolute. In BC, use rights are subject to the rules of the *Water Act* and its associated regulations, the terms set out in the license, orders of the water comptroller and engineers designated under the *Water Act* and perhaps most significantly, the seniority of senior license holders. As a result, the FIT-FIR system establishes a hierarchy of water use, in which earlier licensees take priority over more recently granted licensees. This means that in situations of scarcity, the most senior license-holder will receive their full allocation before any junior license-holder.

The FIT-FIR regime under the *Water Act* has received a considerable amount of criticism for its failure to encourage an efficient use of water and protect environmental flows. Critics points to the historical over-appropriation of water resources within the province and the lack of oversight on licenses, once allocated. This, it is argued, makes the system inadaptable to actual and changing ecosystem functions within respective watersheds. Indeed, the current FIT-FIR system is widely regarded to be out of date and ill equipped to address situations of drought or short term scarcity that appear inevitable in the face of climate change, increased urbanization and intensification of water use. Notably, the existing provincial rules do not recognize First Nation rights to water through priority allocation or any other means.

Federal Jurisdiction

While the constitutional responsibility for water belongs primarily to the provinces, it is shared by the federal government which has played a varying role in direct water management over the years, based on federal responsibilities for fisheries, navigation and other integrally water related areas. Federal jurisdiction is based on specifically assigned powers in section 91 of the *Constitution Act, 1867* such as: sea coast and inland fisheries (91(12)); navigation and shipping (91(10)); international or interprovincial "works and undertakings" (91(21)/91(10)).[20] In addition, federal jurisdiction is also implicated through federal authority over agriculture (shared with the provinces), trade and commerce, taxation, regulation of toxic substances, criminal law as well as the general power with respect to Peace Order and Good Government (POGG) under the national concern branch.

The final area of federal jurisdiction stems from section 91(24) of the *Constitution Act, 1867* which assigns exclusive legislative authority to Parliament over "Indians and Lands reserved for the Indians." By virtue of section 91(24), three federal departments, in addition to First Nation governments, have assumed responsibility for the distribution of water and water standards on reserve. Aboriginal Affairs and Northern Development Canada (AANDC) provides funding to First Nations for the provision of water services to communities, although typically only for citizens' domestic use and public buildings. The funding includes some provision for capital construction, upgrading and operating and maintenance costs. AANDC also oversees the design, construction and maintenance of water facilities on reserve where First Nations have not assumed the jurisdiction to do so. Environment Canada and Health Canada are primarily responsible for providing potable water on reserve. In particular, Health Canada is responsible for monitoring the quality of drinking water on reserves located south of the 60th parallel. Environment Canada is responsible for protecting source water through its powers to regulate waste water discharge into federal waters and to enforce effluent discharge standards into water throughout Canada.

[20] These constitutional sources of jurisdiction make relevant the following pieces of federal legislation: *Fisheries Act*, the *Canadian Environmental Assessment Act*, 2012, the *Species at Risk Act* and the *Navigable Water Protection Act*.

Regulatory Gap

This patchwork of provincial and federal laws results in a significant regulatory gap for First Nations. As noted above, because section 91(24) of the *Constitution Act, 1867* grants to the federal government exclusive jurisdiction over "Indians and lands reserved for the Indians," it is clear that provinces do not have jurisdiction to extinguish Aboriginal title, and that attempts by the province to regulate existing Aboriginal water rights or Aboriginal ownership of waterbeds or the foreshore would be severely limited by the justification test established by the courts.[21] As such, provincial regulatory water standards do not apply to on-reserve First Nations communities.[22]

To date, there has been no federal legislative framework governing drinking water and wastewater in First Nations communities. As a result, no legislative framework exists beyond by-laws that may have been made under the *Indian Act* or laws under comprehensive governance arrangements. The remainder of federal governance over drinking water and wastewater in First Nations communities is contained in federal policies, administrative guidelines and funding arrangements. However, it is anticipated that this situation will change with the recent enactment of new federal legislation, namely *An Act Respecting the Safety of Drinking Water on First Nation Lands,* the details of which are discussed below.

At present, First Nations hold more than 700 active provincial water licenses for a wide range of purposes. For the most part, water licenses granted by BC are assigned to the specific reserve as a whole and are held in the name of Canada or the *Indian Act* "band" to which they were granted. This means that today, unless a First Nation has enacted its own by-law(s) under section 81(1)(f) or (l) of the *Indian Act* or taken over management of water through governance arrangements (whether sectoral or comprehensive), the First Nation government often contracts services from a provincially-regulated provider or with AANDC (through funding agreements) for the design, construction, operation and maintenance of the water systems on reserve, in accordance with federal policies and procedures for the maintenance of those systems.

Many First Nations in BC receive domestic water through agreements with local government entities. Water delivered by local government entities is required to meet provincial drinking water standards and the facilities that produce and distribute water are subject to inspection and regulation by the province.

For First Nations that contract with AANDC, the majority manage their own water systems. As with all assets of a First Nation governing under the *Indian Act*, waterworks are owned by Canada and are

[21] However, it must be noted that while the distribution of powers may preclude the province for regulating existing indigenous water rights, it is does not preclude the province from refusing to grant water rights or ownership of the waterbed or foreshore. See Richard Bartlett, *Aboriginal Rights in Canada* (Calgary: Canadian Institute of Resources Law, 1988) at 122 [Bartlett, 1988].

[22] To review, provincial laws may apply to Indians and lands reserved for Indians in two ways. Firstly, provincial laws apply by way of their effect, so long as they do not interfere with federal jurisdiction or are not inconsistent with any other federal law. Secondly, by way of section 88 of the *Indian Act* which incorporates, by reference, provincial laws of general application. As Thomas Isaac explains, the basic rule is that provincial law applies to Indians and lands reserved for Indians, but this is subject to a number of conditions. Firstly provincial legislation must not single out Indians or lands reserved for Indians. Secondly, provincial laws must not affect an integral part or "of the essence of" of federal jurisdiction. Thirdly, provincial laws must not be inconsistent or otherwise in conflict with federal laws, which will prevail, according to the doctrine of federal paramountcy. See Thomas Isaac, *Aboriginal Law: Commentary, Cases and Materials* (Saskatoon: Saskatchewan, 3rd Ed, 2004) at 199-205 [Isaac, 2004].

administered by the First Nation.[23] In administrating the waterworks, First Nations are responsible for ensuring that water systems on reserve are operated by trained operators, for monitoring drinking water quality and for issuing drinking and boil water advisories. Because there is no statutory framework for water management on reserve, this work is governed under AANDC or Health Canada policy.

First Nations across the province have taken steps to address this regulatory gap. For example, approximately twenty percent of First Nations in BC manage water distribution to some extent pursuant to section 81 *Indian Act* by-laws.[24] Other First Nations have established special purpose local improvement water districts on reserve under provincial jurisdiction. While these mechanisms give First Nations greater ability to operate and deliver water on reserve, they do not address underlying ownership or title to water itself and *Indian Act* bylaws are always subject to Ministerial approval. Notably, *Indian Act* by-laws do not extend waters adjacent to reserve lands, unless it can be proven that such waters and waterbeds are part of reserve lands.[25] The discussion of the exercise of First Nation jurisdiction over water management under self-government arrangements is found later in this Report.

Canada is also attempting to fill the regulatory gap with the introduction of Bill S-8, *An Act Respecting the Safety of Drinking Water on First Nation Lands*, which provides for the development of federal regulations governing the provision of drinking water, water quality standards and the disposal of wastewater in First Nations communities. First introduced in the Senate on February 29, 2012, the Bill passed into law on June 19, 2013 but has yet to come into force.[26] The bulk of the Bill relates to the Governor in Council's power to make regulations governing the provision of drinking water and the disposal of wastewater on reserve. While it is beyond the scope of this report to provide an in-depth analysis of the Bill, it is important to note that the Bill establishes that federal regulations may incorporate, by reference, provincial regulations governing drinking water and wastewater in First Nations communities.

While the federal government maintains that the Bill will provide First Nations communities with drinking water and wastewater standards comparable to provincial or territorial standards off reserve, the Bill has received sharp criticism for its failure to recognize Aboriginal jurisdiction over matters related to water; for opening the door to increasing application of provincial rules, procedures and enforcement mechanisms on reserve lands; and for imposing substantial new costs and responsibilities on First Nations without a committed transfer of resources.

The Bill (and regulations made under it) applies to all First Nations that are not self-governing. This means that regulations under the Bill prevail over any laws or by-laws made by a First Nation under the *Indian Act* or the *First Nations Land Management Act*.

B. Sources of Aboriginal Jurisdiction

As noted above, the Crown's assertion of exclusive jurisdiction to all surface and groundwater in British Columbia is subject to existing Aboriginal rights and title protected under section 35 of the *Constitution*.

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[23] Where a First Nation administers its water system in respect of its citizens and its public buildings, the First Nation pays 20% of the costs of doing so and Canada pays the balance.

[24] Section 81 of the *Indian Act* provides power to the Council to make by-laws in respect to the use of water. This provides First Nations jurisdiction (vis a vis the *Indian Act*) over the management of waterworks and the local distribution of water on reserve.

[25] See *R. v. Lewis*, [1996] 1 S.C.R. 921; *R. v. Nikal* [1996] 1 S.C.R. 1013.

[26] See S.C.2013 Ch. 21.

Aboriginal title or rights in relation to water cannot be abrogated or extinguished unless by constitutional amendment or by agreement with indigenous people. Even though Aboriginal and treaty rights are not absolute and may be infringed, this can only happen where the high standard of the justification test established by the Supreme Court of Canada has been met by external governments.

No cases in Canada have specifically considered the nature and scope of Aboriginal water rights. However, it has been argued by several legal academics that there are many possible sources within Canadian law that deal with the recognition and protection of Aboriginal water rights. The sources of these rights can be broadly grouped into five categories: Aboriginal Title, Aboriginal Rights, Treaty and Reserve Rights, Contemporary Governance Arrangements (Comprehensive and Sectoral) and International Law. The following discussion will examine the current state of knowledge around the origin, nature and scope of these rights.

Aboriginal Title

Aboriginal title is an inherent right grounded in prior occupation and use and exercise of control and exclusive possession over the lands in question by a Nation or First Nation prior to contact. Most importantly, Aboriginal title conveys the right to make decisions with respect to the use and management of the land and water entitling indigenous communities to make water and land use decisions according to their own laws and traditions. This is the governance component of Aboriginal title.

The discussion of Aboriginal title in the courts has historically occurred only in relation to land. The critical question is therefore, do the rights to land also include rights to water and to the shores and beds of water bodies? BCAFN has answered this question unequivocally, stating: "For our Nations, ownership of water, or title to water, is considered as aspect of Aboriginal title. We maintain that our Nations have Aboriginal title to water, and therefore the right to use it, and to govern its use." [27]

Indeed, for the majority of indigenous people across Canada, water is understood as being an intrinsic part of the land and thus a clear part of Aboriginal title. This inclusive meaning of land was captured by the Royal Commission on Aboriginal Peoples (RCAP): "Land means not just the surface of the land, but the subsurface, as well as the rivers, lakes, (and in the winter, ice), shorelines, the marine environment and the air."[28] This integration of land and water forms Richard Bartlett's opinion that "[a] right to water is accordingly an integral part of aboriginal title. It includes and does not distinguish between land and water."[29] A similar understanding of Aboriginal title is articulated by Ardith Walkem: "A right to, and in, water itself is included as part of Aboriginal title. Oceans, lakes, rivers, streams, wetlands, ice and permafrost are all included as part of Aboriginal title territories."[30]

While the existence of Aboriginal title to water has not yet been addressed by the courts, the Supreme Court of Canada has suggested, through a series of discussions on the nature of Aboriginal title, that water may be understood to be an integral part of land. For example, in *R* v. *Calder,* Justice Hall described Aboriginal title as "a right to occupy the lands and enjoy the fruits of the soil, the forests, *and*

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[27] British Columbia Assembly of First Nations, *Governance Toolkit*, online <http://www.bcafn.ca/toolkit/governance-bcafn-governance-tool-3.31.php> at 445.
[28] Indian and Northern Affairs Canada, "Royal Commission on Aboriginal Peoples, Volume 2(1): Restructuring the Relationship" in *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Minister of Supply and Services, 1996) at 448.
[29] Bartlett,1988 *supra* note 20 at 7.
[30] Ardith Walkem, 'The Land is Dry: Indigenous peoples, Water and Environmental Justice' in Karen Bakker, *Eau Canada: The Future of Canada's Water* (Vancouver: UBC Press, 2007) 303 at 306 [Walkem, 2007].

of the rivers and streams [emphasis added]."[31] In *R* v. *Van der Peet*, Justice McLachlin in her dissent, recognized the historical existence of Aboriginal water rights prior to colonization and their continued existence. Her reasons suggest that section 35(1) protects Aboriginal rights that extend to both land and water. She writes:

> ...the interests which aboriginal peoples had in using the *land and adjacent waters* for their sustenance were to be removed only by solemn treaty with due compensation to the people and its descendants. This right to use the *land and adjacent waters* as the people had traditionally done for its sustenance may be seen as a fundamental Aboriginal right. It is supported by the common law and by the history of this country. It may safely be said to be enshrined in s. 35(1) of the *Constitution Act, 1982* [emphasis added].[32]

In *Tsilhqot'in Nation v. British Columbia*, the BC Supreme Court found that the title claim set out in the pleadings was inclusive of some rivers, lakes and streams, although, as no claim of infringement of Aboriginal title over submerged lands had been brought, the judge declined to decide the matter stating: "It may well be that the transfer of a fee simple title, the granted of a grazing permit or a *water licence* [emphasis added] or any other interest from British Columbia to others would all be infringements of Aboriginal rights. But they have not been pleaded."[33] It remains to be seen in the next few months how the Supreme Court of Canada in the *Tsilhqot'in* case will describe the scope and content of Aboriginal title.

To prove Aboriginal title, claimants must establish exclusive occupation prior to the British assertion of sovereignty. In other words, claimants must show that they used and occupied an area, according to their own laws and traditions at the time the Crown asserted sovereignty over that area. In situations where existing occupation of the lands in question is being offered as proof of pre-sovereignty occupation, claimants must be able to establish continuity between existing and pre-sovereignty occupation.[34] In addition, claimants must establish that their land uses are not "irreconcilable uses."[35] While Lamer C.J. suggests that an irreconcilable use is one that conflicts or destroys the "special bond" created by prior occupation – the scope of irreconcilable land uses remains incomplete and uncertain.

Insofar as water is considered an integral part of land, Aboriginal title gives indigenous peoples the right to exclusive use, occupation and possession of the lands submerged by water and entitles them to make use of water for a wide variety of purposes.[36] This includes traditional purposes such as fishing, hunting, gathering, domestic or household uses, transportation, spiritual, cultural and ceremonial practices as well as modern/contemporary uses such as hydro-electric development, large-scale irrigation or other commercial purposes. Perhaps most importantly, Aboriginal title conveys the right to make decisions with respect to the use and management of the land/water, entitling indigenous communities to make water and land use decisions according to their own laws and traditions.[37]

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[31] *Calder v. British Columbia (A.G)*, [1973] S.C.R.313 at 174.
[32] *R v. Van der Peet* [1996] 2 S.C.R. 507 at 265 and 279.
[33] *Tsilhoqt'in Nation v British Columbia* 2007 CarswellBC 2741BCSC, 2007 at para 993.
[34] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [*Delgamuukw*] at para 153-154.
[35] *Ibid* at para 128.
[36] *Delgamuukw* established that Aboriginal title is not restricted to traditional customs and practices. Rather, use is subject to an "inherent limit" in that uses cannot destroy the ability of the land (or water) to sustain future generations of indigenous peoples. See *Delgamuukw at* 1083-1084.
[37] Monique M. Passelac-Ross and Christina Smith "Defining Aboriginal Water Rights to Water in Alberta: Do They Still "Exist"? How Extensive Are They?" *Canadian Institute of Resource Law.* (April 2010) Occasional Paper #29, online: http://www.cirl.ca/OP at 8 [Passelac-Ross & Smith, 2010].

Several First Nations have sought to assert title to the waters and to the beds and shores of water bodies within their traditional territories in court cases. For example, in *R* v. *Adams*, the Mohawks claimed that their right to fish was based on either their Aboriginal title to the lands in the fishing area or on a free-standing Aboriginal right to fish.[38] In *Ahousaht Indian Band and Nation* v. *Canada*, the Nuu-chah-nulth claimed Aboriginal title to their fishing territories, including "the rivers, foreshore areas and bodies of water below the low water mark and extending 100 nautical miles seaward".[39] In their Aboriginal title lawsuit, the Haida claimed title to all of Haida Gwaii, including the deep sea and ocean beds surrounding the islands.[40]

Despite the title claims made in both the *Adams* and *Ahousaht* decisions, courts have declined to deal with the title issue and have, instead, dealt with the matter by finding an Aboriginal fishing right. The claim to Aboriginal title therefore did not need to be answered.

Aboriginal Rights

Aboriginal rights exist independently of the existence of Aboriginal title.[41] Aboriginal rights confer the right to engage in site-specific activity on land to which title may not be held. As a result, indigenous people may hold Aboriginal rights to water without holding title to the water itself.

Aboriginal rights are characterized by the Court as being founded on the actual practices, customs or traditions of the group claiming the rights, practices that were "integral to the distinctive culture" of the group.[42] Aboriginal rights include a wide array of activities or practices. Rights to water include harvesting, which, as noted by the Supreme Court are "land and water based",[43] as well as rights to travel and navigation, rights to domestic use (drinking, washing, tanning hides, watering stock) as well as rights to use water for spiritual, ceremonial, cultural or recreational purposes.[44]

In addition, Aboriginal rights to water may exist where the use of water is directly associated with the particular way of life of an indigenous community and necessary for its survival.[45] In *Sappier* and *Gray*, the Supreme Court held that the 'integral to a distinctive culture' test included those practices undertaken for survival purposes.[46] The uses of water that are vital to life in indigenous communities is potentially quite extensive. Walkem writes "many activities protected as Aboriginal rights (including fishing, hunting, gathering, spiritual practices) are closely tied to water and require a continuing supply of clean water.[47] As Smith and Ross point out, "implicit in the right to fish, trap and hunt is the right to water quantity and quality similar to the riparian owners' right to receive water sensibly undiminished in quantity and quality."[48]

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[38] *R v. Adams* [1996] 3 S.C.R. 101.
[39] *Ahousaht Indian Band and Nation v Canada (A.G)*, 2009 BCSC 1494 at para 495.
[40] "Statement of Claim" *Council of the Haida Nation and Guujaaw, suing on his own behalf and on behalf of all members of the Haida Nation AND: Her Majesty the Queen in Right of the Province of British Columbia and the Attorney General of Canada*, online: Haida Nation. http://www.haidanation.ca/Pages/Splash/PDF/Statement%20of%20Claim.pdf.
[41] *R v. Van der Peet* [1996] 2 S.C.R. 507 at para 34.
[42] *Ibid* at para 74.
[43] *R. v. Sappier; R. v. Gray*, [2006] 2 SCR 686 at para 51 [*Sappier and Gray*].
[44] Passelac-Ross & Smith, 2010, *supra* note 36 at 9.
[45] *Sappier and Gray*, *supra* note 42 at para 24 and 37.
[46] *Ibid* at para 37.
[47] Walkem, 2007, *supra* note 29 at 307.
[48] Passelac-Ross & Smith, *2010 supra* note 36 at 10.

Recognizing that rights to water fall within the general category of Aboriginal rights, a successful claim to water rights must meet the "distinctive culture" test. It seems reasonable to assume that the use of water itself could be demonstrated to be a central and significant part of a distinctive culture. There are several water-related activities that could meet this test including: water use, navigation, environmental protection, and irrigation.

Water rights may also exist as "reasonably incidental to an existing Aboriginal right". In *R* v. *Sundown*, the Supreme Court of Canada applied a "reasonably incidental" analysis, finding that the construction of a hunting cabin in a provincial park (contrary to provincial regulations) was acceptable because the hunting cabin was "reasonably incidental to this First Nations' right to hunt in their traditional expeditionary style... A reasonable person apprised of the traditional expeditionary method of hunting would conclude that for this First Nation the treaty right to hunt encompasses the right to build shelters as a reasonable incident to that right..."[49]

In *Claxton v. Saanichton Marina Ltd*, the British Columbia Court of Appeal applied similar reasoning and found that components linked to the treaty right to fish were protected. Specifically, the court found that the fishery itself (meaning the fish and habitat), the surrounding area and travel to and from the fishery were within the category of rights protected as incidental to the treaty right to fish.[50]

Applying this reasoning to water, it seems likely that Aboriginal fishing and harvesting right-holders could engage in numerous protected, water-related activities that are reasonably incidental to existing Aboriginal and treaty rights. Such incidental rights arguably might include: protection of water quality and quantity; habitat protection; watershed management for the protection of fishing, harvesting and gathering grounds; transportation over waterways (such as right to unrestricted waterways to travel to hunting, fishing and trapping sites); and use of water reasonably incidental to the economic stability of the First Nation including water use for manufacturing, irrigation and the production of electricity.[51]

Historic Treaty and Reserve Rights

Apart from the Douglas Treaties signed on parts of Vancouver Island and Treaty 8 in the Peace River region, very few historic treaties were signed with First Nations in BC. However, both the Douglas Treaties and Treaty 8 reference rights related to water resources. The Douglas Treaties include the right to carry on their fisheries as formerly. Treaty 8 guarantees the right of "hunting, trapping and fishing" for "as long as the rivers run". While these treaties do not include an express treaty right to water, it has been argued that there may be an implied or a reserve-based right to water in Canada. As Richard Bartlett concludes in his 1988 study of Aboriginal water rights in Canada, "...treaties generally did not expressly provide for water rights beyond provisions for hunting, trapping and fishing...Canadian law recognizes a treaty right to water for traditional and contemporary uses by the Indians."[52] In other words, a treaty which expressly protects hunting or fishing rights may implicitly protect the water necessary to sustain those rights.

This approach to treaty interpretation stems from the seminal 1908 case, *Winters* v. *United States*, where the United States Supreme Court established the legal basis for Indian water rights, holding that, by setting aside lands for Indian reservations, the federal government had also reserved sufficient water

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[49] *R v. Sundown* [1999] 1 S.C.R. 393 at para 33.
[50] *Claxton v. Saanichton Marina Ltd* [1989] 57 D.L.R. 4th 161 (B.C.C.A).
[51] Merrell-Ann S. Phare, International Trade Agreements and Aboriginal Water Rights: How the NAFTA Threatens the Honour of the Crown (LL.M thesis:University of Manitoba, 2004) at 58.
[52] *Ibid* at 51-53.

supply to fulfill the purpose for which the reservation was created and to sustain the people themselves.[53] The Court found that while the agreement establishing Fort Belknap reservation in Montana did not explicitly mention water or water rights, a sufficient quantity of water to satisfy the object of the reservation could be implied from the agreement. In 1963, the *Winters* doctrine was affirmed and expanded upon in *Arizona* v. *California* where the United States Supreme Court held that tribal water rights were effectively reserved as of the time the reservation was created, and that the tribes were entitled to an amount of water sufficient to irrigate all of the practicable irrigable acreage on their reservations.[54] In doing so, the Court acknowledged that *Winters* rights were intended to satisfy both the present and future needs of a reservation.[55]

The applicability of the *Winters* doctrine in Canada remains unsettled.[56] While several academics argue that *Winters* should apply to reserves in Canada,[57] there has yet to be a judicial decision explicitly acknowledging its application. This being said, the British Columbia Court of Appeal adopted similar reasoning in *Claxton v. Saanichton Marina Ltd* where the Court identified and protected extensive water-related rights as incidental to the exercise of the treaty right to carry on the fishery.

While the above discussion refers to reserve lands created by treaties, it is arguable that the *Winters* doctrine also applies to reserves that were created by unilateral government actions. While there would be little argument over rights to water if the history and documentation establishing a particular reserve referenced rights to adjacent waters, this information is not often found or remains to found in further research behind the establishment of reserves in BC. Nevertheless, there is nothing to suggest that these reserves would not be subject to the same inference as in the *Winters* doctrine – that when land was set aside for reserves, sufficient quantities of water were similarly reserved to meet the needs of the residents of the reserve.

Contemporary Governance Arrangements (Comprehensive and Sectoral)

Comprehensive Governance Arrangements

Modern comprehensive governance arrangements in BC address some aspects of First Nation jurisdiction over water. For example, under the Westbank Self-Government Agreement, given force of law by federal legislation,[58] Westbank has jurisdiction under the Agreement to manage and regulate

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[53] *Winters v. United States*, 207 U.S. 564 (1908); See also Rebecca Tsosie, 'Tribal Sovereignty and Intergovernmental Cooperation' in John E.Thorson, Sarah Britton and Bonnie Colby, Tribal Water Rights (Tucson: University of Arizona Press, 2006) 13-34 at 22 [Tsosie, 2006).

[54] *Arizona v. California* 373 U.S. 546 (1963); See also Tsosie, 2006 *at* 22.

[55] Kristy Pozniak, "Indian Reserved Water Rights: Should Canadian Courts "Nod Approval" to the Winters Doctrine and What are the Implications for Saskatchewan if they do?" (2006) 69 Saskatchewan Law Review 251 at 253 [Pozniak, 2006].

[56] When applying U.S. jurisprudence in Canada, it worthwhile nothing the following comments made by the Court in *Van der Peet* regarding the application of American law to Canadian Aboriginal decisions. " I agree with Professor Slattery both when he describes the Marshall decision as providing "structure and coherence to an untidy and diffuse body of customary law based on official practice" and when he asserts that these decisions are "as relevant to Canada as they are to the United States"—Understanding Aboriginal Rights, supra at p.739. I would add to Professor Slattery's comments only the observation that the fact that Aboriginal law in the United States is significantly different from Canadian Aboriginal law means that the relevance of these cases arises from their articulation of general principles, rather than their specific legal holdings." See *Van der Peet*, *supra* note 113 at para 35.

[57] See generally Walkem, 2007 *supra* note 29; See also Pozniak, 2006 *supra* note 54.

[58] Westbank First Nation Self Government Agreement, online http://www.wfn.ca/black-bear/wfnlaws.htm [Westbank First Nation Self Government Agreement] and *Westbank First Nation Self-Government Agreement Act* S.C.2004 ch. 17 in force April 1, 2005.

water use in so far as Westbank as legal rights to access water.[59] This power is separate and distinct from the other jurisdiction Westbank has under section 212 of the Agreement over the supply treatment, conveyance, storage and distribution of water (as well as over the collection, treatment and disposal of sewage) as part of its jurisdiction for public works.[60] Westbank has exercised this jurisdiction and has enacted laws in this regard to matters under s. 212 of the Agreement.

The *Sechelt Indian Band Self-Government Act* does not specifically address water, although it is reasonable to argue that it has jurisdiction where water forms part of Sechelt Lands. In addition, there are a several heads of power in section 14 of the Act (establishing Sechelt's legislative powers) such as preservation and management of natural resources on Sechelt Lands that could possibly be relied on to regulate the distribution and use of water.[61] To date, Sechelt Indian Band has not enacted any laws in this subject area.

Neither the Westbank Self-Government Agreement nor the *Sechelt Indian Band Self-Government Act* establish any specific reservation of water however it is significant to note that both include a non-derogation clause with respect to Aboriginal title or rights. This effectively preserves their respective assertions of Aboriginal title or rights in relation to water.

The modern Treaty agreements, with the exception of Tsawwassen, provide for a specific water reservation under provincial law. In addition, the Nisga'a and Maa-nulth agreements both provide that applications may be made to BC for a water license against a general water reservation found in the treaty.[62] The Maa-nulth Agreement also specifically addresses water reservation for hydroelectric generating purposes and the possibility of the province regulating groundwater in the future.

The Tsawwassen Final Agreement, on the other hand makes provision for the First Nation to receive water from the Greater Vancouver Water District.[63]

Sectoral Governance Initiatives

No sectoral governance initiatives specifically address jurisdiction over water. However, there are powers available to First Nations under the *First Nation Framework Agreement on Land Management* and the *First Nations Land Management Act* (FNLMA). While the FNLMA does not specify water directly, it does refer to powers over natural resources in the lands. This could suggest that a First Nation with a Land Code might have the jurisdiction to manage any interests in water that are associated with its reserve lands and to which provincial water licenses may apply.

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[59] *Ibid*, at s. 136

[60] *Ibid*, at s.212; See also WFN *Waterworks Law* (No. 2005-16); and WFN *Sanitary Sewer System Law* (No. 2005-18). Also note that under section 216 of the Westbank Self Government Agreement, Westbank Law with respect to public works, community infrastructure and local services shall prevail over federal laws to the extent of any conflict, so long as Westbank First Nation health and safety standards and technical codes are at least equivalent to federal health and safety standards and technical codes.

[61] *Sechelt Indian Band Self-Government Act* SC 1986 c. 27 at s.14(1)(j).

[62] Nisga'a has a water reservation of 300,000 cubic decameters per year from the Nass River and other streams for domestic, industrial, and agricultural purposes. See Nisga'a Final Agreement, online <http://www.aadnc-aandc.gc.ca/eng/1100100031292/1100100031293>; Maa-nulth First Nations Final Agremeent , online http://www.aadnc-aandc.gc.ca/eng/1100100022581/1100100022591.

[63] Tsawwassen First Nation Final Agremeent, online: http://www.tsawwassenfirstnation.com/finalagreement.php.

International Law

International law provides guidance on the protection of rights of Indigenous peoples. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the UN General Assembly in September 2007 and formally endorsed by Canada on November 12, 2010, establishes minimum standards for the protection of Indigenous rights, includes the following provisions that explicitly include rights to water:

> Article 25: Indigenous people have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, water and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.
>
> Article 32:
>
> 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
>
> 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
>
> 3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

While it is important to identify the recognition of the significance of water for Indigenous Peoples and their role in decision making described in UNDRIP, the full legal impact of UNDRIP remains to be determined under international and domestic law.

PART III – NEW RELATIONSHIP AND SHARED DECISION MAKING

Parallel to the *Water Act* modernization process, the province operates under existing commitments from the New Relationship, signed between the province and the First Nations Leadership Council in 2005.[64] The New Relationship confirms and renews the government-to-government relationship between the parties based on mutual respect, recognition of Aboriginal title, rights and interests and a commitment to reconcile those Aboriginal title, rights and interests with provincial title, rights and interests. Moreover, the New Relationship includes a commitment from the parties to engage in shared-decision making for land and resource use.

[64] Government of British Columbia, *The New Relationship*, online: <http://www.newrelationship.gov.bc.ca/agreements_and_leg/new_relationship_agreement.html> [The New Relationship]

Shared decision-making is understood broadly to be a process in which decision makers with their own jurisdiction, authorities and laws engage in a joint process to reach a common decision. The policy goals expressed in the New Relationship reflect this commitment to indigenous governance rights:

> "We agree to establish processes and institutions for shared decision making about the land and resources and for revenue and benefit sharing, recognizing, as has been determined in court decisions, that the right to Aboriginal title, "in its full form" including the inherent right for the community to make decision as to the use of the land and therefore the right to have a political structure for making those decisions, is constitutionally guaranteed by Section 35. These inherent rights flow from First Nations historical and sacred relationship with their territories..."
>
> " ...ensure that lands and resources are managed in accordance with First Nations laws, knowledge and values and that resource development is carried out in a sustainable manner including the primary responsibility of preserving healthy lands, resources and ecosystems for present and future generations" and
>
> "...integrated intergovernmental structures and policies to promote co-operation, including practical and workable arrangements for land and resource decision-making and sustainable development."[65]

The New Relationship commits the provincial government to acknowledge and respect Aboriginal title and rights and jurisdiction. In the context of water governance, this requires a shared decision-making framework that reflects the commitments and the underlying spirit of the New Relationship, namely: (1) the recognition of First Nation decision-making authority stemming from Aboriginal title and rights; and (2) shared decision making on a government-to-government basis.

It is significant to note that in 2009, the Province proposed a new *Recognition and Reconciliation Act* with the objective of recognizing Aboriginal title in BC and establishing a process for negotiation and implementation of shared decision making and revenue and benefit sharing agreements. However, in March 2009, the proposed Bill was jointly postponed by the Province and the BC First Nations Leadership Council to allow for more comprehensive period of consultation. As a result, uncertainty remains around the substantive nature and process of shared decision-making. It is reasonable to ask why the approach of recognition of Aboriginal title, and reconciliation through shared decision-making, reflected in the 2009 proposal was not carried forward by BC in the present proposal for a *Water Sustainability Act*.

PART IV: PROPOSED LEGISLATIVE CHANGES: *WATER SUSTAINABILITY* ACT

A. Proposed Legislative Changes

It is proposed that the WSA will replace the existing *Water Act.* More specifically, the new legislation will build on the *Water Act* provisions by adding a requirement for the consideration of environmental flow needs (EFN), the regulation of groundwater, as well as changes to the governance framework for fresh water resources within the province.

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[65] *Ibid.*

While the provincial government has put forward relatively sweeping (albeit vague) changes to the *Water Act*, it has remained conspicuously silent with respect to indigenous rights over water and has refused to recognize a right for First Nations either to a priority for water or to have a role in decision making. This lack of recognition is accompanied by the province's continued assertion of exclusive Crown ownership and jurisdiction over all freshwater resources within British Columbia. In doing so, the province unequivocally denies indigenous jurisdiction to water and fails to recognize or give substantive meaning to constitutionally-protected Aboriginal title and rights and treaty rights as they may relate to water. This is a missed opportunity for BC to follow through on principles outlined in the New Relationship.[66]

The following section summarizes the proposed legislative framework, organized by BC's "seven key areas" for improvement, and provides a legal analysis of the potential implications for First Nations as the legislative process moves forward.

1. Protecting Stream Health and Aquatic Environments

The legislative proposal acknowledges the importance of "environmental flow needs" (EFN) – the concept that water should be kept in streams and lakes to provide water for fish and wildlife habitat and for the basic functioning of the watershed. Under the current *Water Act* there is no legal requirement for government decision-makers to consider environmental flows in their decisions about water.

The proposed WSA would require government decision-makers to "consider" EFN in the course of considering new water allocation requests and amending existing licenses. It is significant to note the use of the word "consider" in this context. The requirement for decision-makers to simply "consider" EFN is a weak and ambiguous legal test that fails to prioritize EFN and may jeopardize the functioning of watersheds in the face of population growth, changes in water demand, development and climate change. More clarity is required as to how decision-makers will be required to consider EFN in all aspects of decision-making. To be effective, an environmental flow regime requires clear, binding rules that prioritize environmental flows over other non-essential human uses.

Moreover, the proposal suggests that EFN will only be considered in the context of new or amended licenses. This restriction of EFN provisions to new or amended licenses undermines the very objective of protecting stream health and aquatic environments. To be effective, EFN needs should be considered in all water allocation decisions, including existing licenses.

Key to ensuring environmental flow protection is a robust planning process. The development of rules and standards for protecting stream health and aquatic environments must be developed with First Nations and must reflect constitutionally-protected Aboriginal title and rights, and treaty rights. Regretfully, the proposed WSA does not include provisions for serious consultation with First Nations, nor does it provide opportunity for shared decision-making. Rather, the proposed WSA suggests that the province will continue its practice of unilaterally imposing provincial standards and decision-making processes.

2. Considering Water in Land Use Decisions

The legislative proposal acknowledges the importance of integrated land and water management and the necessity of developing mechanisms to consistently consider water-related issues across the

[66] As discussed above, similar principles were included in the proposal for a *Reconciliation Act* in 2009.

spectrum of provincial resource decisions. To achieve this, it is proposed that the WSA establish "water objectives" that would guide decision-making under the new WSA and under enactments that are land-use focused.

While this suggests potential for effective integration of water and land use considerations, the actual terms of the proposal remain vague and unclear. For example, the proposal does not identify which government agencies or enactments will need to consider the "water objectives". Rather, the proposal simply states that this "will be worked out in future regulations." In fact, the only direction provided in this regard is a suggestion that the *Forest and Range Practices Act* and the *Oil and Gas Activities Act* will be excluded from the requirement to consider water objectives because those Acts already contain appropriate provisions to protect water.[67] This exclusion is problematic as the existing legislative framework for the forestry and oil and gas industries arguably do not appropriately protect fresh water resources.

Similarly, the substance of the proposed "water objectives" remain vague and undefined. While the proposal gives some examples of possible "water objectives", it does not explicitly propose what those objectives may be. The examples provided are vague and thus fail to provide a means of resolving conflicts between competing objectives such as resource development and conservation. More clarity is required on how issues such as short-term economic or resource development projects will be weighed against longer-term ecological health or cumulative effects in the consideration process.

The legislative proposal does not include any mention of engaging First Nations on the determination of "water objectives" that will be used to guide decision- making under the WSA. This silence in the proposal suggests that the Province will continue to engage in unilateral decision-making on a strategic level. This is inconsistent with the legal duty of the Crown to consult with and accommodate First Nations during strategic planning processes, given the potentially serious impacts on Aboriginal rights and title and treaty rights.[68] Moreover, it is inconsistent with the primary commitment of the New Relationship to engage on a government-to-government basis on issues of mutual interest and concern, including land and resource use planning, management and decision-making.[69]

3. Regulate and Protect Groundwater Use

The proposed framework for regulating groundwater parallels the FIT-FIR allocation framework for surface water in an attempt to integrate the rights for both groundwater and surface water use.[70] According to the proposal, all existing groundwater uses (with the exception of domestic wells) will be granted water licenses based on their historical use of water. The corollary of this is that there will be no consideration of whether the existing use of groundwater is ecologically sustainable or otherwise required by other users in the watershed.

Once licensed, a licensee will have a "priority date" based on when the well was first drilled and used. Legally, a water licensee can insist that other users who have a more recent "priority date" stop taking water in times of scarcity. This system works to effectively "grandfather" existing wells and expand the rights of existing wells to claim priority over other, subsequent users. This approach to groundwater

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[67] Government of British Columbia, *A Water Sustainability Act for BC: A Legislative Proposal*, online <http://engage.gov.bc.ca/watersustainabilityact/>at 25 and 26.
[68] *Haida Nation v. British Columbia (Minister of Forests)* [2004] 3 S.C.R.511 para 76-77.
[69] See The New Relationship, *supra* note 60.
[70] Groundwater is defined in the *Water Act* as "water below the surface of the ground."

regulation continues the Crown's practice of legitimizing historical denial of Aboriginal rights and failing to consider First Nations' interests in strategic planning processes. This is particularly problematic in those parts of BC where water is scarce, as the proposed process will grant rights to groundwater to third parties. As with surface water, there is potential that all sources will be allocated, leaving little room for the accommodation of First Nations' claims.

From a sustainability perspective, his approach to groundwater regulation is particularly problematic given the fact that the current use of groundwater in BC is not ecologically sustainable. By accepting existing wells as a guaranteed basis for a water license, the proposed WSA will be locking into an unsustainable use of groundwater. This approach must be reevaluated, particularly in oversubscribed areas, to re-examine existing groundwater use and ensure that license are issued in a manner that ensures water use is sustainable and maintains the health of the aquifer.

The proposal indicates that the following groundwater use would be captured by the new regime: water supply wells, dewatering wells and shallow water source wells.[71] The proposal simultaneously exempts other categories of groundwater including domestic wells, geothermal and remediation wells, and deep saline groundwater often used in oil and gas operations.

Because of how groundwater flows, the impact of one well on the water in nearby wells can be considerable, even if the use of the first well is not affecting aquifer levels. This approach indicates potential for increased levels of conflict between domestic (unlicensed) well users and licensed well users and it remains unclear how much protection domestic well owners will actually have in the proposed regulatory framework.

It is indisputable that groundwater use affects the legal rights of First Nations. However, the proposed WSA fails to acknowledge existing Aboriginal rights and title and treaty rights, and continues to assert unilateral jurisdiction to regulate and control access to groundwater including the authority to provide third parties with access to water resources that are under Aboriginal jurisdiction.

4. Regulate During Scarcity

Under the existing surface water prioritization scheme (FIT-FIR), the earliest water license holder takes priority over more recent licensees when water supply is insufficient to meet the demands of all the licensed users.

The proposed WSA includes new and expanded powers to address water allocation in situations of drought or scarcity. Primarily, the proposal includes provisions for Water Sustainability Plans to address water allocation, including water for environmental flows and temporary orders to protect "critical environmental flows".[72]

Under the proposed WSA, the Minister will continue to have the power under section 9 of the *Fish Protection Act* to order the temporary reduction of water use from a stream (and thus override existing FIT-FIR allocations) in the context of drought or scarcity.[73] This power is further expanded under the WSA to include the extraction and use of connected groundwater; further, the authority to order

[71] New well users will be required to obtain a license before using groundwater. Large-scale groundwater users (250 m^3/day) will be required to pay a nominal amount for their water. And will be required to monitor and report their water usage. The proposed groundwater fee is 85 cents per 1000m^3.
[72] See below for more detailed discussion of Water Sustainability Plans.
[73] *Fish Protection Act* [SBC 1997] Chapter 21.

temporary reductions could also be applied to a stream reach or tributary. While this is a step in the right direction, critical environmental flow protections must be extended beyond the *Fish Protection Act* powers, to account for those watersheds where fish are not present, and for critical ecological thresholds that may differ from fish habitat.

Finally, the proposed WSA provides for reallocation of water in times of shortage or scarcity to prioritize essential household use – to ensure that the basic household needs of people, domestic animals and poultry are met regardless of existing FIT-FIR allocations. In our opinion these are positive changes.

Planning for and responding to situations of drought and scarcity require direct engagement with First Nations and an incorporation of traditional ecological knowledge. Again, however, the proposal falls short in this regard, making little mention of Aboriginal interests or governance in the planning and response to situations of drought and scarcity. While there may be opportunities for First Nation to collaborate with the government, public and stakeholders in the development of Water Sustainability Plans, the current proposal does not speak to how decision-making will be shared or how different interests will be balanced in the planning process. More detail is needed in forthcoming legislation and regulation.

5. Improve Security, Water Use Efficiency and Conservation

The proposed WSA includes a requirement that all water users (licensees, approval holders, water users under the regulation and unrecorded water users) use water beneficially.[74] At first glance, this appears to be a positive step as the requirement of beneficial use acts as an inherent limit on the FIT-FIR allocation system. However, the understanding of "beneficial use" is not clearly defined in the proposal. In fact, the only reference to the meaning of beneficial use returns to the definition in the *Water Act*, namely that beneficial use means ""using the licensed volume of water for the intended purpose(s) and in compliance with the terms of the water license." This very narrowly defines "beneficial use" to be exclusively about the private use of water and thus affirms existing allocation under the FIT-FIR system. In doing so, this effectively excludes unlicensed users and uses, including First Nations and environmental flow needs. Again, this approach continues the Crown's practice of legitimizing historical denial of Aboriginal rights and failing to consider First Nations' interests in strategic planning processes.

Because the requirement for beneficial use acts as an inherent limit on the FIT-FIR system, a broader definition of beneficial use (that takes into account, for example, Aboriginal rights to water, social benefits, efficiency and stream health) would clarify that a water license carries basic responsibilities to steward water resources and may facilitate legislative flexibility in addressing changing social and environmental needs through the reallocation of water resources.

In addition, the WSA proposes the establishment of agricultural water reserves – water rights tied to properties within the Agricultural Land Reserve (ALR) to help secure water for agricultural use on agriculture lands. While this seems on the face of it an admirable goal, this also has implications for First Nations, many of whose land claims and treaty Statement of Intent maps include lands within the ALR.[75]

[74] Interestingly, the proposal includes a suggestion that unrecorded users will also be subject to beneficial use requirements, but the proposal does not state how this would be monitored, or what the consequences would be, leaving many unanswered questions.

[75] For example, the Tsawwassen First Nation Final Agreement includes ALR lands.

6. Measure and Report Large-Scale Water Use

It is widely recognized that accountable legislative systems require comprehensive monitoring, transparent and reliable reporting, and the capacity for independent and credible investigation. The proposed WSA identifies the important of monitoring and reporting but details about the requirements for reporting on actual water use (i.e. what is measured, how often, in what detail, and by whom) are not included in the proposal and have been left to future regulation development.

Moreover, formal monitoring and reporting requirements only apply to large users of 200 000L per day – this is only a small fraction of users in the entire province.[76] This emphasis on large users is misguided and fails to capture a picture of the overall use levels; critical information that provides an accurate picture of the amount of water actually being used in the province.

It appears that important details with respect to monitoring and evaluation will be established in the regulation development process. This regulation development must be undertaken in real consultation and collaboration with First Nations.

7. Enable a Range of Governance Approaches

The proposal expands the water planning provisions of the *Water Act* with the introduction of Water Sustainability Plans that will allow collaboration between the government, public, stakeholders and First Nations in order to develop locally appropriate ways of addressing issues of with water supply, water quality and aquatic ecosystem health.[77] In addition, the proposal includes provisions for the Province to develop area based regulations with the objective of implementing Water Sustainability Plans or to address other needs of a particular watershed or region.

As proposed, the planning provisions have the potential to restructure existing water allocations in situations where stakeholders have agreed to alter FIT-FIR allocations through a Water Sustainability Plan. Moreover, the proposal contemplates using Water Sustainability Plans as the primary tool in the WSA to protect environmental flows in areas with chronic drought or water shortage.

It is widely acknowledged that comprehensive planning is a critical necessity for the successful management of freshwater resources.[78] This expansion of planning provisions outlined in the proposal opens the door for possible delegation and sharing of responsibility for some water-management activities or decisions. However, the current proposal only provides a partial framework for ensuring that those most impacted by local water management issues will have a say in either initiating planning provisions or ensuring appropriate watershed-based solutions are available and made enforceable by law. More detail is needed in forthcoming legislation and regulation, including a clear articulation of accountability mechanisms and areas of responsibility, and a clear statement about what financial resources will be available for the performance of these duties.

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[76] In comparison, the average daily household water use in Canada is 274L per day. Environment Canada, *Residential Water Use Indicator, online:* <http://www.ec.gc.ca/indicateurs-indicators/default.asp?lang=en&n=7E808512-1>

[77] Note that Part 4 of the *Water Act* provides for Water Management Plans that allow the Minister to designate an area and establish a process for completing a Water Management Plan if the Minister considers that a Plan would help address or prevent conflicts or risks to water quality.

[78] Similar planning provisions exist, for example under Section IV of the *Water Act*, as well as Drinking Water Source Protection Plans, however few are ever completed or passed into law.

It is important to note that the proposal does not clearly distinguish between governance and stewardship responsibilities, nor does it indicate which entities (First Nations and other governments, water users, interest groups, etc.) will hold those responsibilities. Rather, the proposal continues to assert provincial jurisdiction and suggests the potential for it to delegate governance authority to third parties without any requirement to first consult with First Nations. This delegated approach maintains the fundamental flaw of assuming that the province has sole jurisdiction over water and thus the authority to delegate water resources where there is a reasonable basis for Aboriginal jurisdiction. At a very minimum, the province should engage in shared-decision making with respect to these issues and not merely consultation.

PART V: CONCLUSIONS AND RECOMMENDATIONS

In making our conclusions and recommendations, we will first focus on the specifics of the WSA legislative proposal as drafted, and will then look more broadly at the issue of engagement of First Nations in the process.

Although the legislative proposal is vague in many areas, and many of the details will be developed at a future date, we do have some specific concerns about the proposed WSA. The proposal continues the FIT-FIR regime for several types of water interests, grandfathering in rights of early license-holders, without taking into consideration First Nations' interests in water. This could result in non-First Nations interest-holders having priority over First Nations interests in water resources. Many users continue to be exempt from licensing or registration requirements, making it very difficult in our view for the province to be able to monitor water use, recognize interest of unlicensed holders, make effective decisions regarding allocations, and take enforcement action when necessary. There is no legislative requirement or process to meaningfully involve First Nations in the allocation of water resources or in the process of granting water licenses. While First Nations continue to assert Aboriginal title and Aboriginal rights in relation to water the costs, delays and risks of litigation remain serious obstacles to judicial confirmation of such rights. First Nations should not be forced into litigation when there is a process to modernize outdated water legislation.

Perhaps more significantly, we have broader concerns about the failure of the provincial government to develop a coherent and legally sound legislative regime that meets its constitutional responsibility to Aboriginal people. The proposed WSA contradicts fundamental principles of the duty to consult and accommodate in accordance with contemporary case law[79], and thus falls short of BC's legal obligations. Indeed, the province appears to continue its assertion of exclusive Crown jurisdiction without recognition of constitutionally-protected Aboriginal title, rights and treaty rights. BC must acknowledge and respect Aboriginal rights and title to water resources, which even if not proven in court, require more serious consideration as the new legislation is developed.

The legislative proposal pays "lip service" to both its legal obligations and political commitments under the New Relationship. For example, the proposal reiterates input from First Nations that the *Water Act* modernization process has not meet the standards set out in the New Relationship and has failed to constitute meaningful consultation. In response to these concerns, the proposal states that it acknowledges First Nations interests and concludes that it "will continue to meaningfully engage with First Nations through development and implementation of the proposed WSA." However, the legislative proposal (and the process leading up to it) does not reflect the meaningful government-to-government

[79] See *Haida Nation v. British Columbia (Minister of Forests)* [2004] 3 S.C.R.511; See also *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650.

engagement envisioned by the New Relationship, nor does it create opportunities for shared decision-making in strategic level planning and decision-making. Rather, it continues the longstanding assertion of provincial jurisdiction where reconciliation remains largely outstanding through court decisions, treaties or other agreements. In doing so, the proposed WSA contradicts the fundamental political commitments made by BC under the New Relationship and fails to meet is legal obligations to consult and accommodate.

In the face of continued failure by the province to meet its constitutional obligations and commitments made under the New Relationship, First Nations must continue to vocalize their concerns and objectives as the legislative process moves forward and there may remain space for meaningful engagement as the legislative development process continues. As noted above, the legislative proposal is marked by repeatedly vague references in a number of critically important areas. As such, it is clear that essential details will be determined in the process of drafting the actual legislative provisions of the Act and the accompanying regulations. This legislative and regulatory development process creates another opportunity for the province to engage First Nations in an open and consultative process and to develop a shared approach to decision-making that recognizes First Nations' rights, including their inherent authority to govern with respect to lands and waters in their traditional territories.

We strongly recommend that First Nations directly and through their political organizations such as BCAFN be actively engaged and involved in the development of the regulations under the WSA. The provisions granting regulation-making powers should require that the regulations be developed collaboratively with First Nations through their organizations or at a minimum provide that regulations can be made only after "taking into consideration" First Nations interests and representations from First Nations organizations" or after consulting with" First Nations and their organizations.[80] Such conditions in absence of a direct commitment to collaboration would obligate the province when challenged to prove that they had "taken into consideration" First Nation interests and representations when making regulations.

The process for development of the *WSA* is not complete and the issues involved for First Nations are so significant that it merits a strong commitment from First Nations organizations to ensure that the legislation fairly reflects and protects First Nation interests.

[80] For example, sections 36, 56 and 89 of the *First Nations Fiscal Management Act*, S.C. 2005, c. 9, provide that the Governor in Council may make regulations "having regard to representations made" by the First Nations Tax Commission or First Nations Financial Management Board or in the case of the First Nations Finance Authority regulations are made "after consulting with" the FNFA.

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