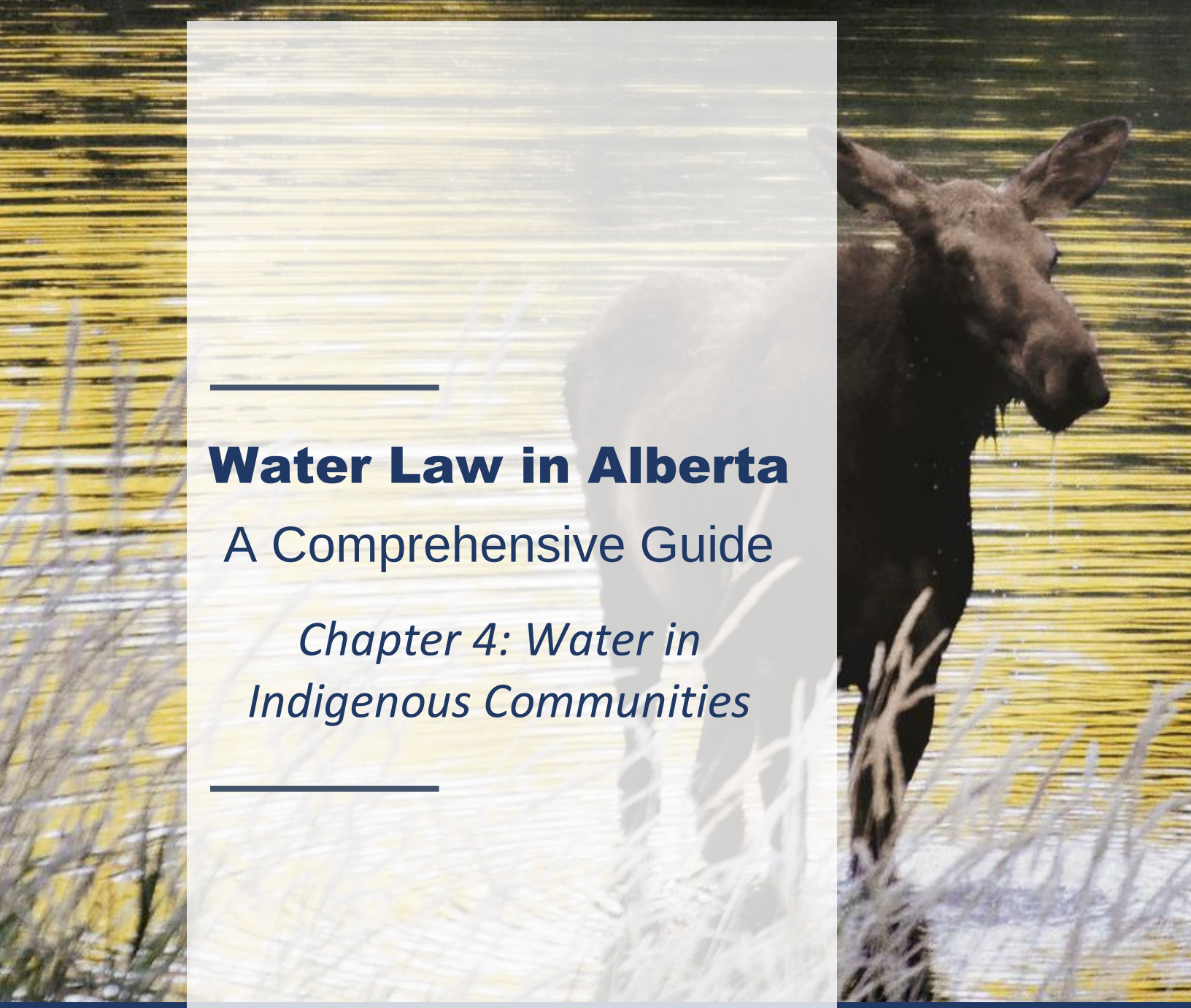


Water Law in Alberta

A Comprehensive Guide

Chapter 4: Water in Indigenous Communities

January 2022

Authored by: Allison Boutillier

Environmental Law Centre

Library and Archives Canada Cataloguing in Publication

Title: Water law in Alberta : a comprehensive guide : an introduction / authored by Allison
Boutillier.
Names: Boutillier, Allison, 1987- author.
Identifiers: Canadiana 20220178453 | ISBN 9781989522172 (PDF)
Subjects: LCSH: Water—Law and legislation—Alberta. | LCSH: Water—Pollution—Law and legislation—
Alberta. | LCSH: Water rights—Alberta.
Classification: LCC KEA493 .B68 2022 | LCC KF5569 .B68 2022 | DDC 346.712304/691—dc23

THE ENVIRONMENTAL LAW CENTRE (ALBERTA) SOCIETY

The Environmental Law Centre (ELC) has been seeking strong and effective environmental laws since it was founded in 1982. The ELC is dedicated to providing credible, comprehensive and objective legal information regarding natural resources, energy, and environmental law, policy, and regulation in the Province of Alberta. The mission of the Environmental Law Centre is to advocate for laws that will sustain ecosystems and ensure a healthy environment and to engage citizens in the laws' creation and enforcement. Our vision is a society where our laws secure an environment that sustains current and future generations and supports ecosystem health.

Environmental Law Centre

#410, 10115 – 100A Street Edmonton, AB T5J 2W2
Telephone: (780) 424-5099 Fax: (780) 424-5133
Toll-free: 1-800-661-4238
Email: elc@elc.ab.ca Website: www.elc.ab.ca
Blog: www.elc.ab.ca/blog/
Facebook: http://www.facebook.com/environmentallawcentre
Twitter: https://twitter.com/ELC_Alberta
To sign up for email updates visit: http://elc.ab.ca/newsandmedia/news/

Copyright © 2021
Environmental Law Centre (Alberta) Society
Charitable Registration #11890 0679 RR0001

If you require legal advice, you should contact a lawyer. Also, note that information reflects the state of the law just prior to publication. Laws and regulations change periodically, and this necessitates a review to determine whether the information is up to date.

Photos courtesy of unsplash.com and pixabay.com

Photos unless otherwise indicated are courtesy unsplash.com and pixabay.com

ACKNOWLEDGEMENTS

The Environmental Law Centre thanks the Alberta Law Foundation for its financial support of the Water Law in Alberta project.

PREFACE

The Environmental Law Centre (ELC) and our role in interpreting and advocating for law reform and its impacts on Indigenous rights

by Jason Unger, Executive Director

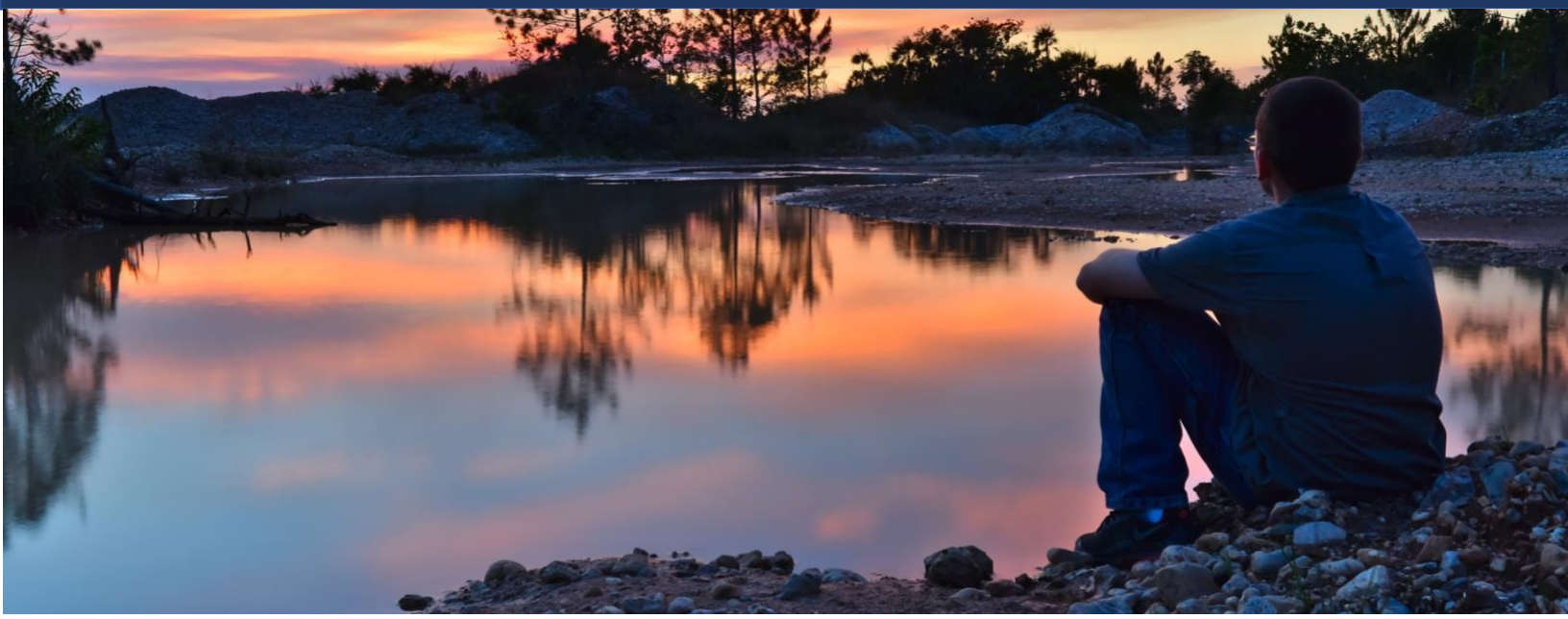
Throughout Canada's history, the settler/colonial legal system has facilitated past and ongoing marginalization and victimization of Indigenous people in Canada. These issues pervade the legal system and this includes how we regulate and use natural resources. The Environmental Law Centre (ELC), with the protection of our environment and natural resources at the heart of our mission, has worked within this system throughout the organization's history. The ELC recognizes that environmental and natural resources laws, Indigenous rights and reconciliation are connected.

This reality has led the ELC down a path of inquiry and introspection around its role in how environmental and natural resources may better reflect Indigenous rights as protected in section 35 of the Canadian Constitution, the United Nations Declaration on the Rights of Indigenous People and the principle of reconciliation reflected in the Truth and Reconciliation Commission Reports and Calls to Action. As lawyers advocating for our charitable purpose of protecting the environment, we recognize that we have privileges and responsibilities to reflect, to inform and to advocate for change.

First and foremost, the aim of this work is to assist in understanding the law and policy challenges that exist in Alberta and to facilitate and inform dialogue around opportunities to reform the legal system.

This year, 2022, will see us start this process, with reports on the current legal situation around water and Indigenous rights, and in 2022 and 2023 with a more in-depth analysis of how settler environmental law and treaty rights interact and how the Centre may play a role in the future.

TABLE OF CONTENTS



CHAPTER FOUR: WATER IN INDIGENOUS COMMUNITIES

In this chapter, we will discuss water law specifically as it applies in the Indigenous communities in Alberta. To accomplish this, the chapter will be divided into five parts.

In the first part of this chapter, we will provide a brief introduction to the topic, starting with some information about how the law applies to Indigenous peoples and then moving on to a brief introduction to the Indigenous communities in Alberta.

In the second part of this chapter, we will consider the ownership of the land underneath water, known as the beds and shores, for waters that are located within First Nations' reserves, as well as the eight Metis Settlements in Alberta. To do this, we will start by discussing the legal rules and presumptions that apply to determine the ownership of beds and shores. Then, we will consider the possibility of an aboriginal title claim, which is a legal claim to property ownership based on Indigenous occupation of land prior to European settlement.

In the third part of this chapter, we will discuss Indigenous rights to take and use water. We will begin this discussion with an explanation of riparian and groundwater rights, which are two types of

water rights that attach to the ownership of property, either next to or above water, as the case may be. Then, we will discuss the possibility of implied treaty rights to water, which are water rights that are necessary to support the other promises made by the government under treaty. Finally, we will discuss the possibility of an aboriginal rights claim to water, which is a type of legal claim that is grounded in the traditional practices of Indigenous peoples prior to European settlement.

In the fourth part of this chapter, we will discuss the regulation of water quality on First Nations' reserves and on Metis Settlements lands. We will start by discussing the general legislation that regulates water quality, and then, we will discuss the legislation and other legal mechanisms that regulate drinking water, sewage, and storm drainage systems.

Finally, in the fifth part of this chapter, we will discuss the legal tools available to Indigenous peoples to enforce their rights to water. Specifically, we will look at the mechanisms available to challenge legislation, the right to consultation on projects that are likely to affect Indigenous water rights, and the possibility of bringing a lawsuit against anyone who violates Indigenous water rights.

I. OVERVIEW

In this section we will provide some background information that will be helpful to understanding the law that is discussed throughout this chapter. To do this, we will start with some general comments about how water law applies to Indigenous peoples, before turning to a brief description of the Indigenous communities in Alberta, including their lands and their governance systems.

i. Introductory Comments

In this chapter, we will cover many of the same topics that were covered in the previous three chapters, specifically as they apply in Indigenous communities in Alberta. The reason for this is that the law applies somewhat differently to Indigenous peoples than it does to other people in Alberta. This difference is due to the historic relationship between Indigenous peoples and the Canadian government and the way the law has developed around that relationship since the arrival of European settlers.

Practically, this means there is legislation that impacts water law that only applies to Indigenous people. Equally, there is legislation around water law that applies to other people but does not apply to

Indigenous people—although, as we will see, the details of what applies and what does not apply can become a somewhat complicated and, often, uncertain area of law.

On that note, as you read this chapter, be aware there is a lot more uncertainty in this area of law than in the other areas of water law. As a matter of pure numbers, it affects fewer people, so there are fewer cases for the courts and other adjudicators to work out the law. As well, the law in this area can be complex, given its relationship with history and with some big constitutional principles, so it can be more difficult to predict what the courts will decide in a given situation. Importantly, the law in this area is also in a state of change, at least in part, to reflect a changing relationship between Indigenous peoples and the rest of Canadian society.

To deal with these uncertainties, as we discuss the law throughout this chapter, we will try to be clear about where the most significant uncertainties lie. In doing so, we will explain the reasons for the uncertainty, and we will discuss what might happen if the law ever settles.

As a last word, as you read this chapter, take note that we will be discussing the law in Indigenous communities as it is currently defined by Canadian law. This is different from Indigenous water law and water rights as they may be described in Indigenous legal traditions, which are represented to a small extent within Canadian law, but usually within the framework of British legal traditions. Increasingly, there are efforts to recognize a more significant place for Indigenous legal traditions in Canada, including to govern water, but this largely remains a project for the future of water law in Indigenous communities.[1]

[1] See e.g. Danika Billie Littlechild, *Transformation and Re-Formation: First Nations and Water in Canada* (2014), online: University of Victoria https://dspace.library.uvic.ca/handle/1828/5826.

ii. Indigenous Communities in Alberta

To understand water law as it applies in Indigenous communities in Alberta, it is important to understand something about the Indigenous peoples that live in the province.[2] Additionally, it is important to know something about the Indigenous communities in Alberta, including the lands that belong to them, as well as the governance structures behind their local governments. In this section, we will provide a very general overview of these topics.

In terms of broad population data, according to Statistics Canada, there are approximately 260,000 people who identify as Indigenous in Alberta, making the province home to the third largest Indigenous population in the country.[3] Of these people, approximately 136,000 identify as First Nations, 114,000 identify as Metis, and 2,500 identify as Inuk.[4]

Of the Indigenous people who live in Alberta, two groups have their own land base and local governments to manage those lands: first, the First Nations in Alberta have reserve lands that were set aside for them by the federal government, and, second, some of the Metis peoples in the province live on Metis Settlements, which were created by the provincial government in the 1930s. In the following sections, we will discuss each of these types of communities in a bit more detail, with a focus on the nature of their lands and their local governments.

[2] For more information about the Indigenous peoples in Alberta and in Canada, see "Indigenous Canada" (2022), online: University of Alberta https://www.ualberta.ca/admissions-programs/online-courses/indigenous-canada/index.html; Thomas King, *The Inconvenient Indian* (Toronto: Anchor Canada, 2013); Daniel Francis, *The Imaginary Indian* (Vancouver: Arsenal Pulp Press, 1992).

[3] "Aboriginal Peoples Highlight Tables, 2016 Census" (2 October 2020), online: Statistics Canada https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/hlt-fst/abo-aut/Table.cfm?Lang=Eng&T=101&S=99&O=A#.

[4] *Ibid*.

a. First Nations' Reserves

In Alberta, there are 48 First Nations and approximately 140 reserves that belong to them.[5] These reserves were set aside for First Nations in fulfillment of the promises the federal government made in the treaties that were signed as European settlers arrived in Canada.

In Alberta, there are three main treaties, which cover almost the entirety of the province:

- Treaty 6, which covers central Alberta, was signed in 1876;
- Treaty 7, which covers southern Alberta, was signed in 1877; and,
- Treaty 8, which covers northern Alberta, was signed in 1899.[6]

In addition, Treaties 4 and 10 cover the remainder of the province, with Treaty 4 in the southeast corner of the province and Treaty 10 tucked along the eastern border.[7] However, no First Nations occupy these areas and, accordingly, there are no reserves under these treaties.

In Alberta, most of the reserves were set aside shortly after the treaties were signed. However, in some cases, the First Nations never received the lands they were entitled to, and, to this day, lands continue to be set aside for reserves to fulfill the promises that were made in the treaties.[8]

Legally, it must be noted that reserve lands are technically owned by the federal government, who holds them for the benefit of First Nations.[9] That said, the courts have recognized that First Nations have a property interest in reserve lands, which the courts have described as *sui generis*, meaning "of its

[5] "First Nations in Alberta" (16 July 2021), online: Government of Canada https://www.sac-isc.gc.ca/eng/1100100020667/1614279204239; *First Nations Reserves and Metis Settlements* (8 April 2021), online: Government of Alberta https://open.alberta.ca/publications/first-nations-reserves-and-metis-settlements-map; *Metis Settlements and First Nations in Alberta: Community Profiles* (17 December 2021), online: Government of Alberta https://open.alberta.ca/publications/1925-5209.

[6] See "Maps of Treaty-Making in Canada" (29 August 2013), online: Government of Canada https://www.rcaanc-cirnac.gc.ca/eng/1100100032297/1544716489360.

[7] *Ibid*.

[8] See "Land claims in Alberta" (2021), online: Government of Alberta https://www.alberta.ca/land-claims-in-alberta.aspx.

[9] See *Indian Act*, RSC 1985, c I-5, s 18.

own kind".[10] The exact nature of the rights and restrictions that attach to First Nation's property interests in reserve lands are dealt with in numerous court cases and, in the other sections of this chapter, we will describe these rights as they relate specifically to water.

From a governance perspective, the federal government still plays a significant role in managing reserves lands and the First Nations that inhabit them, which it does through a piece of legislation called the *Indian Act*. In addition, reserves are governed by Band Councils, which the *Indian Act* recognizes as the local governments on reserves and empowers to pass bylaws that apply on reserve lands.[11]

Notably, if a First Nation has entered into a self-government agreement with the federal government, then that First Nation may have a greater degree of control over the management of its reserve lands, in lieu of the authority the federal government would normally exercise under the *Indian Act*.[12] Currently, eight First Nations in Alberta are in the process of developing a land code, which will eventually allow them to take over land management of their reserve lands under such a self-government agreement.[13]

[10] See *Guerin v The Queen*, [1984] 2 SCR 335 at 382. See also John Borrows & Leonard I Rotman, "The *Sui Generis* Nature of Aboriginal Rights: Does it Make a Difference" (1997) 36-1 Alta L Rev 9.

[11] *Indian Act*, *supra* note 9, s 81.

[12] "Self-government" (25 August 2020), online: Government of Canada https://www.rcaanc-cirnac.gc.ca/eng/1100100032275/1529354547314.

[13] See "Framework Agreement", online: First Nations Land Management Resource Centre https://labrc.com/framework-agreement/. See also *First Nations Land Management Act*, SC 1999, c 24, Schedule 1.

b. Metis Settlements

Approximately 5,000 of the Metis people in Alberta are members of formal Metis communities called Metis Settlements.[14] These Settlements were originally created in 1938 and 1939, following the passage of the *Metis Population Betterment Act*[15], which empowered the provincial government to set aside land for the province's Metis communities. Originally, twelve Settlements were set aside, but four of these communities were dissolved in the 1950s and 1960s, leaving only the eight Settlements that still exist today.[16]

In the 1980s, the provincial government revisited the status of the Metis Settlements in Alberta, and, in 1989, the government and the Settlements signed the *Alberta-Metis Settlements Accord*.[17] As a consequence of the *Accord*, the provincial government added protection for the Settlements' land base to the *Alberta Constitution*.[18] As well, the provincial government formally transferred the ownership of the Metis Settlements' land to the Settlements by issuing letters patent to the lands.[19] Note that letters patent is just an old legal term for an order from the government that grants rights or land to a person or organization.[20]

In terms of governance, the Metis Settlements fall under the jurisdiction of the provincial government and are primarily governed under a piece of legislation called the *Metis Settlements Act*[21].

---

[14] *Metis Settlements and First Nations in Alberta: Community Profiles* (17 December 20201), online: Government of Alberta https://open.alberta.ca/publications/1925-5209. See also "Metis Settlements of Alberta" (2018), online: Metis Settlements General Council https://msgc.ca/.

[15] See Bill 6, *An Act Respecting the Metis Population of the Province*, 2nd Sess, 8th Leg, Alberta, 1938, online: Metis Settlements General Council https://msgc.ca/wp-content/uploads/2019/10/1938-Bill-006-Metis-Population-Betterment-Act.pdf.

[16] *The Government of Alberta's Policy on Consultation with Metis Settlements on Land and Natural Resource Management, 2015* (1 April 2020), online: Government of Alberta at 1 https://open.alberta.ca/publications/policy-on-consultation-with-metis-settlements-2015.

[17] *Ibid*. See also *Alberta-Metis Settlements Accord* (1 July 1989), online: Government of Alberta https://open.alberta.ca/publications/2171929.

[18] *Constitution of Alberta Amendment Act, 1990*, RSA 2000, c C-24.

[19] See *Metis Settlements Land Protection Act*, RSA 2000, c M-16, s 2.

[20] *Black's Law Dictionary*, 4th ed, *sub verbo* "patent".

[21] *Metis Settlements Act*, RSA 2000, c M-14.

In particular, the *Metis Settlements Act* establishes Settlement Councils, which govern each individual Metis Settlement and are empowered to pass bylaws that apply to that Settlement.[22] In addition, the *Metis Settlements Act* creates a General Council, which is an overarching governing body for all eight Settlements.[23] The Metis Settlements General Council is made up of all of the Settlement Councils, and it has the power to pass policies, which are binding on all the individual Settlements.[24]

Although the Metis Settlements are the only Metis communities with their own recognized land base, it is worth noting that there is also another major Metis organization in Alberta, which is called the Métis Nation of Alberta.[25] This is a governance organization for the Metis people in Alberta, and it was recently given formal legal recognition by the federal government as an Indigenous governing body, pursuant to a self-government agreement.[26]

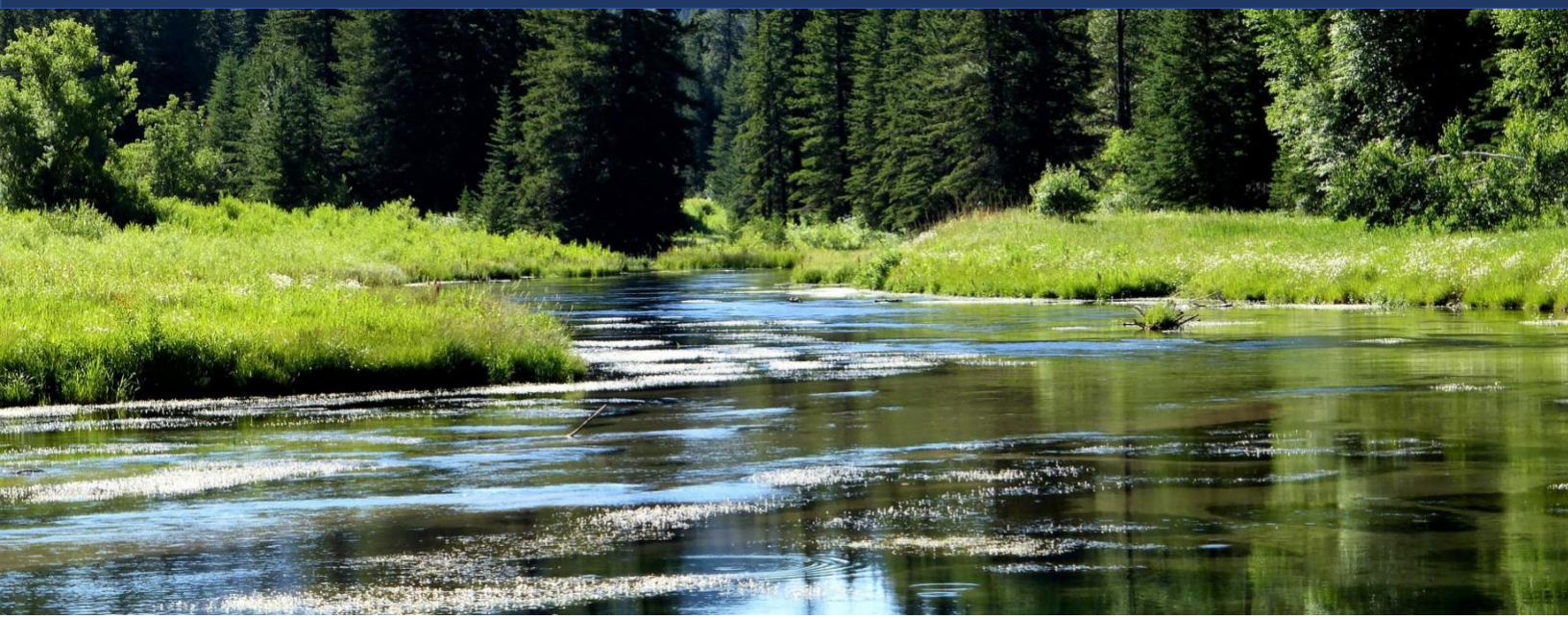
[22] See *ibid*, Part 1, Division 2; Part 2, Division 4.

[23] See *ibid*, Part 8.

[24] *Ibid*.

[25] "Métis Nation of Alberta" (2022), online: http://albertametis.com.

[26] See "Recognition for Metis Nation Self-Government" (2021), online: http://www.albertametisgov.com/.



II. OWNERSHIP OF BEDS AND SHORES

In this section, we will discuss the ownership of the lands that are beneath waterbodies and watercourses, which are referred to as the beds and shores. Specifically, in this section we will discuss the ownership of the beds and shores located within reserve lands, the ownership of the beds and shores within Metis Settlements, and, finally, the possibility of a claim of aboriginal title for beds and shores within Alberta.

As you read this section, keep in mind that, normally in Alberta, the provincial government is the owner of all the beds and shores in the province.[27] This means the provincial government owns the beds and shores of a watercourse or waterbody, even if those beds and shores are located within a property that is owned by someone else.

Notably, this provincial ownership is subject to some exceptions, including beds and shores owned by the federal government and beds and shores that have been specifically granted to someone other than the provincial government.[28] In this section, we will discuss whether the beds and shores on First Nations' reserves and Metis Settlements fall into these categories, such that the First Nations and

[27] *Public Lands Act*, RSA 2000, c P-40, s 3.

[28] *Ibid*, s 3(2).

Metis Settlements are owners of the beds and shores within their lands. We will also consider the possibility of a claim for aboriginal title to beds and shores, which is a special legal claim for title based on Indigenous occupation of land prior to European settlement.

In practical terms, it is worth noting that the ownership of beds and shores is important, because it affects the legal rules that apply to the beds and shores, including who may use them and what activities they may carry out. As we will discuss in the other sections of this chapter, different legal rules often apply to Indigenous lands as opposed to lands held by the provincial government or another private landowner. As a result, determining who owns the beds and shores is important to determining the legal rules that apply to govern those beds and shores.

Beyond what is included in this section, more information about determining the ownership of beds and shores, as well as an explanation of what precisely is meant by the term beds and shores, can be found in the chapter on land ownership and use. Likewise, for more information about the activities that can be carried out on beds and shored owned by the province, take a look at the discussion in the chapter on land ownership and use.

i. First Nations Reserves

Whether a First Nation owns the beds and shores of any waterbody or watercourse located within reserve lands is a question of what was included in the reserve lands when the reserve was created. To answer this question, we must look to the legal document that created the reserve to determine if the beds and shores were included in the reserve lands. In some cases, this legal document will be a Treaty itself, as is the case for some reserves under Treaty 7.[29] Alternatively, in many cases it will be an order in council, which is a legal order passed by the federal cabinet.

[29] See "Treaty Texts" (29 August 2013), online: Government of Canada https://www.rcaanc-cirnac.gc.ca/eng/1370373165583/1581292088522.

For recently set aside reserves, the legal documents that create the reserves are typically quite clear about whether the beds and shores were included in reserve lands.[30] However, many of the older documents are less clear, which means that we must engage in an exercise in legal interpretation to figure out if the beds and shores were included in reserve lands. To do this, we must look to two legal tools to guide us: firstly, legal presumptions for who owns the beds and shores and, secondly, evidence of the circumstances in which the reserve was created.[31] In the following sections, we will discuss each of these legal tools in turn.

a. Legal Presumptions of Ownership

The first legal tool we use to decide if the beds and shores were included in reserve lands is the legal presumptions of ownership. In a nutshell, legal presumptions set out a default position, which means an assumption we use as a starting point for deciding whether the beds and shores were included in a grant of land. Legal presumptions can be rebutted on the evidence, which means we can set aside the presumptions if there is evidence showing the presumptions do not reflect what the parties agreed to. However, in the absence of clear evidence of the parties' intentions, we let the legal presumptions settle the matter.

In Canadian law, the legal presumptions we apply to the ownership of beds and shores depend on whether the waters are navigable. In this context, navigable waters are loosely defined as any waters that are in fact navigable.[32] Notably, to be navigable, a river or other watercourse does not need to be navigable for its entire length, and a lake or other waterbody does not need to be navigable for its entire span. [33] Instead, it is enough that the water is, for the most part, navigable.

---

[30] See e.g. *Lubicon Lake Band No 453 Treaty 8 Lands and Benefits Claim Settlement Agreement* (13 November 2018), online: Lubicon Lake Band www.lubiconlakeband.ca/s/LLB-Settlement-Final.pdf.

[31] See Scott Hopley & Susan Ross, "Aboriginal Claims to Water Rights Grounded in the Principle *Ad Medium Filum Aquae*, Riparian Rights and the *Winters* Doctrine" (2009) 19 J Envtl L & Prac 225 at 228.

[32] See *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 53-54; *Re Provincial Fisheries* (1896), 26 SCR 444 at 483, 486-87.

[33] *R v Nikal*, [1996] 1 SCR 1013 at 1050-51.

Turning to the presumptions themselves, for navigable waters, we presume the beds and shores were not included in any grant of land by the crown.[34] This means that, unless there is evidence the government intended to include the beds and shores of navigable waters in a reserve, we presume the beds and shores were not included in reserve lands.[35] This presumption can be linked to the fact that, historically, the navigable waters of Canada were the "aqueous highways" used to travel across the country. Quite simply, the government retained ownership of them to ensure the public right to navigation.[36]

By contrast, for non-navigable waters, we are not concerned about the right to navigation, so we take an opposite approach and presume the beds and shores were included in a grant of land.[37] More precisely, we presume a grant of land next to water includes the bed and shores of that water up to the midpoint of the bed. Practically, this means if a reserve includes the land on one side of a waterbody or watercourse, we presume the reserve includes the bed and shores up to the midpoint. Equally, if a reserve includes the land all around a waterbody or watercourse, we presume the reserve includes the bed and shores up to the midpoint of each side, which means all the bed and shores.

One slight complication with non-navigable waters arises, because the law changed in 1894, when the federal government enacted the *North-west Irrigation Act*.[38] Under this enactment, the federal government ended the presumption that a grant of land includes the beds and shores of non-navigable waters for any grant of land made after the passage of the *Act*.[39] Practically, this reverses the presumption for non-navigable waters, so that, after 1894, we presume a grant of land does not include the beds and shores of non-navigable waters. This is especially important to keep in mind for reserves created under Treaty 8, which was not signed until 1899 and, therefore, after the presumption changed.

---

[34] *Ibid* at 1050; *R v Lewis*, [1996] 1 SCR 921 at 952-53. But see *R v Nikal*, (1993) 80 BCLR (2d) 245 (CA) at para 92.

[35] *R v Lewis*, *supra* note 34 at 950.

[36] *R v Nikal*, *supra* note 33 at 1047-1048. See also *Re Provincial Fisheries*, *supra* note 32.

[37] *The King v Fares*, [1932] SCR 78; *R v Lewis*, *supra* note 34 at 950-953. This rule is sometimes referred to by its Latin name: *ad medium filum aquae*.

[38] *North-west Irrigation Act,* SC 1894, c 30.

[39] *Ibid*, s 5.

b. Evidence of the Circumstances

Once the appropriate legal presumption has been identified, the next step is to decide if the presumption is rebutted by the circumstances. This means the legal presumptions for the ownership of beds and shores can be overturned if there is evidence to show the presumptions do not reflect what was actually intended when the reserves were created.[40] If that happens, the evidence of the circumstances decides whether the beds and shores were included in reserve lands. By contrast, if there is no evidence or the evidence is unclear, the presumptions govern whether the beds and shores were included in reserve lands.

In this context, the evidence of the circumstances means evidence of whether the beds and shores were meant to be included in reserves lands. This evidence could include things like contemporary government policies, as well as any letters or other communications discussing the setting aside of the reserves.[41] This evidence may also include any contemporary surveys of the reserve lands, including the indicated acreage of the reserve lands and whether it includes the beds and shores.[42]

If the legal document that created a reserve is a treaty, it may also be necessary to interpret the words of the treaty using a special set of legal principles for treaty interpretation.[43] Those principles are as follows.

- The treaties are solemn promises exchanged between the government and Indigenous peoples and should be interpreted with this in mind.
- Treaty interpretation must reflect the honour of the crown and the assumption that the government intends to fulfill its promises.
- Any ambiguities in the wording should be resolved in favour of the Indigenous peoples.

[40] *The King v Fares*, *supra* note 37; *R v Lewis*, *supra* note 34 at 950.

[41] See e.g. *R v Lewis*, *supra* note 34 at 939-947; *R v Nikal*, *supra* note 33 at 1029-45.

[42] See *ibid* at 1054.

[43] *R v Badger*, [1996] 1 SCR 771. See also *R v Marshall*, [1999] 3 SCR 456 at 511-13.

- Any parts of the treaty that restrict Indigenous rights should be read as narrowly as the wording allows.[44]

In addition, to interpret a treaty, we must consider the oral discussions behind the written agreement, especially in light of the Indigenous tradition of oral histories.[45] Accordingly, when interpreting a treaty, it is important to look at both the Indigenous oral history of the treaty, as well as any oral promises made by the representatives of the federal government.

When it gets down to brass tacks, in Alberta, no court case has directly interpreted the legal documents that set aside reserves, treaties or otherwise, to determine if they include the beds and shores in reserve lands. Decisions in other provinces suggest the federal government probably did not intend to include the beds and shores in reserve lands, as least for the reserves created in the nineteenth century.[46] However, until the courts weigh in directly, the ownership of any beds and shores on reserve lands in Alberta is an open question for the law to answer.

ii. Metis Settlements

The ownership of the beds and shores within the Metis Settlements is a somewhat simpler question to answer, because the letters patent that granted the land to the Metis Settlements expressly included the ownership of the beds and shores located within the Settlements. This makes the Metis Settlements and, more technically, the Metis Settlements General Council, the owner of the beds and shores within the Metis Settlements.[47]

[44] *R v Badger*, *supra* note 43 at 793-94.

[45] *Ibid* at 798-804.

[46] See *R v Lewis*, *supra* note 34; *R v Nikal*, *supra* note 33. But see Peggy J Blair, "No Middle Ground: *Ad Medium Filum Aquae*, Aboriginal Fishing Rights, and the Supreme Court of Canada's Decisions in *Nikal* and *Lewis*" (2001) 31-3 RGD 515.

[47] See *Metis Settlements Land Registry Regulation*, Alta Reg 361/1991, s 8(1)(a).

iii. Aboriginal Title Claims

An aboriginal title claim is a claim by an Indigenous group to the title of land based on the group's traditional occupation of that land. In this section we will discuss the nature of aboriginal title claims, as well as the possibility of aboriginal title claims to the beds and shores in Alberta, starting with claims made by First Nations and then moving on to the possibility of a Metis title claim.

a. First Nations Title Claims

For First Nations, an aboriginal title claim is rooted in the fact that First Nations had an entitlement to the territories they occupied prior to the arrival of European settlers. That entitlement is referred to as their aboriginal title to the land.[48] In many cases in Canada, aboriginal title was extinguished by the treaties, because the First Nations gave up their aboriginal title in exchange for reserve lands.[49] However, if a First Nation did not give up its aboriginal title under a treaty, that Nation can now bring a claim for the courts to recognize its aboriginal title to its traditional territories.

To make a successful aboriginal title claim, the First Nation must prove it occupied the land in question prior to the British declaration of sovereignty.[50] Additionally, the First Nation must prove that its occupation of the land was exclusive.[51] If the First Nation relies on its present-day occupation of the land as proof of pre-sovereignty occupation, then it must also prove some level of continuity in that occupation.[52]

If a First Nation successfully claims aboriginal title, the Nation gets roughly the same rights to the land as it would have to reserve lands.[53] This means a broad right to use and occupy the land, subject to the limit that the land cannot be transferred or sold to anyone other than the federal

[48] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at 1081-82.

[49] See "Treaty Texts" (29 August 2013), online: Government of Canada https://www.rcaanc-cirnac.gc.ca/eng/1370373165583/1581292088522.

[50] *Delgamuukw v British Columbia, supra* note 48 at 1097-1102.

[51] *Ibid* at 1097, 1104-07.

[52] *Ibid* at 1097, 1102-03.

[53] *Ibid* at 1085. But see *ibid* at 1088-89.

government.[54] As well, aboriginal title is held communally, meaning that it belongs to the entire First Nation rather than any individual member.[55]

In Alberta, the canonical view is that there are no remaining claims for aboriginal title by First Nations, for beds and shores or otherwise.[56] Quite simply, the entire province is covered by the numbered treaties, and, under those treaties, the First Nations agreed to surrender their aboriginal title in exchange for reserve lands.

Increasingly, some lawyers and academics having challenged this view with respect to water, taking the position that the beds and shores in Alberta were not surrendered under the treaties, because the text of the treaties only speaks of surrendering the lands and not the waters.[57] To support this position, these lawyers and academics rely on the evidence of First Nations elders, who have explained that, at the time of the treaties, First Nations did not think they were giving up the waters of their traditional territories, presumably including the lands beneath them.[58]

For the time being, the canonical view is probably a stronger reflection of the law, given that beds and shores are themselves lands, even if they are located underneath water.[59] However, it would be possible for a First Nation to try to change the law by bringing a legal claim for aboriginal title to the beds and shores and arguing the treaties' surrender clauses did not include the beds and shores. In fact, some First Nations have initiated this type of claim—although so far nothing has made it to a final adjudication.[60] If anything does, the result will depend on the arguments of the lawyers and, ultimately, the decision of the courts.

---

[54] *Ibid* at 1081-82.

[55] *Ibid* at 1082-83.

[56] See e.g. "Land claims in Alberta" (2021), online: Government of Alberta https://www.alberta.ca/land-claims-in-alberta.aspx.

[57] See e.g. Monique M Passelac-Ross & Christina M Smith, "Defining Aboriginal Rights to Water in Alberta: Do They Still 'Exist'? How Extensive are They?" (April 2010), online: Canadian Institute of Resources Law at 18-20 https://cirl.ca/sites/default/files/Occasional%20Papers/Occasional%20Paper%20%2329.pdf.

[58] *Ibid* at 19. See also Littlechild, *supra* note 1 at 71-72.

[59] See *Re Provincial Fisheries*, *supra* note 32.

[60] See e.g. *Tsuu T'ina Nation v Alberta (Environment)*, 2010 ABCA 137 at para 15.

b. Metis Title Claims

In addition to aboriginal title claims by First Nations, the courts have acknowledged that Metis peoples could also make a claim for aboriginal title, using a slightly different test to establish a connection to the land.[61]

Specifically, the Supreme Court has set out a test for establishing Metis title, which takes into account the fact that Metis communities and culture took shape after the arrival of Europeans but before the effective imposition of European control.[62] According to this test, to establish Metis title, it is necessary to prove the existence of a historic Metis community that persists in a modern community.[63] As well, there must be proof of an interest in the land in the period after contact with Europeans but before the area came under the effective control of European laws.[64] This interest in the land must be collectively held, and it must be integral to the Metis community and its relationship with the land.[65]

To date, claims of aboriginal title for Metis groups have struggled to establish a historical connection with land sufficient to establish Metis title.[66] Accordingly, there have not been many claims for Metis title in Canada, let alone in Alberta. In theory, it would be possible for a Metis group to try to challenge the existing law to establish a more accessible test; however, that would probably be an uphill battle.[67] Ultimately, the results of such a challenge would depend on the arguments of the lawyers and, in the end, the decision of the courts.

---

[61] See *Manitoba Metis Federation v Canada (AG)*, 2013 SCC 14 at paras 51-59.

[62] *Ibid* at para 53. See also *R v Powley*, [2003] 2 SCR 207 at 217-18.

[63] *Ibid* at 220-23.

[64] *Ibid* at 226-27.

[65] *Manitoba Metis Federation v Canada (AG)*, *supra* note 61 at para 53.

[66] See e.g. *ibid* at para 56.

[67] See *R v Hirsekorn*, 2013 ABCA 242.

III. WATER RIGHTS

In this section, we will discuss Indigenous rights to take and use water. In particular, we will discuss the water rights that come with the ownership of land next to water, as well as the rights that come with the ownership of property above groundwater. Then, we will discuss the possibility of aboriginal rights claims to water, which are legal claims that are grounded in the traditional practices of Indigenous peoples prior to European settlement. Finally, we will discuss the water rights that may be implied by the treaty rights of First Nations, including the right to drinking water and the right to water to support agricultural practices, as well as the right to fish.

As you read this section, keep in mind that, in law, the right to use water is separate from the ownership of beds and shores. This means the law has one set of rules for who owns the land under water and a separate set of rules for who can take and use the water. So, the fact you own the land under water does not necessarily mean you have any right to take and use the water and vice versa. In this section, we will specifically focus on Indigenous rights to take and use water. Conversely, for more information about Indigenous ownership of beds and shores, take a look at the section of this chapter on that subject.

As well, as you review this section, be aware that, if an Indigenous community needs to take and use water but does not have an entitlement under one of the rights discussed in this section, that community would need to apply for a water licence or other authorization from the provincial government under the provincial *Water Act*.[68] For more information about water licences and how to apply for them, take a look at the chapter on water use and flow.

i. Riparian Rights

Riparian rights are water rights that belong to a person who owns property next to a waterbody or watercourse.[69] Specifically, riparian rights entitle a person who owns property next to water to take and use that water for household purposes, as well as some agricultural purposes.[70] As well, traditionally, a riparian owner had the right to take and use the water for other purposes, but only if it was returned to the source substantially unchanged in quantity and quality.

In the following sections, we will discuss the riparian rights to take and use water that might attach to First Nations' reserves and to Metis Settlement lands. Otherwise, for more information riparian rights, including the other rights that come with property next to water, take a look at the chapter on land ownership and use.

a. First Nations Reserves

The content of the riparian rights that might attach to reserve lands is largely an open question of law. Most importantly, the law has yet to directly acknowledge whether First Nations' interest in reserve lands can attract riparian rights, given that First Nations have a unique property interest in reserves.[71] Additionally, even if First Nations' interest in reserve lands can have riparian rights, it is not clear what the content of those riparian rights might be.

---

[68] *Water Act*, RSA 2000, c W-3.

[69] Gerard V La Forest QC, *Water Law in Canada* (Ottawa: Information Canada, 1973) at 200.

[70] *Ibid* at 208.

[71] See *Pasco v CNR* (1985), 69 BCLR 76 (SC).

For the sake of discussion, in the following sections, we will consider what riparian rights on reserve lands might look like, by considering three questions:

1. What rights were included when the reserve was set aside?
2. Were those rights modified by the *North-west Irrigation Act*? and
3. Have those rights been modified by subsequent provincial legislation?

In the sections that follow, we will consider each of these three questions in turn.

Original Rights

To determine the riparian rights that could attach to reserve lands, we must start by asking what rights would have been included when the reserve was set aside. Normally, riparian rights are automatically transferred along with the ownership of a piece of property, so whatever riparian rights were recognized by law at the time a reserve was created would have been automatically set aside along with the reserve lands.[72] Accordingly, we must ask what the law was at the time a reserve was created to figure what riparian rights were set aside along with the reserve lands.

Primarily, the answer to this question will depend on whether a reserve was set aside before or after the federal government passed the *North-west Irrigation Act* in 1894. Prior to 1894, a riparian owner had the right to take water for domestic purposes and for some limited agricultural purposes like watering livestock.[73] A riparian owner also had the right to take and use water for other purposes, so long as the water was returned to the source in substantially the same quality and quantity.

[72] Alastair R Lucas, *Security of Title in Canadian Water Rights* (Calgary: Canadian Institute of Natural Resources Law, 1990) at 6; La Forest, *supra* note 69 at 206.

[73] *Ibid* at 208.

By contrast, after 1894, riparian rights were restricted by the *North-west Irrigation Act*. Specifically, under the *North-west Irrigation Act*, the federal government declared itself the owner of all rights to take and use water and prohibited anyone from taking and using water without first obtaining a licence from the government.[74] The only exception was the riparian right to take and use water for household and limited agricultural purposes, which meant this was the only riparian right to take and use water after 1894.[75]

Federal Modification

To determine the riparian rights that could attach to reserve lands, the second question we must ask is whether the *North-west Irrigation Act* modified the riparian rights on reserves that were set aside prior to 1894.

Generally speaking, prior to the passage of the *Constitution Act, 1982*[76], the federal government was able to extinguish Indigenous rights by passing legislation to that effect.[77] However, to do so, the government needed to show a clear and plain intention to extinguish the right.[78] This means the legislation needed to expressly extinguish the right, or the extinguishment needed to be a direct consequence of the legislation. By contrast, extinguishing the right could not be a mere possibility under the legislative scheme.

On its face, the *North-west Irrigation Act* seems to have a sufficiently clear and plain intention to limit riparian rights: the *Act* gave all rights to take and use water to the federal government, except the riparian right to take and use water for domestic and limited agricultural purposes. By necessary implication, this would have removed the riparian right to use water for any other purposes from reserves created prior to 1894.

---

[74] *North-west Irrigation Act*, *supra* note 38, s 4.

[75] Hopley & Ross, supra note 31 at 243-45; David R Percy, "Water Rights in Alberta" (1977) 15 Alta L Rev 142 at 157. Note that, technically, the exception for domestic uses was added by amendment in 1985 (see *North-west Irrigation Act,* SC 1895, c 33).

[76] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[77] *R v Sparrow*, [1990] 1 SCR 1075 at 1097-99. See also *Osoyoos Indian Band v Oliver (Town)*, [2001] 3 SCR 746 at 769-70.

[78] *Ibid*.

Notably, some academics argue the *North-west Irrigation Act* did not affect Indigenous riparian rights, because there is no clear and plain intent specifically regarding Indigenous riparian rights.[79] This position could certainly be raised in court, and whether it succeeds would be a question for the lawyers to argue and, ultimately, the courts to decide.

Provincial Modification

The final question we need to answer to determine the riparian rights that could attach to reserve lands is whether provincial laws have modified those rights. Unfortunately, there is some uncertainty in the law about whether the province is able to regulate First Nations rights to reserve lands.[80] Since riparian rights would be rights that attach to reserve lands, in theory at least, they are caught up in this uncertainty.

Additionally, even if the province is able to regulate riparian rights on reserve lands, the province is only able to regulate Indigenous rights if doing so is justified in the broader public interest and consistent with the government's duties to Indigenous peoples.[81] Whether provincial water law is justified in this way is an open question for the law to answer and, at least currently, it is difficult to say what the courts would do. Generally speaking, for more information about how the courts decide if government regulation is justified, take a look at the section of this chapter on enforcement.

Practically, whether the province can regulate riparian rights on reserves impacts the volume of water First Nations would be entitled to take and the priority of their right to take water compared to other people's rights to take water. Specifically, if provincial legislation applies, First Nations would only be allowed to take water according to the volume limits set out in the *Water Act*.[82] Additionally, they

---

[79] See e.g. Passelac-Ross & Smith, *supra* note 57 at 25, 32.

[80] See *Peter Ballantyne Cree Nation v Canada (AG)*, 2016 SKCA 124; *McCaleb v Rose*, 2017 BCCA 318. See also HW Roger Townshend, "What Changes Did *Grassy Narrows First Nation* Make to Federalism and Other Doctrines?" (2017) 95-2 Can Bar Rev 459; Nigel Bankes & Jennifer Koshan, "Tsilhqot'in: What Happened to the Second Half of Section 91(24) of the Constitution Act, 1867?" (7 July 2014), online: ABlawg https://ablawg.ca/2014/07/07/tsilhqotin-what-happened-to-the-second-half-of-section-9124-of-the-constitution-act-1867/.

[81] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 139; *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 at para 53.

[82] See *Water Act*, *supra* note 68, s 1(1)(x), 19, 21. See also *Water (Ministerial) Regulation*, Alta Reg 205/1998, s 8.

would be subject to the priority system in the *Water Act*, which puts riparian rights to take water for domestic uses at the front of the line, but riparian rights to take water for limited agricultural uses at the back of the line, unless the First Nation obtained a priority registration when the *Water Act* was enacted.[83] For more information about how the priority system works, take a look at the chapter on water use and flow.

On the other hand, if provincial legislation does not apply to riparian rights on reserves, First Nations' riparian rights would not be subject to any maximum volume limits—although, First Nations would still only be able to take water for domestic and limited agricultural purposes, assuming the *North-west Irrigation Act* extinguished any other rights to take and use water. Likewise, if provincial legislation does not apply, First Nations' riparian rights would have priority over all other water rights, except other riparian rights.[84] Practically, this would only change the priority of First Nations' rights to take water for limited agricultural uses, which would go to the front of the line, along with the right to take water for domestic purposes.

b. Metis Settlements

The riparian rights attached to Metis Settlements lands do not pose quite the same issues of legal interpretation as reserve lands do, because the Metis Settlements were created by the provincial government and, accordingly, are subject to provincial legislation.[85] This means the current *Water Act* applies to the Metis Settlements and entitles the Settlements to take limited amounts of water for domestic and some agricultural purposes, insofar as the Settlements include property next to water.[86]

Generally speaking, for more information about riparian rights under the *Water Act*, take a look at the discussion in the chapter on water use and flow.

[83] If these provisions apply to First Nations' riparian rights, there may be some question of whether the federal government had a fiduciary obligation to register those rights and obtain a priority registration.

[84] See *North-west Irrigation Act*, *supra* note 38, s 9.

[85] See *Gift Lake Métis Settlement v Alberta (Aboriginal Relations)*, 2019 ABCA 134.

[86] See *Water Act*, *supra* note 68, s 1(1)(x), 19, 21. But see *Water (Ministerial) Regulation*, *supra* note 82, s 8.

ii. Groundwater Rights

Groundwater rights are rights to take and use groundwater that automatically belong to the owner of a piece of property above the groundwater.[87] In the following sections, we will discuss the groundwater rights that might attach to reserve lands and Metis Settlements, with a focus on the extent to which provincial legislation is able to effectively regulate the exercise of these rights.

a. First Nations Reserves

The content of the groundwater rights that might attach to reserve lands is largely an open question of law. Most importantly, the law has yet to directly acknowledge whether First Nations' interests in reserve lands come with groundwater rights, given that First Nations have a unique property interest in reserves.[88] Additionally, even if First Nations can have groundwater rights, it is not clear what the content of those groundwater rights might be.

If First Nations do have groundwater rights, the content of those rights would depend on whether the provincial government is able to regulate groundwater rights on reserves. Unfortunately, there is some uncertainty in the law about whether the province is able to regulate First Nations' rights to reserve lands.[89] Since groundwater rights would be rights that attach to reserve lands, in theory at least, they are caught up in this uncertainty.

Additionally, even if the province is able to regulate groundwater rights that attach to reserve lands, the province is only able to regulate Indigenous rights if doing so is justified in the broader public interest and consistent with the government's duties to Indigenous peoples.[90] Whether provincial water

---

[87] David R Percy, *The Regulation of Groundwater in Alberta* (Edmonton: Environmental Law Centre, 1987) at 1-2.

[88] See *Halalt First Nation v British Columbia (Environment)*, 2011 BCSC 945 at paras 559-562, rev'd on other grounds 2012 BCCA 472.

[89] See *Peter Ballantyne Cree Nation v Canada (AG)*, *supra* note 80; *McCaleb v Rose*, *supra* note 80. See also Townshend, *supra* note 80; Nigel Bankes & Jennifer Koshan, "Tsilhqot'in: What Happened to the Second Half of Section 91(24) of the Constitution Act, 1867?" (7 July 2014), online: ABlawg https://ablawg.ca/2014/07/07/tsilhqotin-what-happened-to-the-second-half-of-section-9124-of-the-constitution-act-1867/

[90] *Tsilhqot'in Nation v British Columbia*, *supra* note 81 at para 139; *Grassy Narrows First Nation v Ontario (Natural Resources)*, *supra* note 81 at para 53.

law is justified in this way is also an open question for the law to answer and, at least currently, it is difficult to say what the courts would do. Generally speaking, for more information about how the courts decide if government regulation is justified, take a look at the section of this chapter on enforcement.

Practically, whether the provincial government can regulate groundwater rights on reserves may be an important question to answer, because if the provincial *Water Act* does not apply, First Nations would only be subject to the traditional rules around groundwater, which let a person with groundwater rights take an unlimited amount of water, with no regard to the rights of any other person to take water from the same source.[91] Quite simply, this could significantly affect the rights of other groundwater users in Alberta.

On the other hand, if the *Water Act* applies to groundwater rights on reserves, First Nations are only entitled to take a limited amount of water for household purposes.[92] As well, in some circumstances, they would be entitled to take a limited amount of groundwater for raising animals and applying pesticides.[93] Generally speaking, for more information about how the *Water Act* regulates groundwater rights, take a look at the chapter on water use and flow.

[91] Percy, *supra* note 87 at 1-2. Note that there is an exception for groundwater that runs in a defined stream, which falls under the same legal rules as riparian rights (see *ibid* at 2).

[92] *Water Act*, *supra* note 68, ss 1(1)(x), 21(2). But see *Water (Ministerial) Regulation*, *supra* note 82, s 8.

[93] *Ibid*, s 19.

b. Metis Settlements

The Metis Settlements were created by provincial law, which means they are subject to provincial legislation.[94] Accordingly, any Metis Settlements above groundwater have the rights to take and use that water set out in the *Water Act*, meaning the right to take a limited amount of water for household purposes and, in some cases, the right to take a limited amount of water for raising animals and applying crops.[95] Notably, these are the same rights that would belong to any other person who owns property above groundwater in Alberta.

Generally speaking, for more detailed information about groundwater rights to take and use water, take a look at the chapter on land ownership and use, as well as the chapter on water use and flow.

iii. Aboriginal Rights to Water

An aboriginal rights claim is a legal claim by an Indigenous group to a right to engage in traditional activities and cultural practices and, sometimes, the right to occupy land to carry out these activities and practices. In law, aboriginal rights are a recognition of the fact that Indigenous peoples were here prior to European settlement, and they had their own established communities and distinctive cultural practices.[96]

In this section we will discuss the nature of aboriginal rights claims, as well as the possibility of aboriginal rights claims to water, starting with claims made by First Nations and then moving on to the possibility of a Metis rights claim to water.

[94] See *Gift Lake Métis Settlement v Alberta (Aboriginal Relations)*, *supra* note 85.

[95] *Water Act*, *supra* note 68, ss 1(1)(x), 19, 21(2). But see *Water (Ministerial) Regulation*, *supra* note 82, s 8.

[96] *R v Van der Peet*, [1996] 2 SCR 507 at 538-39.

a. First Nations' Rights

To the extent that water played a significant role in traditional activities and cultural practices, First Nations may be able to claim aboriginal rights to water to support domestic, commercial, and ceremonial practices.

In a case called *Van der Peet*, the Supreme Court of Canada set out the test for the law to recognize an aboriginal right claimed by a First Nation. According to the Court, for an activity to be an aboriginal right, it must be an element of a practice, custom, or tradition that is integral to the distinctive culture of the First Nation claiming the right.[97] To decide if an activity qualifies as an aboriginal right, the courts will first consider the nature of the right being claimed.[98] Then, the courts will consider if the practice, custom, or tradition was of central significance to the First Nation in question.[99] It will also consider if the current practices have continuity with those that took place prior to the arrival of Europeans, although continuity does not require the practices to be exactly the same as they were pre-contact.[100]

With respect to aboriginal rights claims to water, the canonical view is that there are no remaining First Nations' rights claims in Alberta, insofar as those rights relate to the use of lands in Alberta.[101] Quite simply, the argument is that the entire province is covered by the numbered treaties and, under those treaties, the First Nations agreed to surrender their aboriginal rights to the lands in their traditional territories in exchange for reserve lands and the other benefits promised by the

[97] *Ibid* at 548-50.

[98] *Ibid* at 551-53.

[99] *Ibid* at 553-54.

[100] *Ibid* at 554-57.

[101] See *Ontario (AG) v Bear Island Foundation*, [1991] 2 SCR 570; John Helis, "Achieving Certainty in Treaties with Indigenous Peoples: Small Steps Towards Adopting Elements of Recognition" (2019) 28-2 Const Forum Const 1.

treaties.[102] Normally, the law construes water rights as rights connected to land, which means that any aboriginal rights to water were surrendered under the numbered treaties.[103]

Increasingly, some lawyers and academics having challenged this view, taking the position that aboriginal water rights in Alberta were not surrendered under the treaties, because the text of the treaties only speaks of surrendering the lands and not the waters.[104] To support this position, these lawyers and academics rely on the evidence of First Nations elders, who have explained that at the time of the treaties, First Nations did not think they were giving up the waters of their traditional territories and the rights to use those waters.

For the time being, the canonical position is probably a stronger reflection of the law. However, it would be possible for a First Nation to try to change the law by making a claim to water rights within its traditional territories. In fact, some First Nations have initiated these claims—although so far nothing has made it to a final adjudication.[105] Ultimately, if anything does, the result will depend on the arguments of the lawyers and, in the end, the decision of the courts.

[102] See "Treaty Texts" (29 August 2013), online: Government of Canada https://www.rcaanc-cirnac.gc.ca/eng/1370373165583/1581292088522.

[103] See David R Percy, "Seventy-Five Years of Alberta Water Law: Maturity, Demise & Rebirth" (1996) 35-1 Alta L Rev 221. See also *R v Van det Peet*, *supra* note 96 at 550-51.

[104] See e.g. Passelac-Ross & Smith *supra* note 57 at 18-20; Littlechild, *supra* note 1 at 64-68, 71-72. See also David Laidlaw, "Water Rights and Water Stewardship: What About Aboriginal Peoples?" (8 July 2010), online: ABlawg https://ablawg.ca/2010/07/08/water-rights-and-water-stewardship-what-about-aboriginal-peoples/.

[105] See e.g. *Tsuu T'ina Nation v Alberta (Environment)*, *supra* note 60 at para 15.

b. Metis Rights

In addition to aboriginal rights claims by First Nations, the courts have acknowledged that Metis peoples can also make claims for aboriginal rights, using a slightly different test to establish a historical connection to the right in question.

In particular, in a case called *Powley,* the Supreme Court set out a test for establishing a Metis rights claim, which takes into account the fact that Metis communities and culture took shape after the arrival of Europeans but before the effective imposition of European control.[106] The *Powley* test has eight steps for determining if there is a Metis right.[107]

1. Characterize the Metis right being claimed.
2. Identify the historic Metis community to which the claimed right belongs. This community must have shared customs, traditions, and a collective identity.
3. Confirm the historic community persists in an existing community.
4. Verify that the person asserting the right is a member of the existing community based on self-identification, an ancestral connection, and community acceptance.
5. Identify the time period after the historic Metis community arose, but before it came under the effective control of European laws and customs.
6. Confirm the claimed right was integral to the historic Metis community's distinctive culture during the identified time period.
7. Confirm there is continuity between the historic practice of the claimed right and the contemporary practice.
8. Ensure the government did not at any point extinguish the right.

To date, there have not been any successful claims for a Metis right to water, although there is also no reason to think this type of claim could not be made. Practically, this means that whether the law will recognize Metis rights to water depends on whether any Metis group asserts such a right, as well as the arguments put forward by lawyers on the subject and, ultimately, the decision of the courts.

[106] *R v Powley*, *supra* note 62 at 217-19.

[107] *Ibid* at 219-231.

iv. Implied Treaty Rights to Water

An increasing number of academics and lawyers have started to argue that in addition to any riparian or groundwater rights that come with reserve lands, the First Nations in Alberta also have implied treaty rights to water, insofar as such rights are necessary to enable them to exercise their other rights under treaty.[108] In this section, we will discuss some of the different forms of this argument, specifically dealing with an implied treaty right to drinking water, an implied treaty right to water to support agriculture, and an implied treaty right to water to support the right to fish.

As you read this section, keep in mind that this discussion only applies to First Nations and not to the Metis Settlements or other Metis organizations, given that, in Alberta, only First Nations have entered into treaties with the government.

a. Drinking Water

Some academics have argued that First Nations have a right to drinking water that is implied under the treaties.[109] This argument is based on the legal principle that treaties grant all the rights listed in the treaties, as well as any additional rights that would be necessary to meaningfully exercise the rights listed in the treaties.[110] Quite simply, the treaties were established to give First Nations a way of life that could be sustained on reserve lands. This must, as a matter of implication, include the right to drinking water necessary to sustain that way of life.

The courts have not yet considered whether there is an implied right to drinking water under the treaties, but it is nevertheless open to a First Nation to try to assert these rights in court. This is something to watch for, especially in areas of southern Alberta, where there is a limited amount of water available for use.

---

[108] See e.g. Passelac-Ross & Smith, *supra* note 57 at 21-22; Littlechild, *supra* note 1 at 77-78. See also David Laidlaw, "Water Rights and Water Stewardship: What About Aboriginal Peoples?" (8 July 2010), online: ABlawg https://ablawg.ca/2010/07/08/water-rights-and-water-stewardship-what-about-aboriginal-peoples/.

[109] *Ibid*.

[110] *R v Sundown*, [1999] 1 SCR 393 at 408-10; *Simon v The Queen*, [1985] 2 SCR 387 at 403.

That said, even if the courts were to recognize an implied treaty right to drinking water, keep in mind that the provincial government could limit that right if doing so is both in the public interest and consistent with the government's duties to Indigenous peoples.[111] This means that even if there is an implied treaty right to drinking water, the province may be able to limit that right to effectively allocate water in situations where water is scarce.[112] For more information about when an Indigenous right can be limited, take a look at the section of this chapter on enforcement.

b. Water to Support Agriculture

Some academics have argued that First Nations have an implied treaty right to water to support agricultural activities.[113] This argument is based on the legal principle that treaties grant all the rights listed in the treaties, as well as any additional rights that would be necessary to meaningfully exercise the rights listed in the treaties.[114]

In Alberta, each of the three main treaties includes promises that the government would provide First Nations with tools and supplies to support agricultural practices.[115]

- Treaty 6 promises the tools for agriculture on a per family basis, as well as some cattle, seeds, and additional equipment for the First Nation as a whole.
- Treaty 7 promises cattle on a per family basis and a bull for the First Nation as a whole. Alternatively, a First Nation could receive tools and other supplies for agriculture on a per family basis, in exchange for receiving fewer cattle.

[111] *Tsilhqot'in Nation v British Columbia*, *supra* note 81 at para 139; *Grassy Narrows First Nation v Ontario (Natural Resources)*, *supra* note 81 at para 53.

[112] See *R v Gladstone*, [1996] 2 SCR 723 at 766-69.

[113] See e.g. Passelac-Ross & Smith, *supra* note 57 at 20. See also David Laidlaw, "Water Rights and Water Stewardship: What About Aboriginal Peoples?" (8 July 2010), online: ABlawg https://ablawg.ca/2010/07/08/water-rights-and-water-stewardship-what-about-aboriginal-peoples/.

[114] *R v Sundown*, *supra* note 110 at 408-10; *R v Simon*, *supra* note 110 at 403.

[115] See "Treaty Texts" (29 August 2013), online: Government of Canada https://www.rcaanc-cirnac.gc.ca/eng/1370373165583/1581292088522.

- Treaty 8 promises tools and other supplies for agriculture, as well as one cow per family and one bull per First Nation. Alternatively, each family could choose to receive additional cattle instead of agricultural supplies.

As a matter of implication, the argument is that the treaties must have included the right to use water insofar as it is necessary to support the agricultural practices provided for in the treaties.

The courts have not yet considered whether there is an implied treaty right to water to support agricultural practices, but it is nevertheless open to a First Nation to try to assert this right in court. This is something to watch for, especially in areas of southern Alberta, where there is a limited amount of water available for use.

That said, even if there is an implied treaty right to water for agricultural purposes, the provincial government could limit that right if doing so is both in the public interest and consistent with the government's duties to Indigenous peoples.[116] This means that even if there is an implied treaty right to water for agricultural purposes, the province may be able to limit that right to effectively allocate water in situations where water is scarce.[117] The circumstances when an Indigenous right can be limited are discussed in more detail in the section of this chapter on enforcement.

[116] *Tsilhqot'in Nation v British Columbia*, *supra* note 81 at para 139; *Grassy Narrows First Nation v Ontario (Natural Resources)*, *supra* note 81 at para 53.

[117] See *R v Gladstone*, *supra* note 112 at 766-69.

c. Water to Support Fishing

Some academics have argued that First Nations have an implied treaty right to water to support their treaty right to fish or, put otherwise, an implied treaty right to an adequate amount of water to support fish and their aquatic habitat.[118] This argument is based on the legal principle that treaties grant all the rights listed in the treaties, as well as any additional rights that would be necessary to meaningfully exercise the rights listed in the treaties.[119]

In Alberta, two of the numbered treaties—namely, Treaty 6 and Treaty 8—include a right to fish on the traditional territories that were surrendered under those treaties.[120] In 1930, these rights were modified by the *Natural Resource Transfer Agreement*, which was an agreement between the provincial and federal governments to transfer the control of natural resources in Alberta to the provincial government.[121]

Specifically, after the *Natural Resource Transfer Agreement*, the First Nations under Treaty 6 and Treaty 8 had a treaty right to fish on all unoccupied provincial crown lands, but only for food-related purposes.[122] The *Natural Resource Transfer Agreement* may have also extended the right to fish for food to First Nations under Treaty 7, who otherwise did not have a treaty right to fish.[123] However, this issue remains unclear in law and, accordingly, would need to be determined by the courts.

On the whole, the courts have yet to consider if there is an implied treaty right to water to support the treaty right to fish, but it is nevertheless open to a First Nation to try to assert this right in

---

[118] Littlechild, *supra* note 1 at 77-78; Passelac-Ross & Smith, *supra* note 57 at 21-22. See also David Laidlaw, "Water Rights and Water Stewardship: What About Aboriginal Peoples?" (8 July 2010), online: ABlawg https://ablawg.ca/2010/07/08/water-rights-and-water-stewardship-what-about-aboriginal-peoples/.

[119] *R v Sundown*, *supra* note 110 at 408-10; *R v Simon*, *supra* note 110 at 403.

[120] See "Treaty Texts" (29 August 2013), online: Government of Canada https://www.rcaanc-cirnac.gc.ca/eng/1370373165583/1581292088522.

[121] See *An Act respecting the Transfer of the Natural Resources of Alberta*, SA 1930, c 21.

[122] *Ibid*; *R v Horseman*, [1990] 1 SCR 901 at 933.

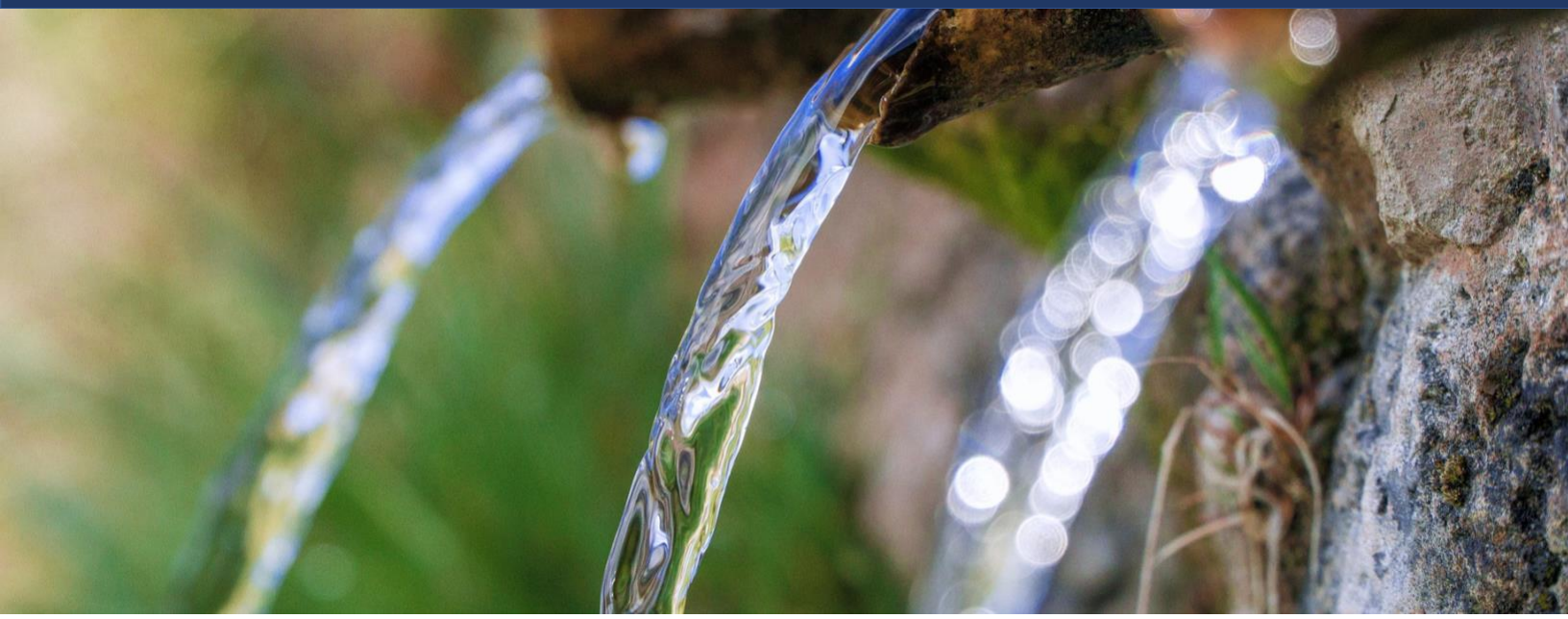
[123] See *Tsuu T'ina Nation v Alberta (Environment)*, *supra* note 60 at paras 60, 74.

court. This is something to watch for, especially in parts of Alberta where there may not be adequate levels of water left in watercourses and waterbodies to support local fish populations.

As well, even if there is an implied treaty right to water to support the treaty right to fish, take note that the provincial government could limit that right if doing so is both in the public interest and consistent with the government's duties to Indigenous peoples.[124] This means that even if there is an implied treaty right to water to support the right to fish, the province may be able to limit that right to effectively allocate water in situations where it is scarce.[125] For more information about when an Indigenous right can be limited, take a look at the section of this chapter on enforcement.

[124] *Tsilhqot'in Nation v British Columbia*, *supra* note 81 at para 139; *Grassy Narrows First Nation v Ontario (Natural Resources)*, *supra* note 81 at para 53.

[125] See *R v Gladstone*, *supra* note 112 at 766-69.



IV. WATER QUALITY

In this section, we will discuss water quality and how it is dealt with on First Nations' reserves and Metis Settlements. The section will be divided into two parts, with the first part addressing how water quality is regulated from an environmental perspective and the second part discussing the regulations that manage water for our everyday uses, including drinking water, sewage, and storm drainage systems.

i. Managing Water Pollution

From an environmental perspective, the water quality on reserves and Metis Settlements is largely dealt with through the same legislation that applies to the other communities in Alberta, albeit with a few additional complications.

In this section, we will discuss how water pollution is regulated in Indigenous communities, by giving an overview of the federal and provincial legislation that applies in Indigenous communities, as well as the ability of Band Councils and Metis Settlement Councils to pass bylaws with additional water quality protections. To do this, we will start by addressing the law that applies to First Nations' reserves before turning to a discussion of the law as it applies to the Metis Settlements.

a. First Nations' Reserves

Reserve lands are administered by the federal government, which means they are subject to general federal legislation dealing with water pollution. This includes federal legislation that deals with:

- Environmental impact assessments;[126] and
- Managing substance releases into water.[127]

For more information about each of these regulatory schemes, take a look at the chapter on water quality.

With respect to provincial legislation, the longstanding rule was that the provincial law dealing with water pollution did not apply on reserves. However, in 2014, the Supreme Court released two major decisions that opened up the possibility provincial law could apply on reserves but left the exact state of the law unclear.[128] Practically, it can be said that provincial legislation is not currently being applied to water pollution on reserve lands. However, be aware that this could change, depending on the adjudication of future court cases on this issue.

At the local level, individual First Nations can pass bylaws dealing with issues related to water pollution, so long as those bylaws are not inconsistent with the *Indian Act* or any of the regulations passed under it.[129] Notably, Band Councils can pass bylaws dealing with zoning on reserve lands, which includes the ability to prohibit constructing any building or carrying on any business or trade in a given zone.[130] A Band Council also has the power to pass bylaws regulating the use of public wells, cisterns, reservoirs, and other water supplies.[131]

---

[126] *Impact Assessment Act*, SC 2019, c 28, s 1.

[127] *Canadian Environmental Protection Act, 1999*, SC 1999, c 33; *Fisheries Act*, RSC 1985, c F-14; *Migratory Birds Convention Act, 1994*, SC 1994, c 22.

[128] *Tsilhqot'in Nation v British Columbia*, *supra* note 81; *Grassy Narrows First Nation v Ontario (Natural Resources)*, *supra* note 81. See also *Peter Ballantyne Cree Nation v Canada (AG)*, *supra* note 80; *McCaleb v Rose*, *supra* note 80; Townshend, *supra* note 80; Nigel Bankes & Jennifer Koshan, "Tsilhqot'in: What Happened to the Second Half of Section 91(24) of the Constitution Act, 1867?" (7 July 2014), online: ABlawg https://ablawg.ca/2014/07/07/tsilhqotin-what-happened-to-the-second-half-of-section-9124-of-the-constitution-act-1867/.

[129] *Indian Act*, *supra* note 9, s 81.

[130] *Ibid*, s 81(1)(g).

[131] *Ibid*, s 81(1)(l).

Additionally, if a First Nation has entered into a land management agreement with the federal government, that First Nation can pass environmental laws dealing with substance releases and other water quality protections.[132] The First Nation is also able to develop an environmental assessment regime for projects on the First Nation's reserve lands.[133] For more information about land management agreements, take a look at the section of this chapter on Indigenous communities in Alberta.

b. Metis Settlements

The Metis Settlements were created under provincial law, which means they are subject to provincial legislation that deals with water pollution.[134] This includes the provincial legislative schemes dealing with:

- Regional land-use planning;[135]
- Water management and planning;[136]
- Approvals for projects that are likely to affect water quality;[137]
- Environmental assessments for projects that are likely to affect water quality;[138] and
- Substance releases into water.[139]

For more information about each of these regulatory schemes, take a look at the chapter on water quality.

[132] "Framework Agreement", online: First Nations Land Management Resource Centre https://labrc.com/framework-agreement/. See also *First Nations Land Management Act*, *supra* note 13.

[133] *Ibid*.

[134] See *Gift Lake Métis Settlement v Alberta (Aboriginal Relations)*, *supra* note 85.

[135] *Alberta Land Stewardship Act*, SA 2009, c A-26.8.

[136] See *Water Act*, *supra* note 68.

[137] See *Environmental Protection and Enhancement Act*, RSA 2000, c E-12.

[138] *Ibid*.

[139] *Ibid*.

Additionally, to the extent that federal legislation governing water quality applies to provincial lands, it also applies to the Metis Settlements. This means that the Metis Settlements are also subject to federal legislative schemes governing water pollution, including:

- Federal-provincial agreements on water management;[140]
- Substance releases into water;[141] and
- Environmental impact assessments.[142]

For more information about each of these regulatory schemes, take a look at the chapter on water quality.

As well, it should be mentioned that the Supreme Court of Canada recently decided the federal government has the power to pass legislation specifically dealing with Metis peoples.[143] This is a relatively new development, so it is not yet clear the extent to which the federal government could use this power to legislate the Metis Settlements, let alone water quality issues affecting the Settlements.[144] Accordingly, this is something to watch for as the law develops.

Finally, at the level of local authorities, the Metis Settlements are governed by the *Metis Settlements Act*, which gives each Settlement Council the power to pass bylaws, including some powers to pass bylaws dealing with water quality.[145] This includes the ability to:

- Regulate the use of wells, springs, and other sources of water in the Settlement; and
- Prevent the contamination of any water in the Settlement area.[146]

---

[140] See *Canada Water Act*, RSC 1985, c C-11.

[141] *Canadian Environmental Protection Act, 1999*, *supra* note 127; *Fisheries Act*, *supra* note 127; *Migratory Birds Convention Act, 1994*, *supra* note 127.

[142] See *Impact Assessment Act*, *supra* note 126.

[143] *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12.

[144] See *Gift Lake Métis Settlement v Alberta (Aboriginal Relations)*, *supra* note 85.

[145] *Metis Settlements Act*, *supra* note 21, s 51.

[146] *Ibid*, Schedule 1.

In addition, Settlement Councils are able to pass bylaws dealing with water quality issues through some of their more general powers, including the ability to pass bylaws to:

- Establish a general plan for land use and development;
- Regulate the use and development of land;
- Regulate the disposal of waste;
- Regulate the activities and equipment allowed in parks or recreation areas; and
- Regulate business, industries, and activities carried on in the Settlement area.[147]

Generally speaking, for more information about how the Metis Settlements are governed, take a look at the section of this chapter on Indigenous communities in Alberta.

ii. Drinking Water, Drainage, and Sewage Systems

In this section, we will discuss the regulatory systems that govern drinking water, sewage, and storm drainage systems on reserves and Metis Settlements. To do so, we will start by discussing how these systems apply on reserves, before addressing the law as it applies to the Metis Settlements.

a. First Nations Reserves

Under the *Constitution Act, 1867*, the federal government has the power to pass legislation dealing with reserve lands, including water systems on reserves.[148] In 2013, the federal government used this power to pass a piece of legislation called the *Safe Drinking Water for First Nations Act*[149], which allows the federal government to make regulations governing drinking water and wastewater on reserves, including:

[147] *Ibid*.

[148] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, s 91(24).

[149] *Safe Drinking Water for First Nations Act*, SC 2013, c 21.

- Rules for protecting drinking water sources from contamination;
- Standards for the design, construction, and operation of drinking water systems;
- Standards for the design, construction, and operation of wastewater systems;
- Provisions for the collection and treatment of wastewater;
- Requirements to test and report on drinking water quality; and
- Emergency measures to respond to drinking water quality issues.[150]

So far, the federal government has not passed any regulations under the *Safe Drinking Water for First Nations Act*, which means there are not yet any binding legal standards in place.

Despite the lack of binding standards, the federal government has developed informal water quality standards that apply to water systems on reserves. Specifically, the federal government has developed protocols for the design, construction, and operation of drinking water and wastewater systems on reserves.[151] Additionally, the federal government has developed guidelines for creating plans to maintain water systems, to protect water sources, and to respond to emergencies.[152] Notably, the difference between binding and non-binding standards is that there is no direct enforcement mechanism for non-binding standards.

Practically, the water systems on reserves are operated through a joint effort between the federal government and the Band Council of each reserve. Specifically, the federal government provides funding for on reserve water systems, and Band Councils are responsible for planning and developing water facilities and running day-to-day operations, with advice and training from the federal government.[153]

---

[150] *Ibid*, s 4.

[151] "Protocols and guidelines for water systems" (9 June 2017), online: Government of Canada https://www.sac-isc.gc.ca/eng/1100100034988/1533665779641.

[152] *Ibid*.

[153] "Roles and responsibilities" (2 March 2021), online: Government of Canada https://www.sac-isc.gc.ca/eng/1314034319353/1533665196191. See also "Water and Wastewater Policy and Level of Services Standards (Corporate Manual System)" (1 August 2011), online: Government of Canada https://www.sac-isc.gc.ca/eng/1312228309105/1533729544122.

Until recently, provincial legislation dealing with water systems did not apply on reserves. However, in 2014, the Supreme Court released two decisions that opened up the possibility of provincial legislation applying to reserve lands.[154] So far, the law is still a little murky, and, at least from a practical perspective, provincial law around water systems is not being applied on reserves.[155] However, be aware that this could change, depending on the adjudication of future court cases on this issue.

Finally, at the local level, Band Councils can pass bylaws relating to water systems on reserves, so long as these bylaws do not conflict with the *Indian Act* or any of the regulations passed under it.[156] Specifically, a Band Council has the power to pass bylaws:

- Providing for the health of residents on reserve and preventing the spread of contagious and infectious diseases;
- Enabling the construction and maintenance of watercourses, ditches, and other local works; and
- Enabling the construction and regulation of public wells, cisterns, reservoirs, and other water supplies.[157]

Notably, in 2011, the federal government assessed the state of water systems on reserves across the country. The information relating to Alberta is available on the federal government's website.[158] The Government of Alberta has still played a role in drinking water on reserve, by working with other levels of government to have tie-ins to regional drinking water systems.[159]

---

[154] *Tsilhqot'in Nation v British Columbia*, *supra* note 81; *Grassy Narrows First Nation v Ontario (Natural Resources)*, *supra* note 81. See also Townshend, *supra* note 80; Nigel Bankes & Jennifer Koshan, "Tsilhqot'in: What Happened to the Second Half of Section 91(24) of the Constitution Act, 1867?" (7 July 2014), online: ABlawg https://ablawg.ca/2014/07/07/tsilhqotin-what-happened-to-the-second-half-of-section-9124-of-the-constitution-act-1867/.

[155] See *Peter Ballantyne Cree Nation v Canada (AG)*, *supra* note 80; *McCaleb v Rose*, *supra* note 80.

[156] *Indian Act*, *supra* note 9, s 81.

[157] *Ibid*, s 81(1).

[158] "National Assessment of First Nations Water and Wastewater Systems – Alberta Regional Roll-Up Report" (8 September 2011), online: Government of Canada https://www.sac-isc.gc.ca/eng/1315502688073/1533826927190.

[159] See Simran Chattha "Gov't of Alberta Funds Project to Deliver Clean Drinking Water in 14 Communities", Water Canada, March 19, 2019 online: Water Canada https://www.watercanada.net/govt-of-alberta-funds-projects-to-deliver-clean-drinking-water-in-14-communities/

b. Metis Settlements

The Metis Settlements were created by the provincial government, which means they are subject to provincial legislation.[160] This includes the drinking water standards established under the *Environmental Protection and Enhancement Act* and the *Public Health Act*[161], both of which are discussed in detail in the chapter on water quality.

Additionally, under provincial law, the Metis Settlements are subject to the provincial standards for the design, construction, and operation of sewage and storm drainage systems, which are set out in the *Wastewater and Storm Drainage Regulation*[162], the *Wastewater and Storm Drainage (Ministerial) Regulation*[163], and the *Private Sewage Disposal Systems Regulation*[164]. Further information about these regulations can be found in the chapter on water quality.

As well, under provincial law, the Metis Settlements are subject to the approvals process under the *Water Act*, which requires a government approval for any activity that changes the flow of water in Alberta. For more information about *Water Act* approvals, take a look at the chapter on water use and flow.

At the federal level, the Supreme Court of Canada recently decided the federal government has the power to pass legislation specifically dealing with Metis peoples.[165] This is a relatively new development, so it is not yet clear the extent to which the federal government could use this power to legislate the Metis Settlements, let alone drinking water, storm drainage, and sewage systems in the Settlements.[166] Accordingly, this is something to watch for as the law develops.

---

[160] See *Gift Lake Métis Settlement v Alberta (Aboriginal Relations)*, *supra* note 85.

[161] *Public Health Act*, RSA 2000, c P-37.

[162] *Wastewater and Storm Drainage Regulation*, Alta Reg 119/1993.

[163] *Wastewater and Storm Drainage (Ministerial) Regulation*, Alta Reg 120/1993.

[164] *Private Sewage Disposal Systems Regulation*, Alta Reg 229/1997.

[165] *Daniels v Canada (Indian Affairs and Northern Development)*, *supra* note 143.

[166] See *Gift Lake Métis Settlement v Alberta (Aboriginal Relations)*, *supra* note 85.

Finally, at the local level, Metis Settlement Councils can pass bylaws to regulate water systems on the Settlements, including bylaws that:

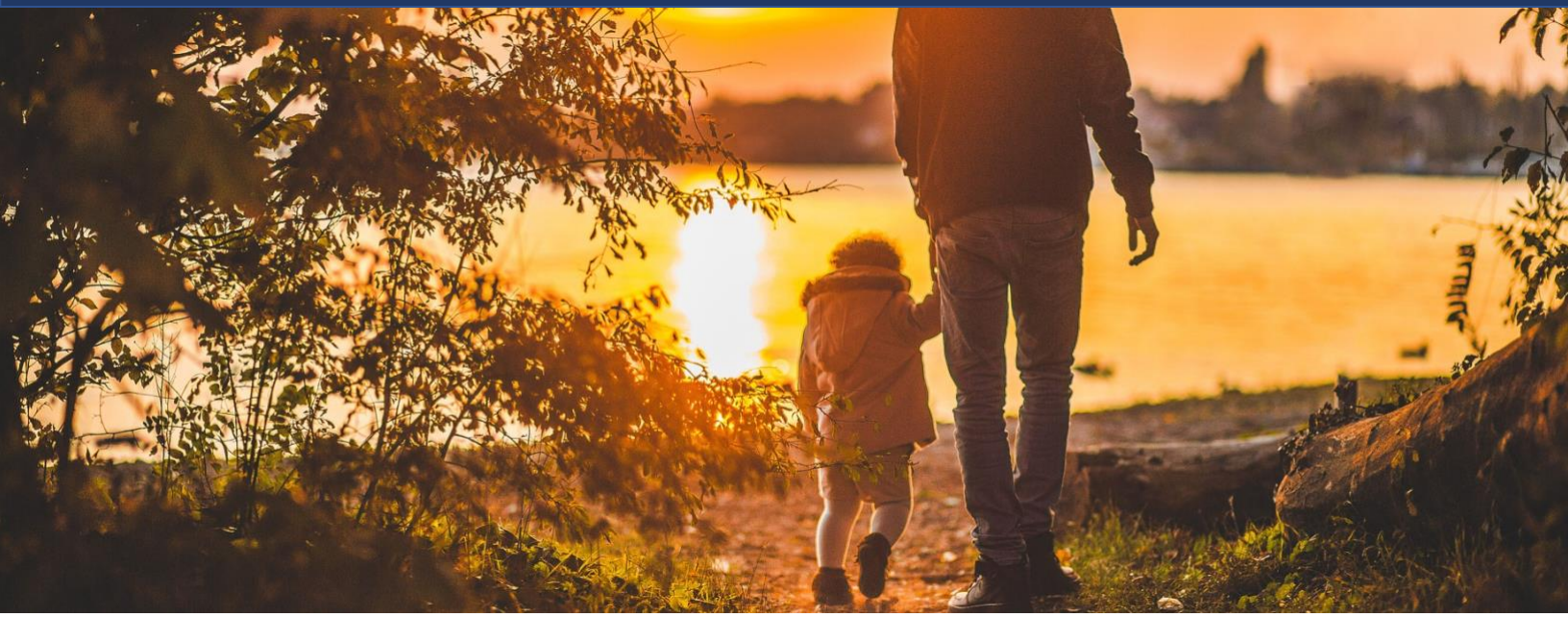
- Protect the health of residents and prevent the spread of disease;
- Regulate and control the use of wells, springs, and other sources of water;
- Prevent the contamination of any water in the settlement area;
- Direct the owner of a building abutting a public place where there is a sewer and water main to install a connection with that main;
- Direct the owner of any building abutting a public right of way or private road with a storm sewer system to connect the building to the system; and
- Prevent the use of a toilet not connected with the sewer.[167]

The Settlements must also pass an essential services bylaw that sets out fees for using the Settlement's drinking water, wastewater, and sewage systems.[168]

Currently, all eight Metis Settlements have water treatment and wastewater facilities and offer water services within their respective Settlements. Generally speaking, for more information about how the Metis Settlements are governed, take a look at the section of this chapter on Indigenous communities in Alberta.

[167] *Metis Settlements Act*, *supra* note 21, s 51. See also *ibid*, Schedule 1.

[168] *Ibid*, s 51.1.



V. ENFORCEMENT OF INDIGENOUS RIGHTS

In this section we will discuss the legal tools that are available to Indigenous peoples in Alberta to enforce their rights, including their rights as they relate to water. We will begin by looking at public law protections, which are legal protections against legislation and other actions by the government that might infringe an Indigenous right. Then, we will look at private law protections, which are lawsuits that Indigenous peoples can bring against people and organizations other than the government who infringe their rights.

i. Public Law Protections

Public law protections are the legal protections that allow Indigenous peoples to protect their rights from infringement by the government, both at the provincial and the federal level. In particular, there are two major public law protections of Indigenous rights: limitations on infringements through legislation and the government's duty to consult. In this section, we will discuss each of these types of protection in turn.

a. Protection from Legislation

Section 35 of the *Constitution Act, 1982* provides constitutional protection to the existing rights of the Indigenous peoples in Canada. In terms of protecting Indigenous rights from legislation, this does two things. First, section 35 prevents the extinguishment of Indigenous rights.[169] This means no government, federal or provincial, is able to pass legislation that gets rid of an existing Indigenous right.[170] In this context, existing rights are rights that have already been proven in court, as well as rights that may be proven in court in the future. By contrast, rights that were extinguished prior to 1982 or rights claims that failed in court do not count as existing rights.

The second way section 35 protects Indigenous rights is by limiting the ability of the federal and provincial governments to regulate Indigenous rights, meaning the way in which Indigenous peoples actually use their rights.[171] Specifically, governments can only regulate in such a way as to interfere with Indigenous rights if the regulation is justified in the broader public interest and is consistent with the government's duties to Indigenous peoples.[172] To determine if this is the case, we need to ask two questions.

First, we need to start by confirming the regulatory scheme created by the government actually interferes with an Indigenous right.[173] To make this determination, we should consider if any limitations under the scheme are unreasonable for Indigenous peoples, if the scheme imposes undue hardship on the Indigenous peoples, and if the scheme denies the Indigenous peoples their preferred manner of

[169] See *R v Van der Peet*, *supra* note 96 at 538.

[170] *Ibid*. See also *R v Sparrow*, *supra* note 77 at 1097-99; *R v Powley*, *supra* note 62 at 231.

[171] *Ibid*.

[172] See *Tsilhqot'in Nation v British Columbia*, *supra* note 81 at para 139; *Grassy Narrows First Nation v Ontario (Natural Resources)*, *supra* note 81 at para 53.

[173] *R v Sparrow*, *supra* note 77 at 1111-12. See also *R v Powley*, *supra* note 62 at 231.

exercising their rights.[174] These questions are not necessarily determinative, but they are intended to help identify possible infringements.[175]

If there is an infringement, the second question we need to ask is if that infringement is justified.[176] For an infringement to be justified, there must be a valid legislative objective behind the regulatory scheme.[177] According to the Supreme Court of Canada, a valid legislative objective must either recognize Indigenous rights or balance those rights with the broader interests of society as a whole.[178]

To decide if an infringement is justified, we must also ask if the regulatory scheme respects the government's obligation to deal honourably with Indigenous peoples.[179] To decide if this is the case, we should consider additional factors such as: whether there has been as little infringement as possible to enact the regulatory scheme; whether compensation is available for the infringement of the right; and whether the government consulted with the Indigenous people in question before enacting the regulatory scheme.[180] Where a regulatory scheme allocates limited resources between Indigenous peoples and other people, we should also consider if the government has considered Indigenous rights in its allocation scheme and, also, has allocated the resource in a manner that is respectful of the fact those rights should have priority.[181]

Notably, if a provincial government is regulating an Indigenous right, then it may only do so through legislation of general application or, in other words, legislation that applies to everyone and not

[174] *R v Sparrow*, *supra* note 77 at 1112-13.

[175] *R v Gladstone*, *supra* note 112 at 757.

[176] *R v Sparrow*, *supra* note 77 at 1113. See also *R v Powley*, *supra* note 62 at 231-32.

[177] *R v Sparrow*, *supra* note 77 at 1113-14.

[178] *R v Gladstone*, *supra* note 112 at 774-75.

[179] *R v Sparrow*, *supra* note 77 at 1114.

[180] *Ibid* at 1119.

[181] *R v Gladstone*, *supra* note 112 at 766-69.

just Indigenous peoples.[182] This is because the jurisdiction to pass legislation dealing specifically with Indigenous peoples and their rights belongs exclusively to the federal government. For more information about how legislative powers are assigned to the federal and provincial governments, take a look at the discussion in the introduction to this guide.

b. Right to Consultation

In 2004, the Supreme Court of Canada decided the government has an obligation to consult with Indigenous peoples before doing anything that could interfere with Indigenous rights, including Indigenous rights to water.[183] Known as the duty to consult, this obligation applies to both the federal and provincial governments, and it applies to almost all government action, aside from passing legislation.[184] Most often, the duty to consult applies when the government grants approvals for natural resource and other development projects that could interfere with Indigenous rights.

According to the Supreme Court, the government's duty to consult is triggered as soon as the government becomes aware of the potential existence of an Indigenous right and contemplates conduct that could interfere with it.[185] Importantly, the duty to consult applies to treaty rights, as well as Indigenous rights that have been proven in court.[186] It also applies to rights that are asserted by an Indigenous group but have not yet been proven in court.[187]

In terms of content, the strength of the duty to consult and, by corollary, the degree of consultation required, depends on the circumstances.[188] In particular, the duty depends on the strength of the claim to an Indigenous right, meaning whether the right has already been proven in court and, if it

[182] See *Tsilhqot'in Nation v British Columbia*, *supra* note 81 at para 150.

[183] *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511. See e.g. *Tsuu T'ina Nation v Alberta (Environment)*, *supra* note 60.

[184] See *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40.

[185] *Haida Nation v British Columbia (Minister of Forests)*, *supra* note 183 at 529.

[186] See *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69.

[187] *Haida Nation v British Columbia (Minister of Forests)*, *supra* note 183 at 526-29.

[188] *Ibid* at 531.

has not, how likely the claim is to succeed. Additionally, the content of the duty to consult depends on how much the proposed project could impact the Indigenous right.[189]

On the weak end of the spectrum, the duty to consult could require the government to give notice of its intended actions and to discuss any issues that arise from that notice.[190] On the strong end, the duty to consult could require the government to conduct deep consultations with Indigenous groups, aimed at achieving a satisfactory solution to any issues.[191] Practically, this could mean allowing Indigenous groups to participate in the government's decision-making process. It could also mean written reasons from the government for its chosen course of action at the end of consultations.

Importantly, the duty to consult is a procedural and not a substantive duty.[192] This means the government must carry out consultations with Indigenous peoples in good faith. However, the government is not under an obligation to reach an agreement with Indigenous groups.[193] Where there is a strong claim to an Indigenous right, and the potential impact from the proposed project is significant, the government's obligation to act honorably may require it to revise its original plans, which is referred to as the government's duty to accommodate.[194] However, this still does not require full consensus with the Indigenous peoples, so long as consultations were carried out in good faith.[195]

[189] *Ibid*.

[190] *Ibid* at 532-33.

[191] *Ibid* at 533.

[192] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, *supra* note 186 at 417-18.

[193] *Haida Nation v British Columbia (Minister of Forests)*, *supra* note 183 at 532.

[194] *Ibid* at 534-35.

[195] *Ibid* at 535.

Generally speaking, for more information about the Government of Alberta's approach to consultation, take a look at the provincial government's website.[196] Equally, for more information about the Government of Canada's approach to consultation, take a look at the federal government's website.[197]

ii. Private Law Actions

Increasingly, Indigenous rights are being used to ground private law actions, which is another way of saying lawsuits against individuals or organizations other than the government. With respect to water rights, there are two types of lawsuits that could be used to enforce Indigenous rights: an action to enforce riparian rights and a claim in nuisance. In this section, we will briefly discuss each of these types of lawsuits in turn.

As you read this section, take note that this is still a fairly new area of law. Practically, this means the courts have not yet fully confirmed that Indigenous rights can be the basis for private lawsuits against individuals or organizations, because there is limited case law to support these claims, and, where cases do exist, the Alberta courts are not bound by them.[198] Accordingly, whether Indigenous rights can ground private lawsuits in Alberta is largely an open question for the lawyers to argue and the courts to determine.

[196] "Indigenous consultations in Alberta" (2021), online: Government of Alberta https://www.alberta.ca/indigenous-consultations-in-alberta.aspx.

[197] "Consultation, engagement and the duty to consult" (26 February 2019), online: Government of Canada https://www.rcaanc-cirnac.gc.ca/eng/1100100014649/1609248789946.

[198] See *Saik'uz First Nation and Stellat'en First Nation v Rio Tinto Alcan*, 2015 BCCA 154; *Thomas and Saik'uz First Nation v Rio Tinto Alcan*, 2022 BCSC 15.

a. Riparian Rights

Riparian rights are water rights that belong to anyone who owns property directly adjacent to a waterbody or watercourse. Roughly speaking, anyone who has riparian rights also has the right to sue a person or organization who interferes with those riparian rights.

In this section, we will briefly discuss riparian rights to sue as they apply to First Nations' reserves and Metis Settlements. Otherwise, for more information about Indigenous riparian rights, take a look at the section of this chapter on riparian rights. Likewise, for more information about riparian rights in general, take a look at the chapter on land ownership and use.

First Nations Reserves

Whether First Nations are able to sue to enforce riparian rights is a fairly open question of law. To date, the courts have acknowledged the possibility that First Nations possess riparian rights, insofar as reserves are next to water.[199] However, since no case has made it to a final adjudication, the exact state of the law remains uncertain. Generally speaking, for more information about riparian rights on reserves, take a look at the section on riparian rights.

Furthermore, even if First Nations do possess riparian rights, it is also uncertain in law if they would be able to sue to enforce those rights. So far, the courts have acknowledged the possibility that First Nations could sue to enforce riparian rights, should those rights exist.[200] However, no case has made it to a final adjudication, and, likewise, the law remains unclear.

Finally, even if First Nations can sue to protect their riparian rights, it is unclear if the right to sue anyone who interferes with the riparian right to take and use water would be limited by the provincial *Water Act*, which prevents suing anyone who has a government authorization to interfere with that

[199] See *Pasco v CNR* (1985), *supra* note 71.

[200] See *Saik'uz First Nation and Stellat'en First Nation v Rio Tinto Alcan Inc*, *supra* note 198 at para 59.

right.[201] This uncertainty arises, because it is currently unclear in law if provincial governments are able to regulate rights relating to reserve lands, which presumably would include riparian rights.[202]

Generally speaking, for more information about the circumstances in which governments can limit Indigenous rights, take a look at the section on riparian rights, as well as the section on protecting Indigenous rights from legislation. Otherwise, for more information about riparian rights, including suing to enforce riparian rights, take a look at the chapter on land ownership and use.

Metis Settlements

The Metis Settlements were created under provincial law, which means they are subject to the same provincial laws as any other owner of riparian property.[203] As such, any riparian lands in the Settlements come with the same rights as any other riparian property in Alberta, including the right to sue to enforce those rights.

Practically, this means the Metis Settlements can sue anyone who infringes their riparian rights to take and use water, unless that person has a government authorization to do so.[204] As well, the Metis Settlements are able to sue anyone who infringes their riparian rights for the water quality to remain the same, unless that person has a government authorization to do so.[205] Generally speaking, for more information about riparian rights in Alberta, including suing to enforce riparian rights, take a look at the chapter on land ownership and use.

[201] *Water Act*, *supra* note 68, s 22(2).

[202] *Peter Ballantyne Cree Nation v Canada (AG)*, *supra* note 80; *McCaleb v Rose*, *supra* note 80. See also Townshend, *supra* note 80; Nigel Bankes & Jennifer Koshan, "Tsilhqot'in: What Happened to the Second Half of Section 91(24) of the Constitution Act, 1867?" (7 July 2014), online: ABlawg https://ablawg.ca/2014/07/07/tsilhqotin-what-happened-to-the-second-half-of-section-9124-of-the-constitution-act-1867/.

[203] See *Gift Lake Métis Settlement v Alberta (Aboriginal Relations)*, *supra* note 85.

[204] *Water Act*, *supra* note 68, s 22(2).

[205] La Forest, *supra* note 69 at 222.

b. Nuisance Claims

The second type of private lawsuit that Indigenous peoples can bring against a person or organization is called an action in nuisance.[206] Generally speaking, nuisance is a lawsuit you can bring against someone who unreasonably interferes with the use or enjoyment of your property.[207] In terms of water rights, nuisance could be used to sue someone who unreasonably pollutes water or someone who causes unreasonable flooding.

To bring an action in nuisance, you must have a property right that has been interfered with. Any possessory right, meaning any right to property that gives you exclusive occupation of the property, will be enough to ground a claim in nuisance.[208] This means a claim in nuisance could be based on ownership of the Metis Settlements and any unreasonable interference with the use and enjoyment of those lands. Equally, the courts have acknowledged that a nuisance claim could be based on the possession of reserve lands, although this conclusion has not yet been adopted in Alberta.[209]

Interestingly, the courts have also acknowledged the possibility of bringing a nuisance suit where you have a non-possessory property right, meaning a right that entitles you to something less than exclusive possession of the property.[210] This makes it possible to bring a nuisance claim based on a non-possessory right to water, such as the right to take and use groundwater.[211] As well, this might make it possible to bring a nuisance claim based on the right to fish, which is also a type of non-possessory property right.[212]

---

[206] See *Saik'uz First Nation and Stellat'en First Nation v Rio Tinto Alcan Inc*, *supra* note 198.

[207] *Antrim Truck Centre Ltd v Ontario (Transportation)*, 2013 SCC 13 at paras 18-19.

[208] *Hunter v Canary Wharf Ltd*, [1997] AC 655 (HL) at 692.

[209] See *Thomas and Saik'uz First Nation v Rio Tinto Alcan*, *supra* note 198 at paras 360-66.

[210] See *Saik'uz First Nation and Stellat'en First Nation v Rio Tinto Alcan*, *supra* note 198 at paras 38-40.

[211] See Percy, *supra* note 87 at 31-32.

[212] See *Thomas and Saik'uz First Nation v Rio Tinto Alcan*, *supra* note 198 at paras 368-382.

Regardless of the property right that grounds a nuisance claim, an action in nuisance is subject to the defence of statutory authority.[213] This means you can only use nuisance to sue a person or organization for an activity if that activity was not authorized by the government. By corollary, you cannot use nuisance to sue a person for an activity that is specifically authorized by the government or is a necessary part of an authorized activity.[214]

[213] Lewis N Klar & Cameron S G Jefferies, *Tort Law*, 6th ed (Toronto: Thomson Reuters, 2017) at 888-892.

[214] *Ibid*.