THE ENVIRONMENT AND THE CONSTITUTION SERIES

THE INTERSECTION OF ENVIRONMENTAL LAW AND INDIGENOUS RIGHTS

April 2023

by Brenda Heelan Powell

Environmental Law Centre

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.

We started this process in 2022, with reports on the current legal situation around water and Indigenous rights and will continue in 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.

EXECUTIVE SUMMARY

Section 35 of the *Constitution Act, 1982* recognizes and affirms Indigenous rights:

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

Notwithstanding section 35, it is apparent that Indigenous rights are not effectively recognized in land use and natural resource development decision-making as evidenced by the impairment of Indigenous rights and the need for Indigenous communities to litigate around the Crown failure to properly maintain those rights. In light of the constitutional protection of Indigenous rights and the inextricable link between those rights and land, the purpose of this report is to explore the interaction of Alberta's environmental law with Indigenous rights.

This report creates context for this exploration by first looking at Indigenous rights, and the legal obligations that flow from constitutional protection of these rights. Next this report looks at the intersection of environmental law with Indigenous rights in Alberta and identifies key failures to recognize and protect Indigenous rights in the environmental law context. Finally, the report rethinks settler law as a means to better recognize Indigenous rights and laws, and to align Alberta's environmental law and policy with the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).

Treaty Rights in Alberta

The entirety of Alberta is subject to historic treaties – primarily Treaty Nos. 6, 7 and 8 - encompassing 45 First Nations and 140 reserves (approximately 812,771 hectares of land). These numbered treaties all indicate that the respective First Nations "cede, release, surrender and yield up to the Government of Canada for Her Majesty the Queen and her successors for ever, all their rights, titles, and privileges whatsoever to the lands" described in the Treaty subject to the limits in the Treaty. While many Indigenous communities consider treaties to be a way to share the land without giving up their rights to the land, the common law view is that Indigenous communities surrendered their Aboriginal title through the treaties in exchange for reservations and other promises. The historic treaties provide the right to continue hunting and fishing (although Treaty No. 7 does not mention fishing) throughout the surrendered lands

excepting those lands that may be “taken up for settlement, mining, lumbering or other purposes” and subject to regulations that may be made.

In 1930, Alberta entered into the *Natural Resources Transfer Agreement* (NRTA) with the federal government wherein the interest of the federal Crown in all Crown lands was transferred to the provincial Crown. The NRTA provides that “the [provincial] laws respecting game... shall apply to the Indians” and that “Indians shall have the right… of hunting, trapping, and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access”. This has been interpreted by the SCC as modifying Treaty rights in two ways, by extinguishing the Treaty right to hunt commercially, and by expanding the geographical areas in which Indians have the Treaty right to hunt.

Métis Settlements in Alberta

Alberta is unique in Canada as the only province with a recognized Métis landbase entrenched in legislation. In 1989, the Government of Alberta and the Alberta Federation of Métis Settlement Associations entered into the *Alberta-Métis Settlements Accord* which was intended to secure a land base, ensure local autonomy, and enable economic self-sufficiency for the Métis peoples. As well, the Accord was intended to resolve litigation and other issues between the province and the Métis Settlements. The Accord was implemented via several pieces of legislation: the *Métis Settlements Act*, the *Métis Settlements Land Protection Act*, the *Métis Settlements Accord Implementation Act*, and the *Constitution of Alberta Amendment Act, 1990.*

Legal Consequences of Indigenous Rights

The existence of Indigenous rights triggers certain legal obligations. These obligations include a duty to consult and accommodate; a requirement to justify infringement of rights; and consultation requirements when taking up land under the terms of a Treaty.

Duty to Consult

The duty to consult and accommodate arises when the the Crown conduct is contemplated (such as issuing an approval), there is knowledge of a potential Indigenous claim or right, and there is potential that the Crown conduct may adversely affect that claim or right. The degree of consultation and accommodation required is situation specific. It is important to note that the duty to consult and accommodate confers procedural rights, it does not confer a veto over development to an Indigenous community.

Infringement of Treaty Rights

When considering issues of legislative infringement of Treaty rights, there is a three step process. Firstly, the First Nation bears the onus of establishing the existence of a Treaty right. Secondly, the First Nation must demonstrate that there may be an adverse impact on its Treaty right as a result of the legislation. If those two steps are met, then the onus switches to the Crown to justify its actions including demonstrating a compelling and substantial objective.

Taking Up Land under a Treaty

As noted, Treaty Nos. 6, 7 and 8 allow the government to “take up” land for settlement, mining or other activities. This means the government may “take up” lands by authorizing activities that may interfere with Treaty rights. A potential decision to “take

up" land may trigger a duty to consult and accommodate with affected Indigenous communities.

The sum of the current legal recognition and protection of rights however, fails to effectively and proactively protect resources that are the subject of treaty, some of which are legal issues, some of which are more practical. The conception of "taking up" is challenged by Alberta's vast cumulative environmental impacts of resource development that, taken together, have undermined key resources that are subject to treaty. The legal onus involved in treaty infringement analysis displaces responsibility for effective resource management onto First Nations when it should lie with the Crown, i.e. relies on the principle of litigating to defend Treaty rather than the Crown establishing that treaty had been upheld. Finally, the duty to consult, while an important legal mechanism for decision making, fails to embrace a governance model focused on preservation of treaty related outcomes in lieu of check-box bureaucracy.

Points of Intersection of Environmental Law and Indigenous Rights

The points of intersectionality reviewed in this report are:

- Wildlife: Conservation and Indigenous Harvesting Rights;
- Water: Indigenous Ownership, Access and Use;
- Land Use and Resource Development: Cumulative Effects on Treaty Rights; and
- Regulatory Tribunals: Role in Indigenous Consultation and Accommodation.

Looking at the overall framework of legislation and regulations governing land use and resource development in Alberta, it is apparent that Treaty rights are not a primary consideration in land use and resource development decisions. Treaty rights often seem to be distilled down to a right to consult and accommodate with the onus on First Nations to demonstrate the existence of a Treaty right and the infringement of that right. There is no clear mechanism in place to consider and mitigate the cumulative impacts of multiple land use and resource development on Treaty rights, nor is there a clear role for decision-making by First Nations acknowledged in the various pieces of legislation.

Under the current environmental and natural resource development legislative schemes in Alberta, the greatest potential to enable some degree of Indigenous co-management and to better address Indigenous concerns is found in regional land use planning under the *Alberta Land Stewardship Act* and water management planning under the *Water Act*. For instance, the *Moose Land Access Management Plan* is an example of a land use approach designed to address Indigenous concerns around cumulative impacts on traditional lands. It may be that full implementation of similar plans or agreements may necessitate legislative change.

UNDRIP and Environmental Law

The Truth and Reconciliation Commission of Canada has stated that it is essential that all levels of government endorse and implement the UNDRIP. From an environmental regulation perspective, three key UNDRIP principles are particularly relevant:

- self-determination which includes the right to political self-determination and the right to dispose freely of a Indigenous people's natural resources;
- recognition of the collective nature of Indigenous rights (i.e. rights are held by an Indigenous community collectively); and

- free, prior and informed consent.

Incorporation of UNDRIP principles into Canadian law may have implications for environmental and natural resource development such as increasing both regulators' and proponents' requirements to seek consensus from Indigenous peoples. Although, it remains likely that ultimate decision-making authority in land use and natural resource development will remain with the Crown.

Rethinking Settler Law, Recognizing Indigenous Law

Despite the inextricable link between Indigenous land-based rights and ecosystem health, there is no clear Treaty right impact consideration integrated into Alberta's legislative schemes for environmental and resource development decision-making. This is exacerbated by the current piece-meal approach to land-use and natural resource development which fails to adequately address cumulative impacts on Treaty rights. This lack of legislative acknowledgement of Treaty rights in Alberta is at odds with both the honour of the Crown and specific Treaty promises.

The ELC proposes that legislation – *An Act for Respecting Historical Treaties in Alberta* – ought to be developed and implemented in Alberta. It is imperative that this legislation be developed on a Nation-to-Nation basis. As its main objectives, this legislation would (1) expressly endorse UNDRIP as part of Alberta law, and (2) establish a framework for Nation-to-Nation negotiation of First Nation Traditional Land Use Management Frameworks. These should merely be stepping stones towards an opportunity for First Nations to pursue application of Indigenous legal orders in the historic treaty areas. This will require a significant commitment, primarily through policy to support and acknowledge those nations who wish to advance the application of their Indigenous legal orders. In turn the application of these legal orders will require significant adjustment to Alberta's current legal governance of natural resources and the environment.

Key elements for the legislative framework for negotiation of First Nation Traditional Land Use Management Frameworks include:

1. Express recognition that reserve lands are small areas within larger territorial lands and that Treaty rights extend to these territorial lands. On a Nation-to-Nation basis, there must be negotiation to clarify the boundaries of these territorial lands for each First Nation.
2. Express recognition that meaningful exercise of Treaty rights, which includes the protection of a way of life, is linked to environmental condition. This includes cumulative impacts of land-use and resource development decisions.
3. Express recognition that Treaty rights have paramountcy meaning the Crown's right to take up land under a Treaty exists in relation to the protection of hunting, fishing and trapping rights and that those Treaty rights are not subject to, or inferior, to the Crown's right to take up land.
4. Within territorial lands, the onus is on the Crown to demonstrate that land-use or resource development decisions do not infringe upon the meaningful exercise of Treaty rights within the territorial lands, or that any infringement arises from negotiations with the relevant First Nation.
5. A First Nation Traditional Land Use Management Framework must be negotiated on a Nation-to-Nation basis. Such frameworks could address matters such as:

- limiting new disturbances within the traditional territory;
- identifying certain high value areas which will be protected from new disturbances with accelerated restoration;
- identifying priority watershed management basins for planning as integral to future development in the area;
- increasing engagement expectations for resource development activities;
- setting requirements for payment of disturbance fees and setbacks for certain values (such as grizzly bear dens, traplines, cabins, and wetlands);
- changing resource application and permitting processes;
- creating wildlife co-management arrangements;
- creating cumulative effects management arrangements;
- establishing monitoring and restoration funds; or
- establishing revenue-sharing approaches.

6. Establish timelines for initiating negotiation of Traditional Land Use Management Frameworks.
7. Express acknowledgement of the role and participation of First Nations in the development and amendment of key environmental and resource development legislation, regulations and policy.

As Traditional Land Use Management Frameworks are developed, it is foreseeable that conflicts with existing land-use and resource development legislation may arise as the frameworks are implemented. This means the proposed legislation should grant paramountcy to Traditional Land Use Management Frameworks on relevant lands.

TABLE OF CONTENTS

THE INTERSECTION OF ENVIRONMENTAL LAW AND INDIGENOUS RIGHTS

INTRODUCTION

The primary purpose of this report is to explore the interaction of environmental law with Indigenous rights, as well as the alignment of environmental regulation with the *United Nations Declaration on the Rights of Indigenous Peoples* and its linkages with reconciliation. The Truth and Reconciliation Commission of Canada identified several principles of reconciliation including that reconciliation is "a process of healing the relationships that requires public truth sharing, apology, and commemoration that acknowledge and redress past harms" and "must create a more equitable and inclusive society by closing the gaps in social, health, and economic outcomes that exist between Aboriginal and non-Aboriginal Canadians".[1]

In order to explore the interaction of environmental law with Indigenous rights, this report creates context by first looking at Indigenous rights, and the legal obligations that flow from constitutional protection of these rights. Next this report looks at the intersection of environmental law with Indigenous rights in Alberta and identifies key failures to recognize and

[1] Truth and Reconciliation Commission of Canada, *What we have learned: principles of truth and reconciliation* (Ottawa: 2015, Truth and Reconciliation Commission of Canada) [TRC Principles] at 3 to 4.

protect Indigenous rights in the environmental law context. Finally, the report rethinks settler law to recognize Indigenous rights and laws, and to align Alberta's environmental law and policy with the *United Nations Declaration on the Rights of Indigenous Peoples.*

When considering the intersection of environmental law and Indigenous rights, it is important to keep two potential pitfalls in mind. Firstly, environmental interests and Indigenous interests should not be conflated. While there may be overlap between the two, they are not equivalent. As stated by Jaremko, in the context of planning for the Peel Watershed:[2]

> The Peel case certainly raises the question of conflation of Aboriginal and Treaty rights with environmental protection, in modern and possibly historical Treaty contexts, and the implications, accuracy and adequacy thereof, and questions around whether such conflation has potential for advancing reconciliation or entrenching false dichotomies.

Indeed, as pointed out by Gorrie, environmental principles and approaches can be embedded in a colonial mindset and operate against Indigenous knowledge and laws pertaining to nature.[3]

Secondly, it is important to avoid a pan-Indigenous approach. As pointed out by Kapashesit and Klippenstein, one cannot generalize about the hundreds of distinct Indigenous groups in North America although it is acknowledged that there are some shared features such as "lack of division between humans and the rest of the environment, a spiritual relationship with nature, concern about sustainability, attention to reciprocity and balance, and the idiom of respect and duty (rather than rights)".[4] This means each Indigenous community has its own knowledge, laws, customs and language relevant to the environment which must be respected. A one-size fits all approach is not appropriate.

It is important to clarify some terminology that will be used throughout this report. Firstly, we recognize that the term "Indian" is considered by many Indigenous people to be inappropriate but as it is still used within the settler legal system, we use this term where it is used by the settler legal system (albeit with reluctance). Otherwise, we will use the terms Indigenous, First Nations, Métis or Inuit as required by context. Secondly, when discussing the settler legal system as it applies to Indigenous peoples and their rights, the term "Aboriginal Law" is used. Finally, when discussing the legal traditions, customs and practices of First Nations, Métis and Inuit peoples, the term "Indigenous Law" is used.

---

[2] Sara L. Jaremko, *The Peel Watershed Case: Implications for Aboriginal Consultation and Land Use Planning in Alberta*, CIRL Occassional Paper #56 (Calgary: 2017, Canadian Institute of Resources Law) at 44.

[3] Melissa Gorrie, *Transformation Beyond the Settler Legal Paradigm: Grounding Ecologically-focused Legal Theories in Relational Accountability to Address Settler Colonialism and Support Indigenous Sovereignty* (August 2022) A Thesis Submitted to the Faculty of Graduate Studies in Partial Fulfillment of the Requirements for the Degree of Master of Laws, Graduate Program in Law, University of Calgary, Calgary, Alberta [Gorrie].

[4] Randy Kapashesit and Murray Klippenstein, "Aboriginal Group Rights and Environmental Protection" (1991) 36 McGill LJ 925 at 929. Gorrie, *ibid.* also discusses this issue.

The Constitutional Framework

The *Canadian Constitution Act* has several provisions that directly reference Indigenous peoples: sections 91(24), 25, 35 and 35.1. These provisions, in particular section 35(1), set the constitutional framework for the protection of Aboriginal and Treaty rights within Canada.

Section 91(24): Federal Jurisdiction over "Indians and Lands reserved for the Indians"

Section 91(24) of the *Canadian Constitution Act, 1867* grants the federal government jurisdiction to legislate with respect to "Indians, and Lands reserved for the Indians". Although section 91(24) only refers to "Indians", the Supreme Court of Canada (SCC) has clarified that the provision applies to all Indigenous people including non-status Indians, Métis and Inuit.[5] In this regard, the federal government has passed several pieces of legislation including the *Indian Act,* the *Indian Oil and Gas Act*, and the *First Nations Land Management Act*.[6]

Section 91(24) gives the federal government the jurisdiction to legislate around matters related to the "core of Indianness". As stated by the SCC in *Paul*, this core has not been exhaustively defined.[7] However, the minimum content of the core in section 91(24) are those "matters that go to the status and rights of Indians".[8] The SCC has indicated that the scope of the core of section 91(24) is narrow.[9]

The jurisdictional boundaries of section 91(24) were further explored by the SCC in the companion cases: *Tsilhqot'in* and *Grassy Narrows.*[10] In *Tsilhqot'in*, the SCC considered (among other things) whether provincial laws of general application apply to land held under Aboriginal title.[11] The SCC stated that, as a general rule, provinces have authority to regulate land use within the province whether held by the Crown, private owners or by holders of Aboriginal title. However, provincial power to regulate land held under Aboriginal title is limited in two ways: by section 35 which requires a compelling and substantial government objective for abridging rights flowing from Aboriginal title and by section 91(24) which grants exclusive federal authority in some situations. The SCC stated:

---

[5] *Daniels v Canada (Indian Affairs and Northern Development)*, [2016] 1 SCR 99 [*Daniels*].
[6] R.S.C. 1985, c. I-5, R.S.C. 1985, c. I-7, and S.C. 1999, c. 24.
[7] *Paul v B.C. (Forest Appeals Commission)*, [2003] 2SCR 585 [*Paul*].
[8] *Nil/tu,o & Fam. Service. v BCGEU*, [2010] SCR 696 [*Nil/tu,o*] at para. 70.
[9] *Ibid.*at para. 73.
[10] *Tsilhqot'in Nation v British Columbia,* [2014] 2 SCR 257 [*Tsilhqot'in*] and *Grassy Narrows v Ontario (Natural Resources)*, [2014] 2 SCR 447 [*Grassy Narrows*]. For a critique of the SCC's approach, see Kerry Wilkins, "Life Among the Ruins: Section 91(24) After *Tsilhqot'in* and *Grassy Narrows* (2017) 55-1 Alberta L.R. 91 who looks at the inconsistent approach to the inter-jurisdictional immunity doctrine taken by the SCC.
[11] *Tsilhqot'in, ibid.* at para. 100.

> Provincial laws of general application, including the [B.C.] *Forest Act*, should apply unless they are unreasonable, impose a hardship or deny the title holders their preferred means of exercising their rights, and such restrictions cannot be justified pursuant to the justification framework outlined above [i.e., *Sparrow* and *Delgamuukw*].[12]

The SCC also pointed out that the "jurisprudence on whether s. 35 rights fall at the core of the federal power to legislate with respect to 'Indians' under s. 91(24) is somewhat mixed".[13] The SCC states that the framework provided by section 35 displaces the role of the doctrine of interjurisdictional immunity[14] and the idea that Indigenous rights are at the core of the federal power under section 91(24). This is because the doctrines of interjurisdictional immunity and paramountcy are meant to address federal-provincial law conflicts. But because Indigenous rights act as a limit on federal and provincial powers, the problem is not one of conflicting federal-provincial law but rather how far a provincial law can go to regulate an Indigenous right (which is dealt with under the section 35 framework).[15]

In *Grassy Narrows*, the central question was "whether Ontario can 'take up' lands … under Treaty 3 so as to limit the harvesting rights under the Treaty, or whether it needs federal authorization to do so".[16] The SCC also considered the question of whether the doctrine of interjurisdictional immunity precluded Ontario from justifying an infringement of the Treaty 3 rights. The SCC found that Ontario did have authority to take up lands and, under Treaty 3 there was no requirement for federal approval.

The SCC stated that:

> While s. 91(24) allows the federal government to enact legislation dealing with Indians and lands reserved for Indians that may have incidental effects on provincial lands, the applicability of provincial legislation that affects Treaty rights through the taking up of land is determined by *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage*)… and by s. 35 of the *Constitution Act, 1982*.[17]

Further, the SCC stated that the "doctrine of interjurisdictional immunity does not preclude the Province from justifiably infringing Treaty rights".[18] However, as noted by Bankes and Koshan,

---

[12] *Tsilhqot'in*, *ibid.* at para. 151. *R. v Sparrow,* [1990] 1 SCR 1075 [*Sparrow*] and *Delgamuukw v British Columbia,* [1997] 3 SCR 1010 [*Delgamuukw*].

[13] *Tsilhqot'in*, *ibid.* at para. 135.

[14] The doctrine of interjurisdictional immunity is a constitutional tool which insulates the activities of one level of government from the other, usually used in favour of the federal government. If legislation enacted by one level of government (within their jurisdiction under section 91 or 92) impairs the basic, unassailable core of the power of the other level of government, then that legislation is inoperable. For a brief discussion of this doctrine, see Centre for Constitutional Studies website, online: https://www.constitutionalstudies.ca/2019/07/interjurisdictional-immunity/.

[15] *Tsilhqot'in*, *supra.* note 10 at paras. 140 to 152.

[16] *Grassy Narrows*, *supra.* note 10 at para. 3.

[17] *Ibid.* at para. 37.

[18] *Ibid.* at para. 53.

the application of the doctrine of interjurisdictional immunity on reserve lands is somewhat uncertain since neither *Tsilhqot'in* nor *Grassy Narrows* dealt with reserve lands.[19] There is authority for the argument that reserve lands lie at the core of section 91(24) and thus cannot be impaired by provincial legislation (i.e. triggers interjurisdictional immunity).[20] At the same time, there is authority extending the SCC's *obiter* statements around the doctrine of interjurisdictional immunity to conclude that the doctrine also does not apply to reserve lands.[21]

Also relevant to the interaction of federal and provincial laws as they impact on Indigenous people is Section 88 of the *Indian Act* which provides that, subject to Treaty terms or federal statute, general provincial laws are applicable to Indians in that province. This provision includes the caveat that those provincial laws cannot be inconsistent with the *Indian Act*, the *First Nations Fiscal Management Act*, or with Indian Band orders, rules, regulations or laws. Section 88 makes no mention of the role of Indigenous law.[22]

Section 25: Charter Rights do not abrogate or derogate Aboriginal or Treaty rights

Section 25 of the Canadian Charter of Rights and Freedoms states:[23]

> 25 The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any Aboriginal, Treaty or other rights or freedoms that pertain to the Aboriginal peoples of Canada including
>
> > (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
> >
> > (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

[19] Nigel Bankes and Jennifer Koshan, *The Uncertain Status of the Doctrine of Interjurisdictional Immunity on Reserve Lands* (October 28, 2014) Ablawg, online: https://ablawg.ca/wp-content/uploads/2014/10/Blog_NB_JK_Sechelt_Oct20141.pdf.
[20] *Ibid.*
[21] *Ibid.*
[22] Olthuis Kleer Townshend LLP, *Aboriginal Law Handbook* (Toronto: 2018, Thomson Reuters) [*Aboriginal Law Handbook*] at Chapter 2: The Constitutional Framework.
[23] *Canadian Constitution Act*, *1982,* Part 1.

There is a lack of clarity around the purpose of section 25. There are two possible interpretations of the role of section 25: as a shield that protects Aboriginal rights from a *Charter* review or as an interpretative tool to be used where there are potentially conflicting rights.

While the SCC did discuss this provision in *Kapp,* the lack of clarity remains.[24] The *Kapp* case centred on a challenge by non-Aboriginal fishers against issuance of communal fishing licenses to three Indigenous bands (which excluded non-Aboriginal fishers for a 24 hour period). The non-Aboriginal fishers argued that this was a breach of their equality rights under section 15(1) of the *Charter*. The SCC found that the communal fishing licences were constitutional by virtue of section 15(2) of the *Charter* which allows programs with the object of ameliorating conditions of disadvantaged individuals or groups. With respect to section 25, the majority decision stated that it was not clear that the provision applied to the issue at hand because the wording of the provision suggests that "only rights of a constitutional character are likely to benefit from s. 25".[25] Further, even if section 25 does apply, whether the provision constitutes a bar to *Charter* claims or is an interpretative provision should be resolved on a case-by-case basis.[26]

However, the concurring decision of Justice Bastarache states that section 25 operates as a bar to the constitutional challenge and is not merely a canon of interpretation (although the majority decision expressed concern with this approach). Section 25 "serves the purpose of protecting the rights of Aboriginal peoples where the application of the *Charter* protections for individuals would diminish the distinctive, collective and cultural identify of an Aboriginal group".[27]

In a more recent decision – *Little Salmon/Carmacks* – the SCC commented on section 25 as follows:

> The framers of the Constitution also considered it advisable to specify in section 25 of that same Act that the guarantee of fundamental rights and freedoms to persons and citizens must not be considered to be inherently incompatible with the recognition of special rights for Aboriginal peoples.[28]

It is noteworthy that the SCC recently granted leave to appeal the Court of Appeal of Yukon's decision in *Dickson v Vuntut Gwitchin First Nation* which also centres on a section 15 challenge, in this case to residency requirements for Council of Vuntut Gwitchin First Nation Council. [29] In the course of the decision, guidance on section 25 was provided by the Yukon Court of Appeal which stated that section 25 "is better characterized as a 'shield' than a 'lens' or interpretive aid that would 'read down' or 'modify' rights in the event of a conflict".[30] In other words, the Court of Appeal essentially agreed with the approach taken by Justice Bastarache in *Kapp* but also

[24] *R. v Kapp*, 2008 SCC 41 (CanLii) [*Kapp*].
[25] *Ibid.* at para. 63.
[26] *Ibid.* at para. 64.
[27] *Ibid.* at para. 89. See commentary in Jennifer Koshan and Jannette Watson Hamilton, "Kahkewistahaw First Nation v. Taypotat – Whither Section 25 of the Charter" (2016) 25 Const. F. 39 [Koshan & Hamilton].
[28] *Beckman v Little Salmon/Carmacks,* [2010] 3 SCR 103 at para. 98.
[29] *Dickson v Vuntut Gwitchin First Nation*, 2021 YKCA 5, leave granted April 28, 2022 CanLii 32895 (SCC) [*Dickson*].
[30] *Ibid.* at para. 143.

pointed out that the right being challenged was constitutional in nature.[31] The Court also states that "it would not be appropriate for us to pronounce any general rule that a court must or must not consider the applicability of section 25 until it has carried out a full analysis of the *Charter* right in question" and should proceed on a case by case basis.[32] It remains to be seen if the SCC will clarify the operation of section 25 in its future consideration of *Dickson.*

Section 35: Recognition and affirmation of Aboriginal and Treaty rights

Part II of the *Constitution Act, 1982* recognizes and affirms Aboriginal and Treaty rights:

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

As explained in the *Aboriginal Law Handbook*, Aboriginal rights are "those rights which the Aboriginal peoples have because of their occupation of North America as sovereign nations before the coming of Europeans" and encompass all aspects of culture, rights to lands, resources, traditions and survival.[33] Treaty rights consist of the promises made when a Treaty was signed with a First Nation, and may change or replace some Aboriginal rights.[34]

Because section 35 refers to "existing" rights, any rights extinguished before the date when the *Constitution Act, 1982* came into effect (i.e., April 17, 1982) are not recognized.[35] Section 35

[31] *Ibid.* at paras. 145 and 146.
[32] *Ibid.* at para. 151.
[33] *Aboriginal Law Handbook*, *supra.* note 22 at 21.
[34] *Ibid.*
[35] *Ibid.*

does not revive extinguished Aboriginal rights.[36] However, there must be a "clear and plain intention on the part of the federal government to extinguish rights, mere regulation of a right is not proof of extinguishment".[37]

Section 35 does not mean that the federal or provincial governments cannot infringe on Aboriginal or Treaty rights but, as outlined in *Sparrow* and *Delgamuukw*, there must be compelling and substantial reasons for doing so. In other words, the government must justify any legislation that has a negative effect on any Aboriginal or Treaty right.[38]

The SCC has held that Aboriginal rights protected by section 35 may also be exercised by a person who is not a Canadian citizen or resident.[39] As stated by the SCC, "[o]n a purposive interpretation of s. 35(1), the scope of "Aboriginal peoples of Canada" is clear: it must mean the modern-day successors of Aboriginal societies that occupied Canadian territory at the time of European contact" which may include Aboriginal groups that are now outside Canada.[40] If this threshold is met, then the test for Aboriginal rights set out in *Van der Peet* applies.[41]

The *Van der Peet* test is: "[t]o be an [A]boriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the [A]boriginal group claiming the right" and must have continuity with those that existed prior to contact with European society.[42] The SCC in *Van der Peet* states that "in order to be integral a practice, custom or tradition must be of central significance to the Aboriginal society in question … one of the things which made the culture of the society distinctive".[43]

Section 35.1: Indigenous participation in amendment of sections 91(24), 25 or 35

This provision of the *Constitution Act, 1982* guarantees that a constitutional conference will be held if there are proposed changes to sections 91(24), 25 or 35:

> Commitment to participation in constitutional conference
>
> 35.1 The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the Constitution Act, 1867, to section 25 of this Act or to this Part,

[36] *Sparrow*, *supra*. note 12 at 1091.
[37] *Ibid.* at 1099.
[38] *Ibid*. at 1113 to 1120.
[39] *R. v Desautel*, 2017 SCC 17 (CanLii) [*Desautel*].
[40] *Ibid.* at para. 1.
[41] *R. v Van der Peet*, [1996] 2 SCR 507 [*Van der Peet*].
[42] *Ibid.* at 549 and 554.
[43] *Ibid.* at 553.

> (a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and
>
> (b) the Prime Minister of Canada will invite representatives of the Aboriginal peoples of Canada to participate in the discussions on that item

In *Native Women's Assn. of Canada v Canada,* the SCC stated that the "right of the Aboriginal people of Canada to participate in constitutional discussions does not derive from any existing Aboriginal or Treaty right protected under s. 35".[44] In other words, section 35.1 merely grants a procedural right to participate in a constitutional conference where there is a potential to impact upon sections 91(24), 25 or 35.

Treaty Rights

Treaty rights are set out in either historic or modern Treaty agreements which define specific rights, benefits and obligations for the parties to the Treaty. In order to identify specific Treaty rights and benefits, it is necessary to look at the text of the specific Treaty. In historic treaties (i.e., those made before 1975), Treaty rights and benefits often, but not always, include:

- lands set aside to be used only by a First Nation (reserves);
- annual payments of money to a First Nation (annuities);
- hunting and fishing rights on unoccupied Crown lands;
- on-reserve schools and teachers to be paid by the government; and
- one-time benefits such as farm equipment, animals, ammunition and clothing.[45]

The entirety of Alberta is subject to historic treaties, encompassing 45 First Nations and 140 reserves (approximately 812,771 hectares of land).[46] Most of Alberta is covered by three treaties:[47]

- Treaty 6 signed in 1876, covers central Alberta and Saskatchewan, 16 First Nations.
- Treaty 7 signed in 1877, covers southern Alberta, 5 First Nations.

---

[44] *Native Women's Assn. of Canada v Canada*, 1994 CanLii 27 (SCC) [*Native Women's Assn.*] at para. LXXVI. This case did not comment on s. 35.1 *per se* but rather the similar, now repealed, sections 37 and 37.1. The central issue was whether to provide funding to the Native Women's Assn. of Canada to participate in Indigenous consultation process associated with the Charlottetown Accord was a violation of ss. 2(b) and 28 of the *Charter.*

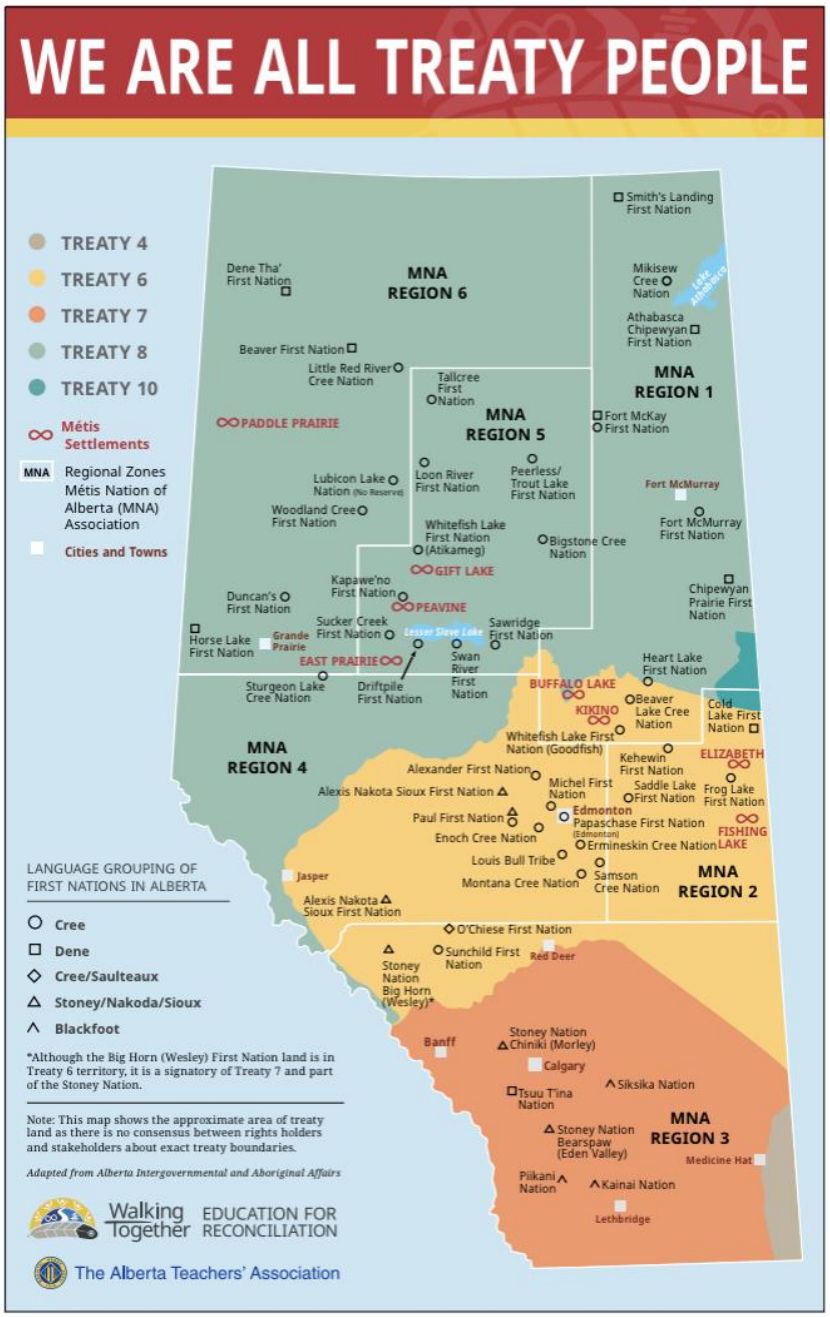
[45] Government of Canada website, online: https://www.rcaanc-cirnac.gc.ca/eng/1100100028574/1529354437231.

[46] Government of Canada, *First Nations in Alberta* (Ottawa: 2013, Aboriginal Affairs and Northern Development Canada).

[47] *Ibid.*

- Treaty 8 signed in 1899, covers portions of Northern Alberta, British Columbia, Saskatchewan and part of the Northwest Territories, 24 First Nations.

Small remaining portions of Alberta are subject to Treaty 4 signed in 1874 (in the southeast corner of the province) and to Treaty 10 signed in 1906 (along the eastern border).[48]



[48] Government of Canada, *Maps of Treaty-Making in Canada: Pre-1975 Treaties of Canada*, online: https://www.rcaanc-cirnac.gc.ca/eng/1100100032297/1544716489360.

According to the *Aboriginal Law Handbook*, the courts in Canada take the position that treaties are governed by domestic law (and not by international law).[49] Treaties are interpreted by looking at the text of the Treaty, the oral history showing the intentions of the parties, documents written at the time as part of the Treaty negotiations, and what the interest of the parties would have been.[50] In particular, historic treaties are given a large and liberal interpretation that accords with the sense that would be naturally understood by the Aboriginal group, ambiguities are resolved in favour of Aboriginal group, and limitations on rights are narrowly construed.[51]

The principles of Treaty interpretation are set out by the SCC in *Marshall:*[52]

> This Court has set out the principles governing Treaty interpretation on many occasions. They include the following.
>
> 1. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation: [references omitted].
> 2. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favor of the Aboriginal signatories: [references omitted].
> 3. The goal of Treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the Treaty was signed: [references omitted].
> 4. In searching for the common intention of the parties, the integrity and honour of the Crown is presumed: [references omitted].
> 5. In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties: [references omitted].
> 6. The words of the Treaty must be given the sense which they would naturally have held for the parties at the time: [references omitted].
> 7. A technical or contractual interpretation of Treaty wording should be avoided: [references omitted].
> 8. Treaty rights of Aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update Treaty rights to provide for their modern exercise. This involves determining what modern practices are

[49] *Aboriginal Law Handbook*, *supra.* note 22. See also *Canada v. Jim Shot Both Sides*, 2020 FCA 20 (CanLii) [*Jim Shot Both Sides*].
[50] *R v Marshall*, [1999] 3 SCR 456 [*Marshall*] at para.78. See also *R v Badger,* [1996] 1 SCR 771 [*Badger*].
[51] *Marshall, Ibid.*
[52] *Ibid.*

> reasonably incidental to the core Treaty right in its modern context: [references omitted].

Treaty No. 6

Treaty No. 6 promises lands to be set aside as reserves, a one-time payment of $12 per person, an annuity of $5 per person, a $1,500 annual expenditure by the Crown for the purchase of ammunition and twine for nets, farming equipment, seed and animals, salaries and clothing for each Chief and subordinate officers, and provision of schools. There is a right to continue hunting and fishing throughout the surrendered lands excepting those that may be "taken up for settlement, mining, lumbering or other purposes" and subject to regulations that may be made. Furthermore, the Crown agrees to provide assistance in times of pestilence or famine, and that a medicine chest shall be kept at the house of each Indian Agent.

Treaty No. 7

Treaty No. 7 promises land to be set aside as reserves (including a portion of land to be reserved for only 10 years), an annuity of $5 per person (with higher amounts to each Chief and minor Chief/Councillor), a $2,000 annual expenditure by the Crown for the purchase of ammunition, clothing and a gun for each Chief and Councillor, various pieces of equipment, cattle for raising stock, farming equipment and seed for land that is broken up for cultivation, and payment of teachers' salaries. There is a right to continue their vocations of hunting throughout the surrendered lands excepting those that may be "taken up for settlement, mining, lumbering or other purposes" and subject to regulations that may be made.

Treaty No. 8

Treaty No. 8 promises that the First Nations people shall have the right to pursue their vocations of hunting, trapping and fishing throughout the surrendered lands except where land "may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes" and subject to regulations that may be made. As well, the Treaty promises that reserves will be set aside for the First Nations, or that individuals/families may choose "land in severally" to be conveyed to them. The Treaty also provides for one-time payments to be made to each Chief, Headman and person (amounts vary), as well as, annuities to each person. There are promises of clothing for the Chiefs and Headmen, equipment and animals for those who choose to farm, an annual payment of $1 per person for ammunition and twine (for those who prefer to hunt and fish), other equipment, and payment of teachers' salaries.

Legal Effect of the Treaties

The numbered treaties all indicate that the respective First Nations "cede, release, surrender and yield up to the Government of Canada for Her Majesty the Queen and her successors for ever, all their rights, titles, and privileges whatsoever to the lands" described in the Treaty subject to the limits in the Treaty. While many Indigenous communities consider treaties to be a way to share the land without giving up their rights to the land,[53] the common law view is that Indigenous communities surrendered Aboriginal title through the treaties.[54] As stated in *Tsilhqot'in Nation,* the "Crown entered into treaties whereby the Indigenous peoples gave up their claim to land in exchange for reservations and other promises".[55]

Treaty rights are collective rights belonging to the community as a whole and enjoyed by individuals. Furthermore, Treaty rights are specific to each Aboriginal community.[56] In *Sundown*, the SCC held that Treaty rights to hunt and fish include activities which are incidental to those rights.[57] In this case, an Indigenous person who is a member of a First Nation which is a party to Treaty No. 6 was charged with breaching provincial park regulations by building a log cabin within Meadow Lake Provincial Park without Ministerial permission. Ultimately, the SCC held that construction of the cabin was incidental to Sundown's Treaty hunting rights as it supported the traditional expeditionary hunts conducted by the Aboriginal community in that particular site.

In reaching this conclusion, the SCC used an established test for ancillary activities: is the activity reasonably incidental to the act of hunting itself? This test was established in the earlier SCC decision in *Simon*.[58] The SCC in *Sundown* provides additional clarity on this test as follows:

> Would a reasonable person, fully apprised of the relevant manner of hunting or fishing, consider the activity in question reasonably related to the act of hunting or fishing? …In order to determine what is reasonably incidental to a Treaty right to hunt, the reasonable person must examine the historical and contemporary practice of that particular Treaty right by the Aboriginal group in questions to see how the Treaty right has been and continues to be exercised. That which is reasonably incidental is something which allows the claimant to exercise the right in the manner that his or her ancestors did, taking into account acceptable modern developments or unforeseen alterations in the

[53] See for example, Monique M. Ross, *Aboriginal Peoples and Resource Development in Northern Alberta, CIRL Occasional Paper #12* (Calgary: 2003, Canadian Institute of Resources Law) and Lynda Collins and Meghan Murtha, "Indigenous Environmental Rights in Canada: The Right to Conservation Implicit in Treaty and Aboriginal Rights to Hunt, Fish, and Trap" (2010) 47:4 ALR 959 at 971.
[54] *Ibid.*
[55] *Tsilhqot'in Nation, supra.* note 10 at para.4.
[56] *R. v Sundown*, [1999] 1 SCR 393 [*Sundown*].
[57] *Ibid.*
[58] *Simon v R.*, [1985] 2 SCR 387 [*Simon*].

> rights…. Incidental activities are not only those which are essential, or integral, but include, more broadly, activities which are meaningfully related or linked.[59]

The SCC noted in *Sundown* that Treaty rights should not be interpreted as if they are common law property rights and should not be defined in a manner that accords with common law concepts like title to land or rights to use property of another. Rather, a Treaty right is "the right of Aboriginal people in common with other Aboriginal people to participate in certain practices traditionally engaged in by particular Aboriginal nations in particular territories".[60]

The NRTA and Limits on Treaty Rights

The NRTA transferred the interest of the federal Crown in all Crown lands to the provincial Crown.[61] The NRTA provides that "the [provincial] laws respecting game... shall apply to the Indians" and that "Indians shall have the right… of hunting, trapping, and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access".[62] This has been interpreted by the SCC as modifying Treaty rights in two ways, by:

- extinguishing the Treaty right to hunt commercially, and
- expanding the geographical areas in which Indians have the Treaty right to hunt.[63]

Discussion of the impact of the NRTA on Treaty rights can be found in the SCC decisions *Horseman* and *Jim Shot Both Sides*. Essentially, the courts consider treaties to be modified by the NRTA such that commercial hunting is no longer considered a Treaty right but hunting for food may be conducted on unoccupied Crown lands and any other lands to which Indigenous people have a right of access (which may include unoccupied private lands). Generally, Treaty rights to hunt and fish have been limited by the Courts for food, social or ceremonial purposes.[64]

It should be noted that there is substantial debate about the correctness of this interpretation of the NRTA with respect to Treaty rights in Alberta (also in Saskatchewan and Manitoba). The basis for this debate is that, both historically and legally, the Courts have misinterpreted the NRTA vis a vis Treaty rights.[65] However, to date the current position of the SCC is that the NRTA unilaterally modified Treaty rights in Alberta to remove rights to hunt commercially while

---

[59] *Sundown, supra.* note 56 at para. 27.
[60] *Ibid.* at para. 35.
[61] *Natural Resources Transfer Agreement, Constitution Act, 1930,* 20-21 George V, c. 26 (U.K.) [NRTA]. The NRTA is incorporated in *Alberta Natural Resources Act*, S.C. 1930, c. 3; and *The Alberta Natural Resources Act*, S.A. 1930, ch. 21.
[62] *Ibid.* at s. 12.
[63] *Frank v The Queen,* [1978] 1 SCR 95; *R v Horseman*, [1990] 1 SCR 901; *Sundown, supra.* note 56; and *Badger, supra.* note 50.
[64] *Aboriginal Law Handbook*, *supra.* note 22.
[65] For more discussion, see the special issue of *Review of Constitutional Studies,* 12(2) (2007) 127.

expanding the geographical areas where Treaty hunting rights may be exercised. It should be noted that the SCC has determined that Métis people are not "Indians" for the purposes of the hunting rights provision in the NRTA (although the SCC did not make any findings with respect to whether there is an Aboriginal right protected by section 35).[66]

Specific Claims Tribunal

The Specific Claims Tribunal was established by the *Specific Claims Tribunal Act*.[67] The Specific Claims Tribunal decides issues of validity and compensation related to First Nations' specific claims. The grounds for a specific claim are:[68]

(a) a failure to fulfil a legal obligation of the Crown to provide lands or other assets under a Treaty or another agreement…

(b) a breach of a legal obligation under the *Indian Act* or other legislation - pertaining to Indians or lands reserved for Indians…

(c) a breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or its administration of reserve lands, Indian moneys or other assets of the First Nation;

(d) an illegal lease or disposition by the Crown of reserve lands;

(e) a failure to provide adequate compensation for reserve lands taken or damaged by the Crown or any of its agencies under legal authority; or

(f) fraud by employees or agents of the Crown in connection with the acquisition, leasing or disposition of reserve lands.

Paraphrasing the Act, the Specific Claims Tribunal does not hear claims that are based on:[69]

- events that occurred within 15 years immediately preceding the date on which the claim was filed;
- land claims agreements entered into after December 31, 1973 (i.e., modern treaties);
- certain federal statues or agreements that are specified in the *Specific Claims Tribunal Act* (these deal with self-government statutes and agreements);

[66] *Blais*, [2003] 2 SCR 236 which dealt with charges arising from a Métis person hunting out of season.
[67] *Specific Claims Tribunal Act*, S.C. 2008, c. 22.
[68] *Ibid.* at s. 14.
[69] *Ibid.* at s. 15.

- concerns with the delivery or funding of programs or services related to policing, regulatory enforcement, corrections, education, health, child protection, social assistance, or similar programs;
- agreements that provide another mechanism for dispute resolution;
- Aboriginal rights or title;
- Treaty rights related to activities of an ongoing and variable nature, such as harvesting rights (although such losses may be considered in awarding specific claim compensation).

Further, a specific claim cannot be filed if there are court or tribunal proceedings (other than the Specific Claims Tribunal) that relate to the same land or other assets and (1) could result in a decision irreconcilable with that of the claim or (2) that are based on the same or substantially the same facts where the First Nation and the Crown are parties to that proceeding, and the proceeding has not been adjourned.[70] In order to file a specific claim, the First Nation must be seeking monetary compensation not exceeding $150 million.[71] Compensation is only for damages that are pecuniary in nature (so cannot be for losses such as spiritual or cultural harms), and cannot be awarded as punitive or exemplary damages.[72] Compensation may be awarded against a provincial Crown so long as it was granted party status.[73]

More details on Specific Claims Tribunal processes are provided in the *Specific Claims Tribunal Rules of Practice and Procedure*.[74] The *Specific Claims Policy and Process Guide* (*Policy)* also provides helpful information about the specific claim negotiation process, settlements, and the role of the Specific Claims Tribunal.[75] The *Specific Claims Policy* indicates that where a First Nation can establish that some of its reserve lands were never lawfully surrendered or otherwise taken under legal authority, the First Nation may be compensated by return of the lands.[76] However, no third parties will be dispossessed in order to provide compensation.[77] Further, if a claim exceeds $150 million, then Cabinet approval is required to embark on specific claim negotiation. While monetary compensation and sometimes return of land may result from the specific claims process, there is no renegotiation of the Treaty itself.

In 2016, the Auditor General of Canada reviewed the specific claims process.[78] In particular, the audit looked at whether Indigenous and Northern Affairs Canada adequately managed the

[70] *Ibid.* at s. 15.
[71] *Ibid.* at ss. 15 and 20.
[72] *Ibid.* at s. 20.
[73] *Ibid.* at s. 20.
[74] *Specific Claims Tribunal Rules of Practice and Procedure*, SOR 2011-119.
[75] Government of Canada, *The Specific Claims Policy and Process Guide,* online: https://www.rcaanc-cirnac.gc.ca/eng/1100100030501/1581288705629 [*Specific Claims Policy*].
[76] *Ibid.*
[77] *Ibid.*
[78] Auditor General of Canada, *Report 6 – First Nations Specific Claims – Indigenous and Northern Affairs Canada* (Ottawa: 2016, Office of the Auditor General of Canada), online: https://www.oag-bvg.gc.ca/internet/English/parl_oag_201611_06_e_41835.html.

resolution of First Nations specific claims. The Auditor General found that there was not adequate management of the resolution of First Nations specific claims due to barriers that hindered access to the process and impeded the resolution of claims. There is currently work underway by the Federal Government – in conjunction with the Assembly of First Nations – to improve the specific claims process.[79]

While the entirety of Alberta is covered by historic treaties, this is not necessarily the case in other parts of Canada. The comprehensive lands claims process is designed to address assertions of Aboriginal rights with the creation of modern treaties as a possible resolution. As a result of this process, there are now some modern treaties in Canada, primarily in B.C. and Northern Canada.

Aboriginal Rights

Unlike Treaty rights which stem from agreement between Indigenous peoples and the Crown, Aboriginal rights pre-exist the colonization of Canada.[80] In other words, Aboriginal rights are inherent rights which are derived from the presence of Indigenous peoples in Canada long before the colonization of Canada.[81] As with Treaty rights, Aboriginal rights are collective rights belonging to the community as a whole although individuals enjoy the benefits of Aboriginal rights.[82] The categories of Aboriginal rights are not closed but harvesting rights - such as hunting and fishing for food, social or ceremonial purposes - have most often been recognized by the Courts.[83] Aboriginal title is another type of Aboriginal right.[84]

The onus is on Aboriginal peoples to prove the existence of any Aboriginal right claimed. There is no assumption that Aboriginal exist, they must be acknowledged by the Courts or the government. The test for proving an Aboriginal right is set out in *Van der Peet* and consists of three parts:[85]

- must be a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right;
- that practice, custom or tradition must have existed prior to European contact; and
- that practice, custom or tradition exists in some form today (albeit it can have evolved over time).

While a practice, custom or tradition must be distinctive, it does not need to be unique to that particular Aboriginal community. The practice, custom or tradition must be of central significance

[79] Government of Canada website, online: https://www.rcaanc-cirnac.gc.ca/eng/1100100030291/1539617582343. See also *Aboriginal Law Handbook*, *supra.* note 22 at Chapter 2.
[80] *Jim Shot Both Sides*, *supra.* note 49.
[81] *Aboriginal Law Handbook*, *supra.* note 22.
[82] *Ibid.*
[83] *Ibid.*
[84] *Ibid.*
[85] *Van der Peet*, *supra.* note 41.

to the Aboriginal community in order to be considered integral, that is, it made the Aboriginal society what it was. The practice, custom or tradition cannot be simply incidental to another integral practice, custom or tradition. In other words, a practice, custom or tradition cannot be considered an Aboriginal right by piggybacking on an integral practice, custom or tradition.

The SCC in *Van der Peet* did indicate that this test would need to be modified for Métis peoples and, indeed, that was done in the *Powley* decision to change the relevant time period to being the time of effective European control. Furthermore, the SCC clarified that claims to Aboriginal rights must be considered on a specific, rather than a general, basis. The existence of an Aboriginal right depends upon the particular Aboriginal community claiming the right.

As pointed out in *Van der Peet*, Aboriginal rights existed at common law but did not have constitutional status until the passage of section 35. Prior to section 35, this meant that Aboriginal rights could be extinguished or regulated at any time. However, since the passage of section 35, Aboriginal rights cannot be extinguished and can only be regulated or infringed in a manner consistent with the justification test set out in *Sparrow*.[86]

Under *Sparrow*, the first question is whether the legislation in question interferes with an existing Aboriginal right. If there is interference, the question is whether that interference can be justified by asking (1) is there a valid legislative objective and (2) is the honour of the Crown upheld? In looking at the issue of justification, depending on the circumstances, it can be appropriate to look at factors such as whether there is as little infringement as possible; if there is expropriation, was compensation fair; and was the Aboriginal community consulted with respect to conservation measures.

The SCC in *Sparrow* also stated that section 35 does not revive extinguished rights nor does it incorporate the specific manner in which an Aboriginal right was regulated before 1982 (i.e. Aboriginal rights can evolve over time). However, the SCC noted that an Aboriginal right is not extinguished merely because it is controlled in great detail by regulations or policy.

Aboriginal Title

One particular type of Aboriginal right is Aboriginal title.[87] Aboriginal title grants a set of rights to control what happens on a particular piece of land, including the right to exclude others.[88] The requirements for proving Aboriginal title are set out in *Delgamuukw:*[89]

- the land must have been occupied prior to the assertion of Crown sovereignty;
- if present occupation is relied on as proof of occupation pre-sovereignty, there must be continuity between present and pre-sovereignty occupation (it does not need to be an

[86] *R v Sparrow*, *supra.* note 12.
[87] *R. v Adams*, [1996] 3 SCR 101 [*Adams*].
[88] *Aboriginal Law Handbook*, *supra*. note 22.
[89] *Delgamuukw, supra.* note 12.

unbroken chain of continuity but rather need to demonstrate substantial maintenance of the connection between the people and the land); and

- at sovereignty, occupation must have been exclusive as demonstrated by the "intention and capacity to retain exclusive control" (shared exclusive possession is a possibility).[90]

The SCC indicated that Aboriginal title is a right to exclusive use and occupation of land; it confers more than the right to engage in specific activities which may be themselves Aboriginal rights. Aboriginal title "confers the right to use land for a variety of activities, not all of which need to be aspects of practices, customs and traditions which are integral to the distinctive cultures of Aboriginal societies".[91] However, Aboriginal title does contain an inherent limitation in that lands cannot be used in a manner irreconcilable with the nature of the Aboriginal community's attachment to those lands. If an Aboriginal community wishes to use land in a way Aboriginal title does not permit, then those lands must be surrendered to the Crown and converted to non-title lands (Aboriginal title lands are inalienable except to the Crown).[92] Aboriginal title is a "burden on the Crown's underlying title".[93]

The SCC notes in *Delgamuukw* that constitutionally recognized Aboriginal rights fall along a spectrum with respect to their degree of connection with the land:

> At the one end, are those Aboriginal rights which are practices, customs and traditions integral to the distinctive Aboriginal culture of the group claiming the right. However, the "occupation and use of the land" where the activity is taking place is not "*sufficient to support claim of title to the land*" … In the middle, there are activities which, out of necessity, take place on land and indeed, might be intimately related to a particular piece of land. Although an Aboriginal group may not be able to demonstrate title to the land, it may nevertheless have a site-specific right to engage in a particular activity…. At the other end of the spectrum, there is Aboriginal title itself… Aboriginal title confers more than the right to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive Aboriginal cultures. Site-specific rights can be made out even if title cannot. What Aboriginal title confers is the right to the land itself.[94]

In other words, Aboriginal rights may be tied to land but fall short of Aboriginal title.

The first decision in which the SCC recognized Aboriginal title for a specific Aboriginal community was *Tsilhqot'in Nation*.[95] In this decision, the SCC clarified that "[o]ccupation

[90] *Ibid.* at para. 156.
[91] *Ibid.* at para. 111.
[92] In *Tsilhqot'in Nation, supra.* note 10 at para. 15: the SCC states that being "irreconcilable with the nature of the group's attachment to that land" means "it is group title and cannot be alienated in a way that deprives future generations of the control and benefit of the land".
[93] *Ibid.* at para. 145. See also *Guerin v The Queen*, [1984] 2 SCR 335.
[94] *Tsilhqot'in Nation, ibid.* at para.138.
[95] *Ibid.*

sufficient to ground Aboriginal title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty".[96] It is not required that there be regular presence or intensive occupation of particular tracts to demonstrate Aboriginal title; Aboriginal title can apply to large territories.

In *Tsilhqot'in* Nation, the SCC also stated that Aboriginal title "confers the right to use and control the land and reap the benefits flowing from it".[97] Further, where title has been asserted but not yet established, the Crown is required to consult and accommodate as appropriate. Infringements on Aboriginal title are only permitted with consent of the Aboriginal group or if justified by a compelling and substantial public purpose that is not inconsistent with the Crown's fiduciary duty.

It should be noted that since historical treaties cover the entirety of Alberta, the current legal view is that the lands in Alberta have been ceded and that Indigenous rights are governed by those treaties. This means there is likely to be limited, if any, consideration of issues of Aboriginal title in the province. However, there may be outstanding issues raised around Aboriginal title to water and by First Nations that are not signatories to the historical treaties.

Comprehensive Land Claims Process

Where there is unceded territory and claims to Aboriginal title and rights, the comprehensive claims process plays an important role and can lead to the development of modern treaties and self-government agreements. This process contrasts with the specific claims process which relates to the administration of land and other assets, or to the non-fulfilment of historic treaties. To date, 29 comprehensive land claim and/or self-government agreements have been brought into effect pursuant to the comprehensive land claim process.[98]

The comprehensive claims process is guided by the *Interim Comprehensive Land Claim Policy.*[99] The *Interim Policy* sets out Treaty negotiation processes and procedures (note that there is a specific process for B.C.). It also sets out several principles respecting the recognition and reconciliation of section 35 rights, the objectives of negotiation, and scope of negotiations.

---

[96] *Ibid.* at para. 50.

[97] *Ibid.* at para. 2.

[98] Government of Canada, *General Briefing Note on Canada's Self-government and Comprehensive Land Claims Policies and the Status of Negotiations* (2016), online: https://www.rcaanc-cirnac.gc.ca/eng/1373385502190/1542727338550).

[99] Aboriginal Affairs and Northern Development Canada, *Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights* (Ottawa: 2014, Government of Canada) [*Renewing the Comprehensive Claims Policy*]. See also Douglas Eyford, *A New Direction, Advancing Aboriginal and Treaty Rights* (Ottawa: 2015, AANDC) which is the report of the Ministerial Special Representative on Renewing the Comprehensive Lands Claims Policy. The *Interim Policy* has been heavily critiqued, see for example *Aboriginal Law Handbook*, *supra.* note 22.

One matter within the scope of comprehensive land claim negotiations is environmental management, particularly wildlife management and the use of water and land. Provision may be made for Indigenous input via membership on committees, boards or similar bodies or via participation in government bodies with decision-making power. It is noted that such "arrangements must recognize that the government has an overriding obligation to protect the interests of all users, to ensure resource conservation, to respect international agreements and to manage renewable resources within its jurisdiction".[100] As well, the *Interim Policy* notes that, in negotiating the rights of Indigenous peoples in treaties, it is not intended to prejudice the existing rights of others and that "[p]rovision must be made for protecting the current interests of non-Aboriginal subsistence users and for the right of the general public to enjoy recreational activities, hunting and fishing on Crown lands, subject to laws of general application".[101]

It is noted in the *Interim Policy* that reconciliation processes may lead to modern Treaty arrangements but also can result in other constructive arrangements such as non-Treaty arrangements, contracts, legislation, memoranda of understanding, and consultation and accommodation processes. Aside from the *Interim Policy*, there is also a *Cabinet Directive on the Federal Approach to Modern Treaty Implementation* and a *Statement of Principles on the Federal Approach to Modern Treaty Implementation.*[102] The Cabinet Directive sets out an operational framework for managing the Crown's modern Treaty obligations and guides federal departments and agencies. The guiding principles are meant to provide guidance to the Crown on modern Treaty implementation.

Because the entirety of Alberta is covered by historic treaties, there is not really a role for the comprehensive claims process vis a vis First Nations whose land is located in Alberta. However, it should be noted that there are outstanding specific Treaty land claims in Alberta. Some relatively recent Treaty land entitlement settlements involve the Lubicon Lake Band and the Bigstone Cree Nation, and there was recently a specific claim settlement with the Siksika Nation.[103] It should also be noted that the Métis Nation of Alberta is engaged in self-government negotiations with the federal government.[104] As well, the Blood Tribe in Alberta has an agreement-in-principle with the federal government with respect to governance and child welfare.

[100] *Renewing the Comprehensive Claims Policy* at 15.
[101] *Ibid.* at 17.
[102] *Cabinet Directive on the Federal Approach to Modern Treaty Implementation (*2015), online: https://www.rcaanc-cirnac.gc.ca/eng/1436450503766/1544714947616, and a *Statement of Principles on the Federal Approach to Modern Treaty Implementation* (2015), online: https://www.rcaanc-cirnac.gc.ca/eng/1436288286602/1539696550968.
[103] Government of Alberta website, online: https://www.alberta.ca/land-claims-in-alberta.aspx. Prime Minister of Canada Press Release (June 2, 2022), online: https://pm.gc.ca/en/news/news-releases/2022/06/02/major-historical-claim-settlement-siksika-nation. For a report on outstanding claims within the federal process, see Reporting Centre on Specific Claims website, online: https://services.aadnc-aandc.gc.ca/SCBRI_E/Main/ReportingCentre/External/externalreporting.aspx.
[104] *Métis Recognition and Self-Government Agreement*, 2019, online: https://albertaMétis.com/app/uploads/2019/08/2019-06-27-MNA-MGRSA-FINAL-to-be-posted-on-website.pdf.

Métis Settlements

Alberta is unique in Canada as the only province with a recognized Métis landbase entrenched in legislation. In 1989, the Government of Alberta and the Alberta Federation of Métis Settlement Associations entered into the *Alberta-Métis Settlements Accord*.[105] The Accord was intended to secure a land base, ensure local autonomy, and enable economic self-sufficiency for the Métis peoples. As well, the Accord was intended to resolve litigation and other issues between the province and the Métis Settlements. The Accord was implemented via several pieces of legislation: the *Métis Settlements Act*, the *Métis Settlements Land Protection Act*, the *Métis Settlements Accord Implementation Act*, and the *Constitution of Alberta Amendment Act, 1990*[106].

Métis Settlements Act

The *Métis Settlements Act* establishes 8 settlements, each of which have the rights, powers and privileges of a natural person and are governed by a settlement council which can engage in commercial and other activities.[107] Many of the provisions in the *Métis Settlements Act* address the management of, access to, and use of Métis settlement lands. There are also several provisions that address fishing activities within the settlement lands.[108] This includes a co-management agreement, appended as Schedule 3, which establishes Métis Settlement Access Committees for each settlement that makes recommendations on mineral dispositions within Métis settlement lands (and can effectively deny access to settlement lands).[109] The Act also addresses matters such as settlement council decision making, membership, and financial administration (among other things). It should be noted that there are amendments to this Act which will come into force on April 1, 2023 (addressing some aspects of financial administration).[110]

The SCC in *Cunningham* found that the purpose and effect of the *Métis Settlement Act* is to create a land base to preserve Métis identity, culture and self-governance.[111] The SCC described the Act as "not a general benefit program, but a unique scheme that seeks to establish a Métis land base to preserve and enhance Métis identity, culture and self-

[105] An archived version is available online: https://open.alberta.ca/dataset/7995f7bb-6b5c-4ba1-81d8-9dd5e6581917/resource/ae03ca27-82b6-4eda-8ee9-b881a4ad3165/download/2171929-1989-alberta-Métis-settlements-accord.pdf.

[106] *Métis Settlements Act*, RSA 2000, ch. M-14; *Métis Settlements Land Protection Act,* RSA 2000, ch. M-16; *Métis Settlements Accord Implementation Act*, RSA 2000, ch. M-15; and *Constitution of Alberta Amendment Act, 1990*, RSA 2000, ch. C-24.

[107] *Métis Settlements Act* at s. 3.

[108] *Ibid.* at ss. 130 to 133.

[109] Monique M. Ross, *Aboriginal Peoples and Resource Development in Northern Alberta, CIRL Occasional Paper #12* (Calgary: 2003, Canadian Institute of Resources Law).

[110] *Métis Settlements Amendment Act, 2021*, SA 2021, ch. 12.

[111] *Alberta (Aboriginal Affairs and Northern Development) v Cunningham,* [2011] 2SCR 670 [*Cunningham*].

government, as distinct from Indian identity, culture and modes of governance".[112] Similarly, in *Gift Lake Métis Settlement v Alberta (Aboriginal Relations),*the Alberta Court of Appeal found that the membership provisions in the Act "serve and advance the object of an ameliorative program, negotiated with the Métis to establish a land base to preserve and enhance Métis identity, culture and self-governance".[113]

Métis Settlements Land Protection Act

The *Métis Settlements Land Protection Act* ratified the grant of land from the Crown to the Métis Settlements General Council. This Act also clarifies that the patented land cannot be used as security, that there are restrictions on alienating the fee simple to all or any portion of the patented land, and that there are specific requirements for obtaining entry to the patented lands.

Métis Settlements Accord Implementation Act

The *Métis Settlements Accord Implementation Act* extinguished legal actions and claims that were ongoing at the time the Accord was signed. As well, the Act implemented the financial assistance elements of the Accord.

Constitution of Alberta Amendment Act, 1990

Finally, the *Constitution of Alberta Amendment Act, 1990* prevents the Government of Alberta from passing any bill that would amend or appeal the *Métis Settlements Land Protection Act*, alter or revoke the letters patent granting land to the Métis Settlements General Council, or dissolve the Métis Settlements General Council without the agreement of the Métis Settlements General Council. However, this Act expressly states that it does not limit the application of Alberta's laws (either existing or new) to Métis settlement land.

Métis Aboriginal Rights and Self-Government

Métis people do have Aboriginal rights under section 35 of the *Constitution*. However, the criteria for recognizing those rights differs from the criteria for recognition of First Nations rights. Métis people must be able to demonstrate distinctive customs, practices and traditions which

[112] *Ibid.* at para. 69.
[113] *Gift Lake Métis Settlement v Alberta (Aboriginal relations)*, 2019 ABCA 134 (CanLii) at para. 42 [*Gift Lake*].

existed at the time of effective European control (whereas First Nations must demonstrate distinctive customs, practices and traditions *prior* to European contact).[114] Métis rights that have been recognized by the Courts to include harvesting rights, and rights to be consulted and accommodated by government prior to decisions being made that may affect Métis rights.[115]

In 2017, the Government of Alberta and the Métis Nation of Alberta entered into a Framework Agreement which has the purposes of promoting and facilitating the advancement of Alberta Métis, including the preservation of Métis identity and cultural heritage, and of clarifying and defining the nation-to-nation relationship between the parties, as well as promoting reconciliation.[116] The framework agreement is not legally binding and sets out priority actions, strategies for achieving the goals of the framework and joint planning, and arrangements for capacity and funding.

As well, there is a Métis harvesting agreement between the Government of Alberta and the Métis Nation of Alberta.[117] This agreement sets out criteria for identification of eligible Métis harvesters and tables several issues such as commercial harvesting, and fishing and appropriate conservation measures for further discussion. Unlike the Framework Agreement, the harvesting agreement is intended to create legally binding obligations. The agreement appends the *Métis Harvesting in Alberta Policy (2018)* which identifies 4 Métis harvesting areas in the province within which hunting and fishing for food, and non-commercial trapping may occur.[118] Licensing, conservation and other requirements still apply as outlined in the Policy.

The Métis Nation of Alberta has also been in negotiations with the Government of Canada leading to numerous framework agreements, memorandums of understanding and so forth. In 2019, the Métis Nation of Alberta and the Government of Canada signed a Métis Recognition and Self-Government Agreement.[119] The overall purpose of the agreement:

> is to support and advance the inherent right of self-determination and self-government of the Métis Nation within Alberta as recognized and affirmed by section 35 of the [*Constitution*] in a manner that is consistent with the *United Nations Declaration on the Rights of Indigenous Peoples* through a constructive, forward-looking, and reconciliation-based arrangement between the Parties that is premised on rights recognition and implementation.[120]

[114] *R. v Powley*, [2003] 2 SCR 207 [*Powley*].
[115] *Aboriginal Law Handbook*, *supra.* note 22 at Chapter 5: Métis.
[116] Available online: https://albertaMétis.com/app/uploads/2019/07/MNA-Alberta-Framework-Agreement.pdf.
[117] Available online: http://www.albertaMétisgov.com/wp-content/uploads/2020/02/Harvesting-Agreement_SIGNED-March-2019.pdf.
[118] *Métis Harvesting in Alberta Policy (2018)* available online: https://open.alberta.ca/dataset/7763cb9c-9457-439b-b206-f31d65156e9c/resource/d1c7a3d9-5a9d-4654-b745-cd4e7a64cedd/download/Métis-harvesting-in-alberta-2018.pdf.
[119] Available online: https://albertaMétis.com/app/uploads/2019/08/2019-06-27-MNA-MGRSA-FINAL-to-be-posted-on-website.pdf.
[120] *Ibid.* at 2.01.

This agreement recognizes the Métis Nation of Alberta as representing the Métis Nation within Alberta in intergovernmental relations with Canada and sets out a process leading to federal legislative recognition of the Métis Government of the Métis Nation within Alberta as an Indigenous government (i.e., self-government). The agreement indicates that federal laws still apply to the Métis Government (and its citizens) and that the Métis Government cannot make laws within specified heads of jurisdiction such as criminal law. Further, provincial laws continue to apply as they did prior to the date of Self-Government Implementation. It is anticipated that additional self-government arrangements may need to be negotiated, including with the participation of the Alberta government, on specific subject matters including environmental and resource management matters.

More recently, in February 2023, the Métis Nation in Alberta and the Government of Canada signed a Self-Government Recognition and Implementation Agreement which builds on the 2019 agreement.[121] Section 3.01 of the Agreement sets out several purposes:

> (a) contribute to the implementation of the [United Nations Declaration on the Rights of Indigenous Peoples] as it relates to the Métis Nation within Alberta's inherent right to self-determination;
>
> (b) support, advance, and recognize the Métis Nation within Alberta's ongoing exercise of its inherent right of self-government recognized and affirmed by section 35 of the *Constitution Act, 1982* based upon Canada's constitutional responsibility to advance relationships with Indigenous Peoples and to engage in negotiations to recognize and delineate Métis Rights;
>
> (c) consolidate and confirm the outcomes and common understandings reached between the Parties to date by recognizing the existing self-government of the Métis Government, including its role, functions, Jurisdiction, and Authority as set out in this Agreement, before the Treaty Implementation Date;
>
> (d) commit the Parties to ongoing negotiations with a view to achieving the Treaty contemplated by Part VI that is premised on the recognition and implementation of Métis Rights;
>
> (e) provide a foundation for addressing, on a government-to-government basis, the identification, assessment, and resolution of outstanding Métis claims against Canada, including any claims that may relate to the Métis Scrip Systems; and
>
> (f) inform and continue the existing government-to-government relationship between the Parties.

[121] *Métis Nation within Alberta Self-Government Recognition and Implementation Agreement between Métis Nation of Alberta as represented by its President and His Majesty the King in Right of Canada as represented by the Minister of Crown-Indigenous Relations* (February 24, 2023).

The Agreement contemplates the adoption of a Métis Constitution, as well as a commitment to negotiate a self-government Treaty between the Métis Nation within Alberta and the federal government.[122] The Agreement recognizes the jurisdiction of the Métis Government with respect to determining its citizenship requirements, its structure, operations and procedures, assets, and financial management and accountability.[123]

Indigenous Rights and Legal Obligations

The existence of Indigenous rights triggers certain legal obligations. These obligations include a duty to consult and accommodate; a requirement to justify infringement of rights; and consultation requirements when taking up land under the terms of a Treaty.

Consultation and Accommodation

The duty to consult and accommodate is a key component of reconciliation and is a constitutional duty flowing from the honour of the Crown.[124] In *Carrier Sekani*, the SCC described the test for determining whether a duty to consult exists as consisting of three elements:

> (1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right (2) contemplated Crown conduct; and (3) the potential that the Crown conduct may adversely affect an Aboriginal claim or right.[125]

On the last element, the "claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights".[126]

As pointed out by the B.C. Court of Appeal in *Chartrand*,[127] offering "an opportunity to participate in fundamentally inadequate consultations" does not preserve the honour of the Crown and an Aboriginal group cannot be faulted for failing to participate in a flawed consultation process.[128] However, if there is an accessible opportunity for meaningful consultation, an Aboriginal group cannot refuse that opportunity and then challenge a decision for lack of consultation.

[122] *Ibid.* at Part III, Chap. 10 and Part VI, Chap. 12 and 13.
[123] *Ibid.* at Part III, Chap. 8
[124] *Aboriginal Law Handbook*, *supra.* note 22.
[125] *Rio Tinto Alcan Inc. v Carrier Sekani,* [2010] 2 SCR 650 [*Carrier Sekani*] at para. 31.
[126] *Ibid.* at para. 45.
[127] *Chartrand v British Columbia (Forests, Lands and Natural Resource Operations)*, 2015 BCCA 345 (CanLii).
[128] *Ibid.* at para. 69.

Accommodation is a balancing of interests which should result in the Aboriginal group being able to meaningfully exercise their rights but not to the point of undue hardship for the non-Aboriginal population.[129] In *Ktunaxa Nation*, the SCC looked at the requirements for accommodation and, specifically, whether accommodation requires consent.[130] In this case, the Ktunaxa Nation was opposed to a proposed ski development which was to be located in Qat'muk which is the home of Grizzly Bear Spirit and a place of great spiritual significance. Their ultimate position was that accommodations was impossible because the project would drive away Grizzly Bear Spirit and irrevocably impair their religious beliefs and practices. The SCC clarified that section 35 does not provide a "veto over development" rather "[w]here adequate consultation has occurred, a development may proceed without the consent of an Indigenous group".[131] As stated by the SCC: "[t]he s. 35 right to consultation and accommodation is a right to process, not a right to a particular outcome".[132]

The duty to consult arises whenever the Crown considers a decision or action that could adversely affect a proven or asserted Aboriginal or Treaty right.[133] While the degree of consultation and accommodation required varies with the strength of the claim and the severity of impacts, the Crown must always act in good faith with the intention of substantially addressing the concerns raised.[134] The duty to consult and accommodate rests with the Crown although procedural aspects may be delegated to third parties (albeit with strong supervision by the Crown).[135] It should be noted that the duty to consult and accommodate is ongoing and continues so long as the Aboriginal or Treaty right is affected (although it does not arise for past decisions and activities that already have infringed on rights).

Framework for the Duty to Consult and Accommodate

The landmark SCC decision regarding the duty to consult is *Haida Nation.*[136] In this decision, the SCC addressed the duty to consult in the context of replacing and transferring a Tree Farm License to Weyerhaeuser without the consent, and over the objections, of the Haida Nation. At the time, the Haida Nation claimed title to all the lands of Haida Gwaii and the water surrounding it but had not legally proven its title. The SCC held that the government has a legal duty to consult with the Haida Nation although there is no duty to reach an agreement. Furthermore, the duty to consult and accommodate cannot be discharged by delegation to Weyerhaeuser, nor

[129] *Aboriginal Law Handbook*, *supra.* note 22.
[130] *Ktunaxa Nation v B.C.,* (2017) 2 SCR 386 [*Ktunaxa Nation*].
[131] *Ibid.* at para. 83.
[132] *Ibid*. at para. 114.
[133] *Ibid.*
[134] *Ibid.*
[135] *Ibid.*
[136] *Haida Nation v British Columbia (Minister of Forests)*, [2004] SCC 73 [*Haida Nation*].

does Weyerhaeuser have an independent duty to consult or accommodate. The duty to consult and accommodate is owed by the Crown.

In the *Haida Nation* decision, the SCC sets out a "general framework for the duty to consult and accommodate, where indicated, before Aboriginal title or rights claims have been decided".[137] The SCC describes the duty to consult as a spectrum. At one end, where the claim to title is weak, the Aboriginal right is limited, or the potential for infringement is minor, the only duty held by the Crown may be to give notice, disclose information and discuss issues raised. At the other end of the spectrum, where there is a strong *prima facie* case for the claim, the right and potential infringement is of high significance to the Indigenous peoples, and the risk of non-compensable damage is high, then deep consultation may be required. Deep consultation may involve an opportunity to make submissions for consideration, formal participation in the decision-making process, and written reasons showing that Indigenous concerns were considered and how they influenced the decision. The SCC notes that every case must be approached individually and remain flexible. The "controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake".[138]

The SCC heard *Taku River* concurrently with *Haida Nation*.[139] In *Taku River,* the SCC acknowledged that "determining the required extent of consultation and accommodation before a final settlement is challenging" but that it is essential under section 35.[140] The SCC stated:

> The duty to consult arises when a Crown actor has knowledge, real or constructive, of the potential existence of Aboriginal rights or title and contemplates conduct that might adversely affect them. This in turn may lead to a duty to change government plans or policy to accommodate Aboriginal concerns. Responsiveness is a key requirement of both consultation and accommodation.[141]

The SCC stated that there was a strong *prima facie* case supporting the claim of Aboriginal rights and title (its title claim had been accepted for negotiation by the B.C. Treaty Commission), and there was potential for a serious adverse effect from the Minister's decision. As such, the SCC found it was apparent that the Taku River Tlingit First Nation was entitled to something significantly deeper than minimum consultation and that this requirement was adequately met by the provincial environmental assessment process. Furthermore, the SCC found that the First Nation's concerns were adequately accommodated by the terms of the project approval certificate.

Although the framework for consultation and accommodation arose in the context of Aboriginal rights in unceded territory, it also applies in the context of Treaty rights. In *Mikisew* Cree, the

[137] *Ibid.* at para. 11.
[138] *Ibid.* at para. 45.
[139] *Taku River Tlingit First Nation v B.C.,* [2004] 3 S.C.R. 550 [*Taku River*].
[140] *Ibid.* at para. 25.
[141] *Ibid.* at para. 25.

SCC stated that the duty to consult flows from the Honour of the Crown and, in that case, applied to the Crown "taking up" land pursuant to the terms of a Treaty.[142] In *Little Salmon/Carmacks*, the SCC addressed the duty to consult in the context of a modern Treaty.[143] The SCC stated that "[c]onsultation can be shaped by agreement of the parties, but the Crown cannot contract out of its duty of honourable dealing with Aboriginal people…it is a doctrine that applies independently of the expressed or implied intention of the parties".[144]

Consultation and Accommodation: Legislative Processes

In *Mikisew Cree 2018,*[145] the SCC considered the duty to consult in the context of the government taking legislative action (specifically, two 2012 omnibus bills impacting several federal environmental laws). The SCC stated that the duty to consult does not extend to legislative decisions (Abella and Martin JJ disagreed on this point). That is, "no aspect of the law-making process – from the development of legislation to its enactment – triggers a duty to consult".[146] However, the SCC noted that when legislation undermines section 35 rights, other protections may be recognized in the future (such as declaratory relief).

Because there is no requirement for Indigenous consultation on the passage of legislation, Indigenous concerns are not necessarily addressed in the creation of the legislative frameworks that govern land use and resource decision-making. It is these same land use and resource decisions that result in taking up land under Treaty provisions and that impact on the exercise of Treaty rights with the only remedy being challenges to individual decisions as opposed to addressing Indigenous concerns in a more comprehensive way (which could, at least in part, be addressed by addressing Indigenous concerns at the legislative stage).

[142] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage),* [2005] 3 SCC 69 [*Mikisew*].
[143] *Beckman v Little Salmon/Carmacks*, [2010] 3 SCR 103 [*Little Salmon/Carmacks*]. See also *Quebec (Attorney General) v Moses*, [2010] 1 SCR 557.
[144] *Little Salmon/ Carmacks, ibid.* at para. 61.
[145] *Mikisew Cree First Nation v Canada (Governor General in Council)*, [2018] SCC 40 [*Mikisew Cree 2018*].
[146] *Ibid.* at para. 50.

Consultation and Accommodation: Administrative Tribunals

The role of administrative tribunals in consultation was addressed by the SCC in *Carrier Sekani.*[147] In this case, a dam was built in the 1950s without consulting with the Carrier Sekani First Nation. Decades later, the B.C. government sought approval from the B.C. Utilities Commission of a contract for sale of excess power from the dam (the power is primarily used for aluminum smelting). The question arose as to whether the Commission is required to consider the issue of consultation with the Carrier Sekani First Nation in determining if the sale is in the public interest. The SCC stated that "the role of particular tribunals in relation to consultation depends on the duties and powers the legislature has conferred on it".[148] This means for a tribunal to enter into interim resource consultation with First Nations, it must have that power conferred upon it (explicitly or implicitly); such power cannot be inferred from the mere power to consider questions of law. Where a tribunal has authority to consider adequacy of consultation but not the power to enter consultations, it must provide whatever relief it considers appropriate in the circumstances in accordance with its remedial powers.

Government Policy on the Duty to Consult

Aside from guidance from the Courts on the duty to consult and accommodate, there are policies and guidelines at both the provincial and federal levels of government.

In 2020, the Government of Alberta amended its *Policy on Consultation with First Nations on Land and Natural Resources Management, 2013* (*First Nations Consultation Policy*).[149] This Policy is meant to address the government's legal and constitutional duty to consult a First Nation when its decisions related to management of land, water, air, forestry, or fish and wildlife may adversely impact Treaty rights and traditional uses. During the course of consultation, it may become apparent that there is a Crown duty to accommodate in order to avoid, minimize or mitigate adverse impacts on Treaty rights or traditional uses. The Policy indicates which matters are subject to the Policy (provincial regulation, policies and plans, and decisions on projects) and which matters are not subject to the Policy. The Policy sets out guiding principles, the elements of consultation, circumstances in which there will be direct consultation by the Crown and when elements of consultation may be delegated, roles and responsibilities in delegated consultation, timelines, and other matters related to consultation.

[147] *Carrier Sekani, supra*. note 126.
[148] *Ibid.* at para. 55.
[149] *The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013* (Edmonton: 2020, Government of Alberta) [*First Nations Consultation Policy*].

It is noteworthy that the *First Nations Consultation Policy* distinguishes between Treaty Rights and Traditional Uses, as follows:[150]

> Treaty Rights Context
> Alberta respects that First Nations' Treaty rights are protected by section 35 of the *Constitution Act, 1982*, and understands the important role these rights have in maintaining First Nations' cultures and traditions. Alberta recognizes that impacting Treaty rights to hunt, fish, and trap for food may trigger a duty to consult. These rights may be practised on unoccupied Crown lands and other lands to which First Nations members have a right of access for such purposes.
>
> Traditional Uses
> Alberta recognizes that First Nations may engage in customs or practices on the land that are not existing section 35 Treaty rights but are nonetheless important to First Nations ("traditional uses"). Traditional uses of land include burial grounds, gathering sites, and historical or ceremonial locations and do not refer to proprietary interests in the land. First Nations' traditional use information can help greater inform Crown consultation and serve to avoid or mitigate adverse impacts. Alberta will consult with First Nations when traditional uses have the potential to be adversely impacted by land and natural resource management decisions.

Importantly, under the Policy, Traditional Uses are not considered to be Treaty Rights protected by section 35. It should be noted that Alberta's approach to consultation and accommodation has not gone uncriticized. As Laidlaw states, Alberta takes a narrow interpretation of the treaties which leads to a narrow approach to consultation.[151] Treaty rights are viewed as being limited to rights to harvest for food, and traditional uses are not viewed as being Treaty rights. According to Laidlaw, this approach leads to limited consultation without regard to the "connectivity between land and sub-surface activation that affect the environment necessary to support Treaty harvesting rights".[152] It also drives the "incorrect implication that these Treaty rights may only be exercised on undisturbed land".[153]

Further detail on consultation is found in the provincial *Guidelines on Consultation with First Nations*.[154] The guidelines are meant to "clarify the expectations of all parties engaged in the

[150] *Ibid.* at 1.
[151] David Laidlaw, *Alberta First Nations Consultation & Accommodation Handbook – Updated to 2016*, CIRL Occasional Paper #53 (Calgary: 2016, Canadian Institute of Resources Law) at 18-19, and 64.
[152] *Ibid.* at 64.
[153] *Ibid.* at 64.
[154] *The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management, July 28, 2014* (Edmonton: 2014, Government of Alberta) [*Guidelines on Consultation with First Nations*].

consultation process" and provide an overview of consultation procedures.[155] The guidelines provide additional information regarding roles of various parties and the process for consultation. These guidelines include sector-specific matrices which suggest the appropriate level of consultation for a variety of industrial activities, including those which may not and do not require consultation. Consultation management and support in Alberta is provided by the Aboriginal Consultation Office (ACO).[156]

The Alberta Energy Regulator (AER) and the ACO have entered into an agreement called the *Joint Operating Procedures for First Nations Consultation on Energy Resource Activities* (*Consultation JOP*).[157] Essentially, the *Consultation JOP* outlines the procedures established to administer and coordinate the operations of both bodies on matters relating to Indigenous consultation arising from applications, including those for renewal or amendment, made to the AER. As stated in the *Consultation JOP*:

> The AER has no jurisdiction regarding the adequacy of Crown consultation associated with the rights (such as Treaty rights) of Aboriginal peoples as recognized and affirmed under Part II of the *Constitution Act, 1982*. Disputes regarding adequacy of consultation are out of scope in AER-facilitated ADR. The ACO will not participate in an ADR process.[158]

As such, there is a standing request from AER to the ACO for a determination of whether or not the Province of Alberta has found consultation to be (1) adequate, (2) adequate pending outcome of the AER's process, or (3) not required. As well, the AER seeks information as to whether actions may be required to address potential adverse impacts on existing Treaty rights and traditional uses.

In 2020, the Government of Alberta amended its *Policy on Consultation with Métis Settlements on Land and Natural Resource Management, 2015* (*Métis Consultation Policy)*.[159] The Policy is meant to address potential adverse impact to Métis Settlement members' harvesting (hunting, trapping and fishing) and traditional use activities due to Crown decisions regarding land and natural resource management. The Policy indicates that Alberta will consult with Métis Settlements when Alberta has real or constructive knowledge of harvesting or traditional use activities; Alberta is contemplating a decision relating to land and natural resource management; and Alberta's decision has the potential to adversely impact the continued exercise of those harvesting or traditional use activities. If consultation reveals an adverse impact, then the

[155] *Ibid.* at 1.
[156] Government of Alberta website, online: https://www.alberta.ca/indigenous-consultations-in-alberta.aspx.
[157] Alberta Energy Regulator, *Joint Operating Procedures for First Nations Consultation on Energy Resource Activities* (October 31, 2018) [*Consultation JOP*]. See also Ministerial Order Energy 105/2014 and Environment and Sustainable Resource Development 53/2014 (October 31, 2014).
[158] *Consultation JOP* at s. 4.6.
[159] *The Government of Alberta's Policy on Consultation with Métis Settlements on Land and Natural Resource Management, 2015* (Edmonton: 2020, Government of Alberta) [*Métis Consultation Policy*].

primary goal of accommodation is to avoid, minimize or mitigate those adverse impacts. Accommodation will be reflected in the Crown's decision.

The *Métis Consultation Policy* sets out which type of decisions will fall into the purview of the Policy (strategic and project-specific decisions); guiding principles; elements of consultation; roles and responsibilities of various parties; circumstances in which there will be direct consultation by the Crown and where procedural aspects of consultation will be delegated; and other matters related to consultation. Further details about consultation are found in the *Guidelines on Consultation with Métis Settlements*.[160] These guidelines include sector-specific matrices which suggest the appropriate level of consultation for a variety of industrial activities, including those which may not and do not require consultation.

The Government of Canada also has *Guidelines for Aboriginal Consultation and Accommodation*.[161] These guidelines are directed toward federal officials. These guidelines outline the federal government's understanding of the duty to consult, along with relevant legal case summaries. The guidelines also provide guiding principles and consultation directives, outline roles and responsibilities, indicate how to develop a departmental or agency approach to consultation and accommodation, and provide a step-by-step guide to consultation and accommodation.

Impact and Benefit Agreements

Closely associated with consultation and accommodation requirements are Impact and Benefit Agreements (IBAs) which are also known as participation agreements, benefits agreements, and supra-regulatory agreements.[162] These agreements, typically kept confidential, arise between Indigenous communities and companies conducting development activities. IBAs are meant to address potentially adverse impacts of development activities and to ensure that the Indigenous community acquire benefits from the development activities.[163] It should be noted that IBAs are different from resource revenue-sharing agreements that share public revenues – such as taxes and royalties – generated from resource development.[164] While in some jurisdictions the negotiation of IBAs may be required, in Alberta their negotiation is voluntary.[165]

---

[160] *The Government of Alberta's Guidelines on Consultation with Métis Settlements on Land and Natural Resource Management 2016* (Edmonton: 2016, Government of Alberta) [*Guidelines on Consultation with Métis Settlements*].
[161] *Aboriginal Consultation and Accommodation, Update Guidelines for Federal Officials to Fulfil the Duty to Consult* (Ottawa: 2011, Government of Canada) [*Guidelines for Aboriginal Consultation and Accommodation*].
[162] Ginger Gibson and Ciaran O'Faircheallaigh, *IBA Community Toolkit: Negotiation and Implementation of Impact and Benefit Agreements,* (Toronto: 2015, Gordon Foundation) [Gibson and O'Faircheallaigh].
[163] Norah Kielland, *Supporting Aboriginal Participation in Resource Development: The Role of Impact and Benefit Agreements (In Brief)*, *Publication No. 2015-29-E* (Ottawa: 2015, Library of Parliament) [Kielland].
[164] *Ibid.* See also *Aboriginal Law Handbook*, *supra.* note 22.
[165] Kielland, *ibid.*

Because they are usually confidential, there is no standard form IBA[166] but there are several key provisions to be covered in an IBA: financial compensation, employment opportunities, business development opportunities, and social and cultural protection.[167] There appears to be a tendency to emphasize the fair distribution of revenue for the Indigenous community. This may include provisions addressing employment, business development opportunities, compensation for adverse impacts, and distribution of project revenue.[168]

IBAs also may include environmental "mitigation or remedial measures over and above those commitments made during the environmental assessment process", as well as additional compensation for unplanned events or events that are more significant than anticipated.[169] For example, environmental provisions may address environmental management, research on environmental issues, and monitoring and management systems.[170] There may also be provisions for impairment of harvesting and traditional uses.[171]

The existence of an IBA does not discharge the Crown's duty to consult and accommodate[172] but may be viewed by the government as evidence that Aboriginal and Treaty rights have been accommodated.[173] As stated by Gilmour and Mellett:

> In exchange for the provision of …benefits, the project proponent typically recovers commitments of project support, or at least of non objection from the First Nation. Such support can reduce the uncertainty associated with the project regulatory process, and reduce the risk of time and cost associated with conflict over the resolution of Aboriginal concerns at the approval stage, and in subsequent litigation. The project developer also hopes to establish a positive relationship with affected communities and obtain access to local knowledge, labour, and other forms of community involvement.[174]

As such, a project proponent may seek to include provisions that preclude challenges to associated permits and approvals, acknowledgements that the Crown has met its consultation requirements, and release of past alleged Aboriginal or Treaty rights infringements.[175] It is also important that the project proponent confirm that the negotiators on behalf of the Indigenous

[166] Brad Gilmour and Bruce Mellet, "The Role of Impact and Benefit Agreements in the Resolution of Project Issues with First Nations" (2013) 51:2 *Alberta Law Review* 386 [Gilmour and Mellet].
[167] Sandra Gogal, Richard Riegert, and JoAnn Jamieson, "Aboriginal Impact and Benefit Agreements: Practical Considerations" (2005) 43:1 *Alberta Law Review* 129 [Gogal, Riegert and Jamieson].
[168] Kielland, *supra.* note 164. See also Cameron Gunton et al., *Impact Benefit Agreement Guidebook* (Vancouver: 2020, Simon Fraser University) [Gunton].
[169] Gogal, Riegert and Jamieson, *supra.* note 168 at 139.
[170] Gunton, *supra.* note 169. See also Gilmour and Mellet, *supra.* note 167.
[171] Gunton, *ibid*.
[172] *Aboriginal Law Handbook*, *supra.* note 22.
[173] Kielland, *supra.* note 164.
[174] Gilmour and Mellet, *supra.* note 167 at 389.
[175] Gilmour and Mellet, *ibid.*

communities have the requisite mandate and authority to negotiate the IBA, and that the appropriate parties have executed the IBA.[176]

Because IBAs address financial matters, two pieces of legislation are relevant: the *First Nations Financial Transparency Act* and the *Extractive Sector Transparency Measures Act.*[177] The *First Nations Financial Transparency Act* is meant to enhance the financial accountability and transparency of First Nations by setting requirements for the preparation, auditing and public disclosure of financial statements. This could require disclosure of payments made under an IBA. However, enforcement of this Act was put on hold in 2015.[178] A consultation was undertaken but no amendments have yet been made to the Act.[179]

The *Extractive Sector Transparency Measures Act* is designed to implement Canada's international obligations to fight corruption in the extractive sector by imposing reporting obligations around payments made in relation to the commercial development of oil, gas or minerals in the amount of $100,000 or more, including those made to Indigenous governments. Due to concerns from Indigenous communities, the requirement to report payments to Indigenous governments was initially deferred for a two year period but reporting has been required since June 1, 2017.[180]

Judicial Consideration of IBAs

Recently, originating from Alberta, there has been some direct judicial consideration of IBAs and their impact on regulatory processes. In *Ermineskin Cree Nation,*[181] the Federal Court considered a judicial review application by the Ermineskin Cree Nation (ECN) which sought to quash a Designation Order made by the Minister of Environment and Climate Change Canada

[176] Gilmour and Mellet, *ibid.* and Gogal, Riegert and Jamieson, *supra.* note 168.
[177] *First Nations Financial Transparency Act*, S.C. 2013, c. 7 and *Extractive Sector Transparency Measures Act*, S.C. 2014, c. 39, s. 376.
[178] The decision in *Canada (Attorney General) v Cold Lake First Nations*, 2015 FC 1197 (CanLii) stayed certain enforcement actions undertaken by the federal Attorney General in light of pending constitutional challenges to the *First Nations Financial Transparency Act*. See also *Statement by the Honourable Carolyn Bennett on the First National Financial Transparency Act*, December 18, 2015, online: https://www.canada.ca/en/Indigenous-northern-affairs/news/2015/12/statement-by-the-honourable-carolyn-bennett-on-the-first-nations-financial-transparency-act.html.
[179] See *A new approach for mutual transparency and accountability between First Nations and the Government of Canada: Engagement 2017*, online: https://www.sac-isc.gc.ca/eng/1470082330610/1565374902335.
[180] John W. Boscariol and Bianca Déprés, *Reporting of Payments to Aboriginal Governments Now Required under the Canadian Extractive Sector Transparency Measures Act* (July 4, 2018), McCarthy Tetrault, online: https://www.mccarthy.ca/en/insights/blogs/terms-trade/reporting-payments-Aboriginal-governments-now-required-under-canadian-extractive-sector-transparency-measures-act. See also Government of Canada, *Extractive Sector Transparency Measures Act* (March 2017), online*: https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/mining-materials/PDF/ESTMA%20Info%20Sheet%20-%20Indigenous%20Govts.pdf.*
[181] *Ermineskin Cree Nation v Canada (Environment and Climate Change)*, 2021 FC 758 (CanLii) [*Ermineskin Cree Nation*]. There was a parallel challenge made by Vista Coal which was unsuccessful: *Coalspur Mines (Operations) Ltd. V Canada (Environment and Climate Change)*, 2021 FC 759.

(Minister). At issue was the proposed Vista Coal Mine expansion and underground test mine. In 2019, the Minister decided not to designate the project for assessment under the federal *Impact Assessment Act* but, due to new information (i.e. addition of the underground test mine) and concerns raised by the public and Indigenous communities, the Designation Order was issued in 2020.[182] ECN sought to quash the Designation Order on the basis that it would adversely impact its Treaty 6 and Aboriginal rights, including the economic rights created by its IBA with Coalspur (the project proponent). The Court found that the Minister did not consult ECN about its decision to issue the Designation Order; the only Indigenous consultation that had been done was with the Indigenous groups seeking the Designation Order. The Court determined that an economic interest, including a potential economic interest, may trigger the Crown's duty to consult. As such, the Court held that the Designation Order should be quashed for lack of consultation.

The Federal Court decision was appealed to the Federal Court of Appeal which ultimately dismissed the appeal.[183] The basis of the dismissal was that the appeal was moot due to the fact that the Minister had initiated a new consultation process regarding designation of the project and ultimately decided to issue Designation Order #2. The only live issue then was whether the consultation on Designation Order #2 was sufficient and that matter was the subject of another judicial review proceeding. It is interesting to note that the Court of Appeal indicated that, although it decided the appeal was moot, its "reasons should in no way be understood as an endorsement of the Federal Court Judge's decision".[184]

Similarly in the *Benga Mining* decision,[185] the proponent of a metallurgical coal mine sought leave to appeal the decision of a Joint Review Panel (JRP) which denied approval of the proposed project. The JRP was responsible for conducting both federal and provincial reviews. The JRP, in its provincial capacity, denied the project due to significant adverse environmental effects and adverse impacts on Indigenous peoples. The JRP, in its federal capacity, did not complete its assessment since provincial approval was denied (although it did make recommendations to the federal government).

In this case, two First Nations – the Stoney Nakoda and the Piikani – had IBAs with the project proponent. While the JRP was aware of the existence of the IBAs, the contents remained confidential. As a ground of appeal (among others), the project proponent argued that the JRP failed to properly assess the impact of the rejection of the project on Aboriginal rights and economic interests.

[182] *Impact Assessment Act*, S.C. 2019, c. 28 [IAA].
[183] *Canada (Environment and Climate Change) v Ermineskin Cree Nation*, 2022 FCA 123 (CanLii) [*Ermineskin* appeal decision]. The decisions in both the judicial review by ECN and the judicial review by Coalspur were appealed, and both were dismissed as being moot appeal due to issuance of the intervening Designation Order #2.
[184] *Ibid.* at para. 42.
[185] *Benga Mining Limited v Alberta Energy Regulator*, 2022 ABCA 30 (CanLii) [*Benga Mining*].

The Stoney Nakoda and the Piikani also sought to appeal on the grounds that:

- there was failure to consult on the potential finding that the project was not in the public interest;
- there was failure to consider and apply the honour of the Crown and the principle of reconciliation by not approving the Project without seeking additional information on economic benefits from Stoney Nakoda and Piikani,
- the JRP's discretion was fettered by not considering positive or beneficial effects on First Nations because only potential negative impacts were considered;
- the JRP made determinations on the validity of asserted Aboriginal rights and interests when it was specifically not allowed to do so.

The Court of Appeal summarized the concerns raised in the appeal around First Nations into three themes: lack of consideration of the positive project benefits to First Nations in the contexts of the public interest and of the honour of the Crown and reconciliation; the JRP's responsibilities once it considered not approving the project (i.e., any obligations for further consultation); and concerns with the language of the terms of reference.

After considering each theme of concerns, the Court of Appeal denied leave to appeal. On the first theme, the Court found that the First Nations did not provide any information about what would be lost if project was not approved, even though they knew it was a possible outcome. On the second theme, the Court found no merit to the argument that there was a lack of consultation on the potential decision to not approve. The First Nations were granted full participation rights and knew non-approval was a possible outcome. The JRP had information to fulfil its mandate, understood that benefits would accrue to the First Nations upon approval, and had no obligation to seek additional information about implications of non-approval after the hearing closed. Finally, on the third theme, the Court found that there was no merit to the argument that the terms of reference directed the JRP to only consider negative impacts of a project. As such, the Court denied leave to appeal the JRP's decision on the grounds there is no arguable merit to the grounds of appeal. Subsequently, the Stoney Nakoda and the Piikani (as well as the project proponent) sought leave to appeal the Court of Appeal's decision to the SCC. The SCC denied leave to appeal without reasons.[186]

An interesting question raised by IBAs is the balance between the right of one First Nation to enter an IBA essentially allowing some impairment of its Treaty rights and the right of other First Nations to exercise their Treaty rights. This tension can be seen in *Ermineskin Cree Nation* where some First Nations entered into IBAs and supported development whereas other First Nations had continuing concerns with the same development. At this point, there is little judicial guidance on the appropriate balance.

[186] *Piikani Nation v Alberta Energy Regulator*, 2022 CanLii 88699 (SCC).

Legislative Infringement on Treaty Rights

When considering issues of legislative infringement of Treaty rights, there is a three step process. Firstly, the First Nation bears the onus of establishing the existence of a Treaty right. Treaty rights are set out in either historic or modern Treaty agreements which define specific rights, benefits and obligations for the parties to the Treaty. In order to identify specific Treaty rights and benefits, it is necessary to look at the text of the specific Treaty.

Secondly, the First Nation must establish an infringement by demonstrating an interference with or meaningful diminution of a Treaty right. The threshold to establish an infringement is low.[187] As an example, in *Badger*, the SCC found that a hunting license scheme was an infringement of Treaty rights because it imposed limitations on the method, timing and extent of hunting and thus eroded Treaty hunting rights.[188]

Thirdly, the onus then shifts to the Crown to justify the infringement. As stated in *Badger,* "justification of provincial regulations enacted pursuant to the *NRTA* should meet the same test for justification of Treaty rights that was set out in *Sparrow*".[189]

The SCC in *Tsilhqot'in Nation* summed up the *Sparrow* requirements as follows:

- The Crown must establish that it discharged its procedural duty to consult and accommodate. The degree of consultation and accommodation required is proportionate to the strength of the Treaty claim and the seriousness of the negative impact.[190]
- The Crown must have a compelling and substantial objective for its actions. As stated in *Tsilhqot'in Nation*, to "constitute a compelling and substantial objective, the broader public goal asserted by the government must further the goal of reconciliation, having regard to both the Aboriginal interest and the broader public objective".[191]
- The Crown's action must be consistent with its fiduciary duty. This means that an infringement cannot be justified if it "would substantially deprive future generations of the benefit of the land".[192] It also means that the infringement must be proportional.[193] This means that the infringement "must be necessary to achieve the government's goal (rational connection); the government go no further than necessary to achieve it (minimal impairment); and the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the … interest (proportionality of impact)".[194]

[187] *Aboriginal Law Handbook*, *supra* note 22.
[188] *Badger*, *supra.* note 50 at paras. 86 to 95.
[189] *Badger, ibid.* at para. 96. See also *R v Marshall*, [1999] 3 SCR 456 [*Marshall*] and *R v Marshall*, [1999] 3 SCR 533 [*Marshall II*].
[190] *Tsilhqot'in Nation, supra.* note 10 at paras. 78 to 80.
[191] *Ibid.* at para. 82.
[192] *Ibid.* at para. 86.
[193] *Ibid.* at para. 87.
[194] *Ibid.* at para. 87.

Some commentators have criticized using the approach set out in *Sparrow* to justify Treaty infringements, arguing that the standard applied to Treaty rights should be more exacting than that applied to Aboriginal rights.[195] It is argued that a more exacting standard is required for infringement of Treaty rights due to the general fiduciary duty to act in the interests of Indigenous peoples and the specific obligation to keep Treaty promises.[196] In other words, because there is a specific Treaty right on top of the fiduciary duty, the government must be keenly aware and accommodating of that right.

Aboriginal Rights, Infringement and Justification

Since historical treaties cover the entirety of Alberta, the current legal view is that the lands in Alberta have been ceded and that Indigenous rights are governed by those treaties. This means there is likely to be limited, if any, consideration of issues of Aboriginal title and rights in the province.

Much like with Treaty rights, consideration of an alleged infringement of Aboriginal rights occurs via a three step process. Firstly, the Indigenous group bears the onus of establishing the existence of an Aboriginal right. Aboriginal rights are not assumed to exist unless acknowledged by the Courts or government, and the test for proving an Aboriginal right is set out by the SCC in *Van der Peet*.[197] To prove an Aboriginal right, the Indigenous group must demonstrate a practice, custom or tradition integral to their distinctive culture; that practice, custom or tradition must have existed prior to European contact (or in the case of Métis peoples at the time of effective European control); and that practice, custom or tradition exists in some form today. Further, the Aboriginal right cannot have been extinguished by the Crown. In order for Aboriginal rights to have been extinguished, there must have been a plain and clear intent to do so, mere regulation is not extinguishment.[198]

Secondly, the Indigenous group must establish a *prima facie* infringement by demonstrating an interference with an existing Aboriginal right. In *Gladstone*, the SCC set out the test for determining infringement of an Aboriginal right as asking:

> whether the legislation has the effect of interfering with an existing Aboriginal right; and
>
> whether the limitation was unreasonable, imposed undue hardship, and denied the right-holders their preferred means of exercising the right.[199]

[195] Monique M. Passelac-Ross, *The Trapping Rights of Aboriginal Peoples in Northern Alberta, CIRL Occasional Paper #15* (Calgary: 2005, Canadian Institute of Resources Law) at 41 to 44.
[196] *Ibid.*
[197] *Van der Peet*, *supra*. note 41.
[198] *Sparrow, supra*. note 12.
[199] *R v Gladstone*, [1996] 2 SCR 723 [*Gladstone*]. See also *Sparrow*, *ibid*.

The SCC clarified that answering one of the above questions in the negative will not prohibit a court from finding a *prima facie* infringement. These questions "only point to factors which will indicate that such an infringement has taken place".[200]

Thirdly, the onus then shifts to the Crown to justify the infringement. The requirements to demonstrate justification of the infringement are set out by the SCC in *Sparrow*. [201] That is, the Crown must have a valid legislative objective for the interference, and the Crown's action must be consistent with its fiduciary duty.

Taking up as an Infringement of Treaty Rights

It should be noted that many treaties contain provisions that allow the government to "take up" land under the Treaty. That is, the government may "take up" lands by authorizing activities that may interfere with Treaty rights. As mentioned, most of Alberta is primarily covered by Treaties Nos. 6, 7 and 8 and each of these treaties provides that land may be "taken up for settlement, mining, lumbering or other purposes" and will be subject to regulations that may be made. The Alberta Court of Appeal in *Athabasca Chipewyan* considered whether any taking up of Treaty land automatically has an adverse effect on Treaty rights thereby triggering the duty to consult.[202] The Court of Appeal concluded that:

> …it cannot be presumed that a First Nation suffers an adverse effect by a taking up anywhere in the Treaty lands. A contextual analysis must first occur to determine if the proposed taking up may have an adverse effect on the First Nation's rights to hunt, fish and trap. If so, then the duty to consult is triggered.[203]

As such, there must be some evidence that a taking up of Treaty lands will have an adverse effect on Treaty rights prior to triggering the duty to consult and accommodate. It cannot simply be presumed that a taking up will result in adverse effects on Treaty rights.

In *Mikisew*, a case originating from Alberta, the SCC considered the taking up provisions in Treaty No. 8.[204] In 2000, without consulting the Mikisew Cree First Nation (Mikisew), the federal government approved a winter road which would run through the Mikisew's Reserve (which is located in Wood Buffalo National Park). After protests by the Mikisew, the road alignment was modified to track around the boundary of the Reserve (but again without consultation).

The SCC stated that:

[200] *Sparrow, ibid.* at para. 43.
[201] *Ibid.*.
[202] *Athabasca Chipewyan First Nation v Alberta* (2019) ABCA 401 (CanLii) [*Athabasca Chipewyan*].
[203] *Ibid.* at para. 61.
[204] *Mikisew, supra.* note 143.

> The Crown has a Treaty right to "take up" surrendered land for regional transportation purposes, but the Crown is nevertheless under an obligation to inform itself of the impact its project with have on the exercise by the Mikisew of their hunting and trapping rights, and to communicate its findings to the Mikisew. The Crown must then attempt to deal with the Mikisew "in good faith, and with the intention of substantially addressing" Mikisew concerns.[205]

The SCC stated that if a time comes when there is no meaningful right to hunt over its traditional territories, then there is a potential action for Treaty infringement. The SCC clarified that "the 'meaningful right to hunt' is not ascertained on a Treaty-wide basis… but in relation to the territories over which a First Nation traditionally hunted, fished and trapped, and continues to do so today".[206]

Although dealing with the taking up provision of another Treaty (Treaty No. 3), the SCC confirmed this approach in *Grassy Narrows*.[207] The Crown's power to take up lands is "not unconditional… the Province… must exercise its powers in conformity with the honour of the Crown, and is subject to the fiduciary duties on the Crown in dealing with Aboriginal interests".[208] This means that the harvesting rights must be respected and if the "taking up leaves … no meaningful right to hunt, fish or trap in relation to the territories over which they traditionally hunted, fished, and trapped, a potential action for Treaty infringement will arise".[209]

The Alberta Court of Appeal commented the *Mikisew* test for taking up and infringement of Treaty rights in its *Fort McKay First Nation v Prosper Petroleum* decisions.[210] In the *Prosper Petroleum* leave decision, the ABCA considered the Fort McKay First Nation's application to appeal the AER's decisions to refuse to consider constitutional questions (pertaining to consultation and accommodation) and to approve Prosper Petroleum's oil sands project. The ABCA did grant leave to appeal but only on the limited question of whether the "AER committed an error of law or jurisdiction by failing to consider the honour of the Crown and, as a result, failing to delay approval of the Project until the First Nation's negotiations with Alberta about the [Moose Lake Access Management Program] are completed".[211]

In considering another ground for appeal that was argued by the Fort McKay First Nation – namely that the AER's duty to consider cumulative effects on the First Nation's Treaty rights in considering a project application was not met - the ABCA stated the following about *Mikisew*:[212]

> [56] Mikisew considered, at para 48, when a particular "taking up" of Treaty 8 land would infringe a particular Treaty 8 right. It held that there will be an

[205] *Ibid.* at para. 55.
[206] *Ibid.* at para. 48.
[207] *Grassy Narrows*, *supra*. note 10.
[208] *Ibid.* at para. 52.
[209] *Ibid.* at para. 52.
[210] *Fort McKay First Nation v Prosper Petroleum*, 2019 ABCA 14 (CanLii) [*Prosper Petroleum* leave decision] and *Fort McKay First Nation v Prosper Petroleum*, 2020 ABCA 163 (CanLii) [*Prosper Petroleum* appeal decision].
[211] *Prosper Petroleum* leave decision, *ibid.* at para. 60.
[212] *Ibid.* at para. 56.

> infringement if the "taking up" deprives the First Nation of "meaningful" rights to hunt, trap and fish over its traditional territories. This test of infringement implicitly requires the adjudicator to take into account the cumulative effect of previous development on the traditional territories of Treaty 8 First Nations. The test sets a threshold (are meaningful rights left?) and asks whether a current "taking up" or use will exceed that threshold (no meaningful rights left). That inevitably requires an adjudicator to take into account previous development activity. But it still requires the adjudicator to ask whether a current project will have the effect of leaving no meaningful opportunities for exercise of Treaty rights over traditional territory.

The ABCA found that the AER did indeed consider and apply this test for infringement to conclude that the project would not render the Treaty 8 rights meaningless. The ABCA found that there was no arguable error of law and noted that an attack on a finding of mixed fact and law cannot be a ground for appeal.

Similar comments on *Mikisew* were made by the concurring judgment in the *Prosper Petroleum* appeal decision (the ABCA ultimately allowed the appeal due to the AER's failure to consider the honour of the Crown and the Moose Lake Management Access Program process thereby vacating the project approval and directing the AER to reconsider). The concurring judgment stated that:[213]

> [79] As later clarified in Mikisew 2005, however, not every "taking up" by the Crown constitutes an infringement of Treaty 8: para 31. Instead, an action for Treaty infringement will only arise once, as a result of the Crown's power to take up land, "no meaningful right to hunt" remains over the Aboriginal group's traditional territories: Mikisew 2005 at para 48; GrassyNarrows First Nation v Ontario (Natural Resources), 2014 SCC 48 at para 52, [2014] 2 SCR 447. This raises the prospect that the effects of any one "taking up" of land will rarely, if ever, itself violate an Aboriginal group's Treaty 8 right to hunt; instead, the extinguishment of the right will be brought about through the cumulative effects of numerous developments over time. In other words, no one project on FMFN's territory may prevent it from the meaningful right to hunt –however, if too much development is allowed to proceed, then, taken together, the effect will be to preclude FMFN from being able to exercise their Treaty rights.

The concurring judgment continues to state that "the Crown's obligation to ensure the meaningful right to hunt under Treaty 8 is an *ongoing* one" and that "[p]roper land use management remains a perennial concern for the Crown".[214] Further, the concurring judgment states that "the long-term protection of Aboriginal Treaty rights, including the right to hunt under Treaty 8, is increasingly thought to require negotiation and just settlement of disputes outside

[213] *Prosper Petroleum* appeal decision, *supra.* note 211 at para. 79.
[214] *Ibid.* at para. 81.

the context of individual projects in order to address the *cumulative effects* of land development on First Nation Treaty rights".[215]

Cumulative Effects as Infringement of Treaty Rights

The question of whether cumulative effects from taking up in the form of multiple provincially authorized activities, projects and developments could amount to a breach of Treaty rights was considered by the B.C. Supreme Court in *Yahey.*[216] In this case, the Blueberry River First Nation (BRFN) argued that the cumulative effects from provincially authorized activities, projects and developments – including oil and gas, forestry, mining, hydroelectric, agriculture and others - within and adjacent to their traditional territory have resulted in significant adverse impacts on the meaningful exercise of their Treaty rights. The BRFN argued that this amounted to a breach of Treaty No. 8 obligations by the Crown. The Crown, on the other hand, argued that the test for Treaty infringement is whether so much land has been taken up in the BRFN's traditional territory that its members cannot meaningfully exercise their Treaty rights and that the BRFN's members can still meaningfully exercise their Treaty rights.

Ultimately, the Court determined that the Crown breached its obligation to BRFN under Treaty No. 8, including its honourable and fiduciary obligations. It found that the Crown has "taken up lands to such an extent that there are not sufficient and appropriate lands in the Blueberry Claim Area to allow for [BRFN's] meaningful exercise of their Treaty rights… has therefore unjustifiably infringed [BRFN's] Treaty rights in permitting the cumulative impacts of industrial development to meaningfully diminish [BRFN's] exercise of its Treaty rights".[217] The Court ordered that the Crown was no longer allowed to authorize activities that unjustifiably infringe on BRFN's exercise of its Treaty rights. Furthermore, BRFN and the Crown were directed to "consult and negotiate enforceable mechanisms to assess and manage the cumulative impacts of industrial development on [BRFN's] Treaty rights and to ensure these constitutional rights are respected".[218]

The *Yahey* decision is very lengthy, reflecting the "extraordinary" amount of evidence regarding "history, ethnography, wildlife science, geology, geography, forestry, land use planning and functioning of various governmental regulatory regimes".[219] It also contains a comprehensive review of the jurisprudence on Treaty rights and infringement, as well as jurisprudence specific to Treaty No. 8 (although none of the latter allege breaches of Treaty rights). Based on its review of the evidence and jurisprudence, the Court states that while "Treaty 8 did not promise

[215] *Ibid.* at para. 81.
[216] *Yahey v British Columbia*, 2021 BCSC 1287 [*Yahey*].
[217] *Ibid.* at para. 1894.
[218] *Ibid.* at para. 1894.
[219] *Ibid.* at para. 5.

continuity of nineteenth patterns of land use, this did not mean that both foundational and incidental elements of that way of life, including the continued existence of healthy environments used for hunting, trapping and fishing and the continuation of other cultural and spiritual practices connected with those activities were not also promised and protected".[220] The Court concluded that, historically, the perspective of the BRFN was that most of the Treaty area would remain unoccupied and be available for hunting, trapping and fishing.

The Court stated that the right to take up land is not an "independent" right but rather it exists in relation to the protection of hunting, fishing and trapping rights[221] and that Indigenous rights are "not subject to, or inferior, to the Crown's right to take up land".[222] There must be a balance that allows the exercise of rights to remain meaningful in the face of the Crown's ability to take up lands. But, in fact, the Court found that there "is not sufficient appropriate lands in the Plaintiff's traditional territories… to permit the meaningful exercise of their Treaty 8 rights. Sufficient habitat, territory and wildlife have not been preserved to allow Blueberry members to carry out their hunting, trapping, and fishing mode of life."[223] Furthermore, looking at the various industrial regulatory frameworks in place, there are no substantive measures in place to address or to protect the BRFN's claim area from cumulative impacts.

Although the decision in *Yahey* is not binding in Alberta (since it is a B.C. Supreme Court decision),[224] it is an interesting decision in that it expands the rights to hunt, trap and fish to being part of a right to a way of life (as opposed to discrete, narrow rights to hunt, trap and fish).[225] As well, rather than just considering the extent of lands taken up, the decision considered the effects of taking up land on surrounding lands and the wildlife populations.[226]

Similar actions asserting unjustifiable infringement of Treaty rights due to cumulative effects of development in traditional territories are underway in Alberta. For instance, the Beaver Lake Cree claim in *Anderson*[227] asserts that the province improperly allowed its lands to be taken up

[220] *Ibid.* at para. 272.
[221] *Ibid.* at para. 275.
[222] *Ibid.* at para. 532.
[223] *Ibid.* at para. 1180.
[224] The decision has not been appealed by the Provincial Crown and a new framework is currently being negotiated. Government of British Columbia, Attorney general's statement on Yahey v British Columbia (July 28, 2021), online: https://news.gov.bc.ca/releases/2021AG0117-001488. Agreements have been reached between B.C. and some First Nations, and negotiations with other First Nations are ongoing, see Ray Chartier et al., "BC's changing regulatory landscape: BC and Treaty 8 First Nations negotiate collaborative approach to address cumulative defects on development" (February 6, 2023) Norton Rose Fulbright website, online: https://www.nortonrosefulbright.com/en-ca/knowledge/publications/055c6796/bcs-changing-regulatory-landscape-bc-and-Treaty-8-first-nations-negotiate-collaborative-approach. Also see Ministry of Energy, Mines and Low Carbon Innovation and BC Oil & Gas Commission, *BRFN Agreement – Rules for oIl and Gas Development* (n/d), online: https://www.bcogc.ca/files/documents/20230126_FINAL-PNG-Info-Bulletin-detailed-document.pdf.
[225] Maureen Killoran et al, "Treaty infringement claims for cumulative effects come to Alberta" (August 29, 2022), Osler Blog online: https://www.osler.com/en/resources/regulations/2022/Treaty-infringement-claims-for-cumulative-effects-come-to-alberta [Killoran et al.].
[226] *Ibid*.
[227] *Anderson v Alberta,* 2022 SCC 6 (CanLii). This particular decision pertains to an application for advance costs to fund the litigation.

for industrial and resource development. This claim was commenced in 2008 and a trial is set to commence in January 2024.

More recently, in a Statement of Claim filed on July 18, 2022, the Duncan's First Nation asserts that their Treaty rights have been significantly diminished by the province's decisions with respect to resource development, agriculture, transportation and settlement activities.[228] The Duncan's First Nation assert that Treaty 8 ensures "the right to carry on their way of life free from interference as well as the rights to hunt, fish, trap and gather natural resources in their traditional territory".[229] They seek an order that declares "Alberta's regulatory mechanisms are insufficient to address cumulative effects, directing the province to establish new mechanisms for assessing cumulative impacts of development, and prohibiting the province from permitting any activities that further infringe … Treaty rights".[230]

Treaty Rights that have been recognized by the Courts

Treaty rights to hunt, fish and trap have been affirmed by the courts in numerous cases. Related activities – such as carrying a gun, building a fire, teaching others and building cabins – have been protected as being part of hunting, trapping and fishing rights.[231] Once an Aboriginal right to harvest for food, social or ceremonial purposes is recognized, it has priority over other sport or commercial users.[232] However, Treaty rights are not unlimited. Treaty rights may be limited by provincial legislation with a conservation purpose (although such limitations must be justified as per *Sparrow*) and by the Crown taking up land for other purposes.

Most of Alberta is covered by either Treaty 6, 7 or 8. Each of these treaties has been considered by the SCC which provides some guidance as to how Treaty rights may be interpreted going forward.

Treaty 6 CaseLaw

In *R v Horse,* a case originating from Saskatchewan, the SCC considered whether there is a Treaty right to hunt on occupied private lands.[233] In this case, several members from a First Nation that was an adherent to Treaty 6 were charged with hunting with a spotlight contrary to

[228] *Gladue v Alberta,* online: http://jfklaw.wpenginepowered.com/wp-content/uploads/2022/09/DFN-–-Statement-of-Claim-–-18-July-2022.pdf [*Gladue*]. See also Killoran et al., *supra.* note 226.
[229] *Ibid.* at paras. 2 and 3.
[230] Killoran et al., *supra.* note 226.
[231] *Aboriginal Law Handbook*, *supra.* note 22 at chap. 3.
[232] *Ibid.* at chap. 3.
[233] *R v Horse*, [1988] 1 S.C.R. 187 [*Horse*].

the provincial *Wildlife Act.* In addition, they were on occupied private land without permission. The SCC held that the right to hunt in Treaty 6 does not extend to occupied private land and, as such, the defendants were not immune to the requirements of the *Wildlife Act*.

In the similar decision of *Sundown,* a member of a Cree First Nation that is a party to Treaty 6 cut down trees in a provincial park to build a cabin to be used while hunting.[234] Sundown was convicted of building a permanent dwelling on park land without permission, upon appeal the conviction was quashed, and the SCC upheld the decision to quash the conviction. The SCC stated that firstly it must be determined whether the cabin is reasonably incidental to the hunting and fishing rights of the First Nation, and secondly whether the Park Regulations (prohibiting the construction of the cabin) infringe upon the hunting rights set out in Treaty and modified by the NRTA.

The SCC found that the cabin in *Sundown* was reasonably incidental to the First Nation's right to hunt in their traditional expeditionary style, and that the Treaty right to hunt encompasses the right to build shelters as a reasonable incident to that right. The SCC noted that Treaty rights "must not be interpreted as if they were common law property rights" and should not "be defined in a manner which would accord with common law concepts of title to land or the right to use another's land".[235] Treaty rights "are the right of Aboriginal people in common with other Aboriginal people to participate in certain practices traditionally engaged in by particular Aboriginal nations in particular territories".[236] Furthermore, there should not be a ""frozen-in-time' approach to Aboriginal or Treaty rights".[237]

The SCC stated that, implicit in the Treaty right itself, are three limitations. Firstly, provincial legislation that relates to conservation and that can be justified (as per *Sparrow*) could validly restrict building a cabin. Secondly, there must be compatibility between the Crown's use of the land and the Treaty right claimed. Thirdly, the Treaty right to hunt is limited to lands not required or taken up for settlement. In this case, the Crown acknowledged that the particular Park Regulations did not have a conservation purpose. The SCC found the other two limitations did not apply since hunting is not incompatible with the Crown's use of the land since hunting is allowed within the provincial park and the land is not used for settlement purposes.

In order for a conservation focused regulation to limit Treaty hunting rights, the SCC holds that there must be evidence that the regulation does indeed address conservation concerns, and further that it does not unduly impair Treaty rights (evidence of justification is required). The SCC states that application of section 88 of the *Indian Act* means that, since the park regulations are provincial laws of general application which conflict with the Treaty, the regulations must give way to the Treaty.

[234] *Sundown, supra.* note 56.
[235] *Ibid.* at para. 35
[236] *Ibid.* at para. 35.
[237] *Ibid.* at para. 32.

Treaty 7 CaseLaw

In *Jim Shot Both Sides*[238] the Federal Court of Appeal considered whether or not Treaty 7 was enforceable in a Canadian court before section 35 of the *Canadian Constitution* came into effect in 1982. The Kainai Nation is a signatory to Treaty 7 and, in 1980, brought an action based on its claim that the size of the reserve did not accord with the terms promised in Treaty 7 (the reserve was much smaller than promised). The Kainai Nation argued that this was a breach of Treaty 7 and of the Crown's fiduciary duty. The trial judge found the claim to be discoverable by 1971. Since the courts would have recognized a claim for breach of Treaty prior to 1982 (i.e. treaties were enforceable at common law prior to section 35) and the claim was discoverable in 1971, the limitation period of two years applied and the claim could not proceed. The FCA pointed out that the Kainai Nation would not face a limitation issue in the Specific Claims Process and was advised to address the historical Treaty grievances though that route.

In the *Lefthand* decision, two Treaty 7 people were charged with illegal fishing and raised the defence of an Aboriginal right to fish notwithstanding the federal *Fisheries Act* regulations that they breached.[239] Although Treaty 7 does not mention fishing, the Crown admitted that there was a Treaty right to fish for the purposes of these prosecutions.

In this case, the Court found that the evidence showed Treaty 7 peoples rarely fished and that there was no evidence to show that the defendants' right to feed themselves and their families was practically affected by the regulations (i.e., there was no evidence to show why the defendants needed to fish in a closed location or with bait). As such, the Court concluded that the regulations were within the implied limits on Aboriginal fishing rights or, alternatively, the limitations set out in Treaty 7. The Court concluded that the regulations were part of a genuine conservation regime, were reasonable in scope and content, and adequately recognized the priority of the Aboriginal right to fish. The Court went on to state that even if the regulations were not within the implied limits on Aboriginal fishing rights or the limits within Treaty 7, there was no breach of the Aboriginal right by the regulations in question (and alternatively, if there was a breach, it was justified).

Treaty 8 CaseLaw

Of the three main treaties in Alberta, Treaty 8 has received the most judicial consideration. With the exception of the *Yahey* decision, the cases have involved regulatory prosecutions or applications for judicial review of decisions.[240] The *Yahey* decision, on the other hand, involved an action alleging a breach of Treaty 8 on the basis of cumulative impacts associated with the

[238] *Jim Shot Both Sides*, *supra*. note 49. Leave to appeal was granted by the SCC on February 2, 2023.
[239] *R v Lefthand*, 2007 ABCA 206 (CanLii) [*Lefthand*].
[240] *Yahey*, *supra.* note 217.

issuance of numerous regulatory approvals and other land use decisions on lands covered by the Treaty.[241]

Decisions of note pertaining to Treaty 8 are: *Horseman*, *Badger*, *Mikisew*, *Halfway River*, and *West Moberly*.[242]

R v Horseman

The SCC decision in *Horseman* looked at Treaty 8 hunting rights and the impact of the NRTA on commercial hunting rights. In this case, Horseman killed a grizzly bear in self-defence while hunting moose for food, he later purchased a grizzly bear licence and sold the hide in order to support his family rather than as part of any planned commercial activity. Horseman was charged with unlawfully trafficking in wildlife in violation of the Alberta *Wildlife Act*.[243] The majority of the SCC concluded that Horseman's actions were a violation of the *Wildlife Act.* The SCC found that, while Treaty 8 originally included rights to hunt and fish for commercial purposes, the NRTA removed the right to hunt commercially while extending the geographical areas in which hunting for food could be conducted. As well, the NRTA limited provincial regulation on the means employed in hunting – for example, restrictions like using night lights, dogs and seasonal restrictions are not applicable to Indigenous hunters. The SCC also noted that Treaty 8 did not provide an unfettered right to hunt, that right was intended to be subject to geographic limitations (i.e., lands that had not been taken up) and to regulation necessary to protect fish and fur bearing animals.

R v Badger

Violations of the Alberta *Wildlife Act* were again at issue in *Badger*, this time hunting for food on privately owned lands within the Treaty area without a licence and outside the hunting season. The SCC held that that the Treaty 8 right to hunt has been altered or modified by the NRTA (not extinguished and replaced) to the extent that the NRTA indicates a clear intention to effect such a modification. The NRTA places geographical limits on the right to hunt on unoccupied Crown lands and to any other lands which Indigenous people have a right of access to. Treaty 8 does not contain express provisions with respect to hunting on private lands (but the SCC found that other treaties may do so). Rather, the right to hunt for food can be exercised on any land not taken up. Whether or not land is taken up is a question of fact. If the private lands are occupied such that there is a visible use which is incompatible with hunting, then there is no Treaty 8 right to hunt. But if the private lands are unoccupied and not put to a visible use, then there is a Treaty 8 right to access and hunt for food. Further, both Treaty 8 and the NRTA make it clear that provincial game laws are applicable to Indigenous people so long as those law are aimed at conservation of game. Even if regulation is concerned with conservation, it still must be

[241] *Ibid*.

[242] *Horseman*, *supra.* note 63; *Badger*, *supra.* note 50; *Mikisew, supra.* note 143; *Halfway River First Nation v British Columbia (Ministry of Forests)*, [1997] 4 C.N.L.R. 45, affidavit [1999] 4 C.N.L.R. 1 (BCCA) [*Halfway River*]; and *West Moberly First Nations v British Columbia*, (2011) BCCA 247, leave denied 2012 CanLii 8361 (SCC) [*West Moberly*].

[243] *Wildlife Act*, R.S.A. 2000, c. W-10 [*Wildlife Act*].

determined whether the regulation conflicts with the hunting right provided under Treaty 8, as modified by the NRTA, and using the test from *Sparrow*.

Halfway River v BC

In *Halfway River*, the First Nation sought judicial review of a hunting licence on the basis that it infringed its hunting rights under Treaty 8. In this case, the BCCA said that any interference was a *prima facie* interference with the Treaty right to hunt. Since there was no consultation, the infringement could not be justified. The Crown's right to take up land under Treaty 8 is not an independent right, it is a limitation or restriction on the Treaty right to hunt and cannot be exercised without affecting the Treaty right. The BCCA stated that hunting rights mean an entitlement to exercise their preferred means of hunting in an "unspoiled wilderness".[244] Preferred means of hunting refers to methods or modes of hunting rather than referring to a particular area or nature of an area.[245] It should be noted, that unlike in Alberta, Treaty 8 in BC is not affected by the NRTA.

Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)

Another Treaty 8 case considered by the SCC is *Mikisew*, originating from Alberta. In this case, the First Nation sought judicial review of a federal decision to build a winter road through their reserve lands. The Mikisew objected to the road due to its impact on hunting and trapping within the area to be covered by the road, and due to the impact on their traditional lifestyle which was central to the Mikisew's culture. The SCC stated that the "meaningful right to hunt" is to be ascertained "in relation to the territories over which a First Nation traditionally hunted, fished and trapped, and continues to do so today" rather than on a Treaty-wide basis.[246] Further, the SCC states that "[i]f the time comes that in the case of a particular Treaty 8 First Nation "no meaningful right to hunt" remains over *its* traditional territories, the significance of the oral promise that "the same means of earning a livelihood would continue after the Treaty as existed before it" would clearly be in question, and a potential action for Treaty infringement, including the demand for a *Sparrow* justification, would be a legitimate First Nation response".[247] In other words, the Treaty promise for hunting rights cannot be honoured by "dispatching the Mikisew to territories far from their traditional hunting grounds and traplines".[248] On the other hand, there is no promise for continuity of "nineteenth century patterns of land use".[249]

West Moberly v BC

In *West Moberly,* the BCCA considered an application for judicial review of a decision to allow bulk coal sampling and exploration activities. The First Nation based their application on the

[244] *Halfway River*, *supra.* note 243 at para. 140.
[245] *Ibid.* at para. 141.
[246] *Mikisew, supra.* note 143 at para. 48.
[247] *Ibid.* at para. 48.
[248] *Ibid.* at para. 46.
[249] *Ibid.* at para.32.

failure of decision-makers to consider their rights to hunt caribou in the area. The BCCA concluded that it was not an error to consider the specific location and species when analyzing the First Nation's Treaty 8 right to hunt. In this case, the First Nation's Treaty 8 rights included the right to hunt caribou (although hunting was not limited to only caribou).

Yahey v British Columbia

Although not binding in Alberta (since it is a B.C. Supreme Court decision),[250] the decision in *Yahey* expanded the rights to hunt, trap and fish to being a right to a way of life (as opposed to discrete, narrow rights to hunt, trap and fish) under Treaty 8.[251] As well, rather than just considering the extent of lands taken up, the decision considered the cumulative effects of taking up land on surrounding lands and the wildlife populations.[252]

The Court stated that the right to take up land is not an "independent" right rather it exists in relation to the protection of hunting, fishing and trapping rights[253] and that Indigenous rights are "not subject to, or inferior, to the Crown's right to take up land".[254] There must be a balance that allows the exercise of rights to remain meaningful in the face of the Crown's ability to take up lands. But, in fact, the Court found that there "is not sufficient appropriate lands in the Plaintiff's traditional territories… to permit the meaningful exercise of their Treaty 8 rights. Sufficient habitat, territory and wildlife have not been preserved to allow Blueberry members to carry out their hunting, trapping, and fishing mode of life."[255] Furthermore, looking at the various industrial regulatory frameworks in place, that Court found that there are no substantive measures in place to address or to protect the BRFN's claim area from cumulative impacts.

Métis CaseLaw

The courts have found that Métis peoples have the right to be consulted and accommodated by government prior to decisions being made that may affect their rights.[256] Further, Métis harvesting rights have been confirmed by the courts. In *Powley*, the SCC recognized the Métis right to subsistence hunting. Although the Crown argued that the infringement of rights could be justified on the ground of conservation requirements, the SCC found that the record did not support that justification as the relevant moose population was not under threat. Further, even if it was, the Métis people are still entitled to a priority allocation to satisfy their subsistence needs as per *Sparrow.* In this particular area (Sault Ste. Marie), the SCC said that hunting rights of the Métis people should track those of the Ojibway in terms of restrictions for conservation purposes and priority allocations where there are threatened species.

---

[250] *Yahey, supra.* note 217.
[251] Killoran et al, *supra.* note 226.
[252] *Ibid*.
[253] *Yahey, supra.* note 217 at para. 275.
[254] *Ibid.* at para. 532.
[255] *Ibid.* at para. 1180.
[256] *Aboriginal Law Handbook*, *supra.* note 22 at Chapter 5: Métis.

Environmental regulation and its interaction with Indigenous Rights

Given the inextricable link with Indigenous land based rights, as well as the link between harvest rights and ecosystem health, it is inevitable that land use and resource developments are particularly impactful to Indigenous peoples. This section of the report will look at the interaction between environmental regulation and Indigenous Rights.

When considering how environmental regulation interacts with Indigenous rights in Alberta, the over-riding consideration is always honour of the Crown. Arising from the honour of the Crown and specific Treaty promises is the duty to consult and accommodate when Indigenous rights may be impacted by provincial decisions (which can include a decision to "take up" land pursuant to the terms of the Treaty). Further, legislation that infringes upon Indigenous rights must be justified by the Crown demonstrating a valid legislative objective for the interference and acting in a manner consistent with its fiduciary duty.

Under the historical treaties, tracts of land (reserves) were set aside for the exclusive use and benefit of First Nation signatories to the treaties. Pursuant to the *Indian Act*, the federal government has authority over much of the activity on the reserves:

> Reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any Treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.[257]

Activities on reserve lands may be subject to federal regulations or to by-laws passed by the Band Council.[258] Band Council bylaws may deal with matters such as protection and preservation of wildlife; destruction of noxious weeds; construction and maintenance of watercourses, roads, bridges and other local works; construction and maintenance of public wells, cisterns, reservoirs and other water supplies; zoning lands for different uses; and construction, repair and use of buildings.[259]

Section 88 of the *Indian Act* states:

> Subject to the terms of any Treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or the First Nations Fiscal Management Act, or with any order, rule, regulation or law of a band made under those Acts, and except to the

[257] *Indian Act* at s. 18.
[258] *Indian Act* at ss. 73 and 74.
[259] *Indian Act* at s. 74.

> extent that those provincial laws make provision for any matter for which provision is made by or under those Acts.
>
> In other words, provincial laws of general application apply to Indigenous peoples but those provincial laws cannot extinguish Indigenous rights.[260] However, as "federal lands, provincial laws and regulations that purport to affect land do not apply on reserve".[261] While Indigenous people may live and exercise their Indigenous rights on reserve lands, it is important to recognize that reserve lands are not the same as a First Nation's traditional territory. The result is that Indigenous rights may be, and often are, exercised off-reserve. For example, harvesting rights may be exercised on Crown lands and unoccupied private lands.[262] This means that provincial laws and regulations impacting land are highly relevant to the exercise of Indigenous rights.

To the extent that provincial laws may infringe on Indigenous rights, the government must be able to justify the infringement. The requirements to demonstrate justification of the infringement are summed up by the SCC in *Tsilhqot'in Nation*:

- The Crown must establish that it discharged its procedural duty to consult and accommodate. The degree of consultation and accommodation required is proportionate to the strength of the Treaty claim and the seriousness of the negative impact.[263]
- The Crown must have a compelling and substantial objective for its actions. As stated in *Tsilhqot'in Nation*, to "constitute a compelling and substantial objective, the broader public goal asserted by the government must further the goal of reconciliation, having regard to both the Aboriginal interest and the broader public objective".[264]
- The Crown's action must be consistent with its fiduciary duty. This means that an infringement cannot be justified if it "would substantially deprive future generations of the benefit of the land".[265] It also means that the infringement must be proportional.[266] This means that the infringement "must be necessary to achieve the government's goal (rational connection); the government goes no further than necessary to achieve it (minimal impairment); and the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the … interest (proportionality of impact)".[267]

Furthermore, although the treaties that cover Alberta each provide that land may be "taken up for settlement, mining, lumbering or other purposes" and will be subject to regulations that may

[260] *Delgamuukw v. British Columbia, supra.* note 12 at paras. 182 and 183.
[261] John W. Gailus, *Management of Contaminated Sites on Indian Reserve Lands, Site Remediation in British Columbia Conference* (March 7-8, 2013) at 1.
[262] NRTA and *Badger, supra.* note 50.
[263] *Tsilhqot'in Nation, supra.* note 10 at paras. 78 to 80.
[264] *Ibid.* at para. 82.
[265] *Ibid.* at para. 86.
[266] *Ibid.* at para. 87.
[267] *Ibid.* at para. 87.

be made, the Crown may still be required to consult and accommodate the relevant First Nations before affecting their rights to use the land. If the taking up of land leaves no meaningful right to hunt, fish or trap, then there may be a potential action for Treaty infringement.[268]

Environmental Regulation and Decision-making in Alberta

It is necessary to have an overview of the environmental and regulatory landscape in order to understand the interaction of environmental regulation and Indigenous rights in Alberta.

General Environmental Legislation

In Alberta, the main pieces of general environmental legislation are the *Environmental Protection and Enhancement Act* (EPEA) and the *Water Act.*[269] The EPEA establishes a system of approvals, registrations, and notices for activities (as listed in the EPEA's Schedule of Activities); establishes the provincial environmental assessment process; and prohibits the release of substances that may cause a significant adverse effect or that are in contravention of an approval, code of practice or regulation.

The *Water Act* sets out the licensing and priority regime for the allocation of water, its diversion, and its use throughout the province via water licenses. In addition, *Water Act* approvals are needed for activities specified in the Act such as maintaining, removing or disturbing ground, vegetation or other material that:

- alters, may alter or may become capable of altering the flow or level of water, whether temporarily or permanently;
- changes, may change or may become capable of changing the location of water or the direction of flow of water;
- causes, may cause or may become capable of causing the siltation of water or the erosion of any bed or shore of a water body; or
- causes, may cause or may become capable of causing an effect on the aquatic environment.[270]

[268] *Aboriginal Law Handbook*, *supra* note 22.
[269] *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 [EPEA] and *Water Act*, R.S.A. 2000, c. W-3 [*Water Act*].
[270] *Water Act* at s. 1(1)(b). Exceptions to approval requirements are made for certain activities as outlined in the *Water (Ministerial) Regulation*, A.R. 205/98.

Aside from providing regulatory frameworks for the management of Alberta's natural resources, legislation also makes important declarations pertaining to ownership of those resources. Some of these ownership declarations include that the provincial Crown owns:

- live wildlife;[271]
- all water in the province;[272]
- the beds and shores of water bodies of all permanent and naturally occurring bodies of water, and all naturally occurring rivers, streams, watercourses and lakes;[273] and
- provincial public lands.[274]

When it comes to the subsurface, mines and minerals are predominately owned by the Crown although there may be some private ownership of such resources.[275]

Wildlife and Species at Risk Legislation

In terms of wildlife and species at risk, both federal and provincial legislation plays a role. The provincial *Wildlife Act,* which primarily deals with management of wildlife, contains provisions for the designation and protection of endangered species and enables habitat conservation areas and migratory bird lure sites.[276] The federal *Species at Risk Act* is focused on the prevention of extirpation and extinction of species, the recovery of species at risk, and management of species of special concern.

The federal *Migratory Birds Convention Act, 1994* imposes restrictions on hunting certain migratory birds, and regulations under the Act prohibit the disturbance, destruction or taking of a nest, egg, or nest shelter, or the possession of a live or dead migratory bird, nest or egg.[277] Activities may also incidentally result in violation of the regulations, which is referred to as "incidental take". The Canadian Wildlife Service has published a guide for avoiding incidental take.[278]

---

[271] *Wildlife Act* at s. 7.
[272] *Water Act* at s. 3.
[273] *Public Lands Act*, R.S.A. 2000, ch. P-40 [*Public Lands* Act] at s. 3.
[274] *Public Lands Act* at s. 2.1.
[275] More detail is provided in the *Mines and Minerals Act*, R.S.A. 2000, ch. M-17 [*Mines and Minerals Act*].
[276] See also Shaun Fluker & Jocelyn Stacey, "The Basic of Species at Risk Legislation in Alberta" (2012) 50:1 AB L Rev 95 at 97.
[277] *Migratory Birds Convention Act, 1994,* S.C. 1994, c. 22 and *Migratory Birds Regulations*, *2022*, SOR/2022-105. It should be noted that amendments to the regulation were made in 2022 and more are pending: https://www.canada.ca/en/environment-climate-change/services/migratory-game-bird-hunting/continued-evolution-mbr-2022.html.
[278] Canadian Wildlife Service, Environment Canada, *Incidental Take of Migratory Birds in Canada* (Ottawa: Environment Canada, 2014).

The federal *Fisheries Act* contains several provisions relating to fish and fish habitat protection, and pollution protection. For instance, the *Fisheries Act* prohibits the harmful alteration, disruption or destruction of fish habitat, and the deposition of deleterious substances into fish habitat.[279] Pursuant to the Act, fish habitat is defined as water frequented by fish (including all life stages of fish, shellfish, crustaceans and marine animals) and other areas on which fish depend to carry out their life processes.[280] As well, obstructing the free passage of fish is prohibited, as are activities that may result in the death of fish (unless otherwise authorized).[281] There is also provincial fisheries legislation – the *Fisheries (Alberta) Act* – which sets out a licensing regime for fishing and aquaculture,[282] enables measures for conservation purposes,[283] and deals with invasive species.[284]

Land Use Planning and Management Legislation

The key pieces of land use planning and management legislation are the *Alberta Land Stewardship Act* which enables regional planning within the province (as well as land stewardship tools) and the *Public Lands Act* which regulates administration and management of provincial public lands.[285] The *Municipal Government Act* confers significant land use planning and development authority to municipalities for municipal and private lands located within a municipality.[286]

Protected areas are governed by several pieces of legislation: the *Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act* and the *Provincial Parks Act*, and the federal *Canada National Parks Act*.[287] The level of protection provided to a "protected" area varies greatly with the type of protected area designation, with some types of protected areas being subject to high levels of development and disturbance.

Natural Resource Development Legislation

Each natural resource development sector in Alberta is subject to its own regulatory regime, as well as being subject to general environmental legislation. For instance, the *Forests Act* and its regulations govern forestry dispositions and operations in the province.[288] Dispositions of

[279] *Fisheries Act* at ss. 35, 35.1, 35.2 and 36.
[280] *Ibid.* at s. 2.
[281] *Ibid.* at ss. 34.3(4) and 34.4.
[282] *Fisheries (Alberta) Act*, RSA 2000, c. F-16.
[283] *Ibid.* at 32.
[284] *Ibid.* at 43 and 44.
[285] *Alberta Land Stewardship Act*, S.A. 2009, c. A-26.8 [ALSA] and *Public Lands Act*.
[286] *Municipal Government Act*, R.S.A. 2000, c. M-26 [MGA].
[287] *Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act*, R.S.A. 2000, c. W-9, *Provincial Parks Act*, R.S.A. 2000, c. P-35, and *Canada National Parks Act*, S.C. 2000, c. 32.
[288] *Forests Act*, R.S.A. 2000, c. F-22 [*Forests Act*].

minerals – such as gold, silver, coal, oil and gas – are governed by the *Mines and Minerals* Act. The exploration and extraction of oil and gas is regulated by the *Responsible Energy Development Act* (REDA), the *Oil and Gas Conservation Act,* and several other pieces of legislation.[289] Similarly, coal mining activities are governed by REDA and the *Coal Conservation Act.*[290]

Points of Intersection

Given the central importance of land to Indigenous culture, spirituality, language and livelihoods, it is inevitable that land use and resource developments are particularly impactful to Indigenous peoples.

Furthermore, Treaty harvesting rights (hunting, fishing, and trapping) are inextricably linked to environmental quality. Recognizing this link, Collins & Murtha argue that a constitutional right to environmental preservation is implicit in Treaty rights to hunt, trap and fish.[291] According to Collins & Murtha, in securing their harvest rights, Indigenous peoples were in fact securing the continued existence of their traditional subsistence activities which cannot survive without ecosystem preservation and, as such, harvesting rights must be seen as encompassing environmental preservation rights.[292] Collins & Murtha conclude that, if there is an implicit right to conservation, this right would constrain governmental decision-makers in the issuance of permits that will affect animal and fish subject to Indigenous harvests to ascertain the resource needs of Indigenous groups to ensure their harvesting rights are not compromised when making decisions around resource development scale and location.[293]

Given the linkage between environmental matters and the constitutional protection of Indigenous rights, the following sections look at the intersection of environmental law and Aboriginal law. The points of intersectionality reviewed are:

- Wildlife: Conservation and Indigenous Harvesting Rights;
- Water: Indigenous Ownership, Access and Use;
- Land Use and Resource Development: Cumulative Effects on Treaty Rights; and
- Regulatory Tribunals: Role in Indigenous Consultation and Accommodation.

Looking at the overall framework of legislation and regulations governing land use and resource development in Alberta, it is apparent that Treaty rights are not a primary consideration in land

[289] *Responsible Energy Development Act*, S.A. 2012, c. R-17.3 [REDA]; and *Oil and Gas Conservation Act*, R.S.A. 2002, ch. O-6 [*Oil and Gas Conservation Act*].
[290] *Coal Conservation Act*, R.S.A. 2000, c. C-17 [*Coal Conservation Act*].
[291] Lynda Collins and Meghan Murtha, "Indigenous Environmental Rights in Canada: The Right to Conservation Implicit in Treaty and Aboriginal Rights to Hunt, Fish, and Trap" (2010) 47:4 ALR 959 [Collins & Murtha].
[292] *Ibid.*
[293] *Ibid.*

use and resource development decisions. Treaty rights often seem to be distilled down to a right to consult and accommodate with the onus on First Nations to demonstrate the existence of a Treaty right and the infringement of that right. There is no clear mechanism in place to consider and mitigate the cumulative impacts of multiple land use and resource development on Treaty rights, nor is there a clear role for decision-making by First Nations acknowledged in the various pieces of legislation.

Wildlife: Conservation and Indigenous Harvesting Rights

In Alberta, provincial wildlife conservation measures are implemented through the *Wildlife Act,* its regulations and policy. Unsurprisingly, this regulatory system intersects with Treaty rights to hunt, fish, and trap. The courts have been clear that conservation principles are paramount to the exercise of Treaty rights.[294] However, not all wildlife regulations are necessarily aligned with conservation needs and, as such, the government must provide specific evidence on conservation (not merely generalized statements about conservation).[295]

The constitutional nature of Indigenous harvesting rights is somewhat reflected in fishery and wildlife regulations. For example, the *Alberta Fishery Regulations* under the federal *Fisheries Act* allow an Indian to engage in sport fishing without a licence, and provide for Indian food fishing licences.[296] Similarly, the provincial *General Fisheries (Alberta) Regulation* creates a "domestic licence" which can be used for subsidence fishing and specifically references Métis harvesting.[297] The provincial *Wildlife Regulation* has provisions for Métis hunting licenses, Indian fur management licences (which are treated the same as other fur management licences)[298], and use of bird dogs.[299] The *Wildlife Regulation* also mentions some activities pursuant to constitutionally recognized rights, namely hunting of bison and the exportation of certain wildlife like black bears.[300]

Despite these specific references, overall, there is limited accommodation in these regulations for Indigenous harvesting rights. In fact, there is often conflict between wildlife management regulations and Indigenous harvesting rights. Much of the case-law considering the impact of wildlife regulation on Treaty harvesting rights arises in the context of convictions for violations of wildlife regulations. One has to question whether this is the most appropriate forum in which to delineate and protect Treaty rights given that the need for conservation regulation is often driven by poor land use and resource development decision-making without sufficient consideration of cumulative impacts.

---

[294] *Aboriginal Law Handbook*, *supra.* note 22 at chap. 3.
[295] *Ibid.* at chap. 3.
[296] *Alberta Fishery Regulations, 1998*, SOR 98-246 at s. 13.
[297] *General Fisheries (Alberta) Regulation*, AR 203/97 at s. 25.
[298] Monique M. Passelac-Ross, *The Trapping Rights of Aboriginal Peoples in Northern Alberta*, *CIRL Occasional Paper #15* (Calgary: 2005, Canadian Institute of Resources Law).
[299] *Wildlife Regulation*, Alta Reg 143/1997 at ss. 4, 37, 38, and 103.1.
[300] *Ibid.* at ss. 3(j.2), 4 and 118.

Key decisions on the interaction of Indigenous rights and conservation regulations include *Sparrow*, *Marshall, Denny, Jack*, *Lefthand* and *Gladstone.*[301] With respect to the impact of conservation regulations on Métis hunting rights, the key decision is *Powley*.[302]

Sparrow

In 1990, the SCC considered the impact of conservation regulations on Aboriginal fishing rights in *Sparrow.*[303] In this case, Sparrow was charged under federal fisheries regulations for using a longer drift net than permitted in the Band's licence. His defense was that he was exercising an Aboriginal right to fish and the net length restriction in the Band's licence was invalid due to section 35 of the *Constitution Act*. The SCC held that the issuance of fishing licenses was merely a means to control the fisheries, not a definition of underlying rights. The SCC found that the fishery regulations were a *prima facie* infringement which needed to be justified (the matter was sent back to trial to determine if there was justification). In establishing the test for justification, the SCC extensively discussed conservation objectives as part of the "valid legislative objective" aspect of justification. The SCC stated that the "justification of conservation and resource management… is surely uncontroversial".[304] Further, "any allocation of priorities after valid conservation measures have been implemented must give top priority to [Indigenous] food fishing" and the "brunt of conservation measures [should] be borne by the practices of sport fishing and commercial fishing".[305] Even though regulations for the purpose of conservation or management have a reasonable objective, those regulations must still be justified as per the test established in *Sparrow* which includes considerations such minimal infringement and consultation.

Marshall

In *Marshall*, the SCC heard an appeal of three convictions under federal fishery regulations: selling eels without a licence, fishing without a licence, and fishing with illegal nets. The issue at trial was whether Marshall was exempt from the fishery regulations by virtue of the treaties of 1760-61. The SCC determined that the convictions should be overturned because "nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi'kmaq people".[306] The SCC found that there was a Treaty right to fish and to sell fish in order to earn a moderate livelihood (the treaty was not subject to the NRTA which eliminated commercial rights). Further, they found that the exercise of those Treaty rights was "exercisable only at the absolute

[301] *Sparrow, supra.* note 12; *Marshall, supra.* note 190; *R v Denny,* (1990) CanLII 2412 (NSCA) [*Denny*]; *Lefthand, supra.* note 240; *Gladstone*, *supra.* note 200; and *R v Jack,* [1996] 2 CNLR 113 (BC CA) [*Jack*]. There are numerous lower court decisions as well: *R v Jackson,* [1992] 4 CNLR 121 (ON Prov Div); *R v Joseph* [1990] 4 CNLR 59 (BC SC); *Neskonlith Band v Canada (Procureur General*), (1997) CanLii 6173 (FC); *R v Traverse,* (2004) SKPC 14 (CanLii); and *R v Ned*, [1997] 3 CNLR 251 (BC Prov Ct).
[302] *Powley, supra.* note 115.
[303] *Sparrow, supra.* note 12.
[304] *Ibid*. at 1113.
[305] *Ibid.* at 1116.
[306] *Marshall*, *supra.* note 190 at para. 4.

discretion of the Minister".[307] As such, the fishery regulations constituted an infringement of Treaty rights which must be justified. Furthermore, there cannot be a limitation on the method, timing and extent of hunting or fishing under a Treaty apart from a Treaty limitation to that effect.

Denny

Convictions arising from violations of fisheries regulations were again at issue in the Nova Scotia Court of Appeal (NSCA) decision in *Denny.*[308] In this case, the violations included fishing using illegal means and without appropriate licences (there were three appellants, all Indigenous). Aboriginal or Treaty rights to fish were asserted and claimed as providing immunity to prosecution under the fisheries regulations. The appellants argued that, as Indigenous people, they had priority over other user groups in the allocation of surplus fishery resources once the needs of conservation had been met. The NSCA agreed.

The NSCA found that there was an existing Aboriginal right to fish for food and, as such, did not consider whether there was a Treaty right. Furthermore, the Court held that section 35 of the *Constitution Act, 1982* provided the appellants "with the right to an allocation of any surplus of the fisheries resource which may exist after the needs of conservation have been taken into account" and that this "right is subject to reasonable regulation of the resource in a manner that recognizes and is consistent with the appellants' guaranteed constitutional rights".[309]

Jack

The priority of conservation requirements over Indigenous fishing rights was discussed quite extensively by the BC Court of Appeal (BCCA) in *Jack.*[310] At issue in the appeal was the question of whether conservation measures put into place by the federal Department of Fisheries and Oceans (DFO) interfered with Aboriginal rights to fish. The conservation measures were designed to preserve chinook salmon stocks in the Leiner River and included closure of sport fishing in the Leiner River, as well as restricted sport fishing allocations in other certain areas. The BCCA found that the DFO failed to give priority to Aboriginal fishing rights – which include fishing for food, social and ceremonial purposes – when it "prohibited fishing for chinook at the mouth of the Leiner River but at the same time allowed sport fishers a daily limit of two chinook per person in the entrances to Esperanza and Nootka inlets" both of which were chinook entrances to the Leiner River.[311] The BCCA found that the prohibition of sport fishing for chinook on Nootka Sound and Esperanza Inlet would have been justified on the evidence, and by failing to implement a prohibition, DFO did not give priority of the Aboriginal fishing right to other users. Effectively, there was an allocation of fish stocks to sport fishers at interception points at the same as closure of the terminal location where Aboriginal fishing rights were

[307] *Ibid.* at para. 64.
[308] *Denny, supra.* note 302.
[309] *Ibid.* at 21.
[310] *Jack, supra.* note 302.
[311] *Ibid.* at para. 65

exercised. The evidence showed that a reduction of fishing at the interception points (by sport fishers) would have provided an opportunity for Aboriginal fishing in the terminal location.

Further, the BCCA found that the consultations that were conducted did not meet the criteria in *Sparrow* because not all conservation measures that were implemented were raised in the consultation, nor were the full impacts on the relevant Indigenous community considered. The BCCA did emphasize that DFO was not required to achieve consensus with the Indigenous community as part of the consultations (i.e., the Indigenous community was not entitled to veto the conservation measures).

Lefthand

An Alberta-based case that considered the justiciability of regulations that prohibited fishing in certain areas, and that prohibited the use of bait in other areas is the *Lefthand* decision. This case involved two Treaty 7 people who were charged with violating long-standing federal fishing regulations (i.e., fishing in a closed location and using bait). While Treaty 7 does not explicitly mention fishing rights, the Crown admitted that there was a Treaty right to fish for the purposes of these prosecutions.[312] The Court stated that any type of conservation measure may be potentially justified. Even where harvesting is allowed, the means of fishing may be relevant to protecting stocks (i.e., avoidance of habitat destruction, wasteful practices or damage to the fish population). Seasonal and species limitations may also be justifiable. In this case, the Court concluded that the regulations were part of a genuine conservation regime, were reasonable in scope and content, and adequately recognized the priority of the Aboriginal right to fish.

The Court also found that the evidence showed Treaty 7 peoples rarely fished and that there was no evidence to show that the defendants' right to feed themselves and their families was practically affected by the regulations (i.e., there was no evidence to show why the defendants needed to fish in a closed location or with bait). As such, the Court concluded that the regulations were within the implied limited on Aboriginal fishing rights or, alternatively, the limitations set out in Treaty 7. Further, even if the regulations were not within those limitations, there was no breach of the Aboriginal right which serves as a defence to the violation (and alternatively, if there was a breach, it was justified).

Gladstone

In *Gladstone*, the SCC indicated that conservation objectives are not the only governmental objectives that can justify an infringement of Treaty rights. In this case, the defendants – two Heiltsuk individuals who held an Indian food fish licence to harvest 500 pounds - attempted to sell herring spawn on kelp which was an offence under the B.C. *Pacific Herring Fish Regulations*. The SCC found that there was an Aboriginal right to harvest herring spawn on kelp for commercial purposes and that the right was *prima facie* infringed by the regulation since it limited the harvest amount (whereas previously the Heiltsuk Nation determined the appropriate

[312] The Court also stated that the NRTA was not relevant to this case because it does not impact on the federal government's power to legislate on fisheries (and the case involved federal fishery regulations).

harvest amounts). The SCC reiterated that to show justification for the infringement, it must be demonstrated that the government is acting pursuant to a valid legislative objective and that the action taken is consistent with the Crown's fiduciary duty.

On the issue of justification, the SCC stated that the notion of priority as articulated in *Sparrow* assumes that the Aboriginal right has an inherent limitation (such as meeting only food, social and ceremonial needs). But, as in the case at hand, when there is no such inherent limitation, the notion of priority would mean the Aboriginal rights become exclusive because the only limit would be market demand. The SCC concluded that where there is no inherent limitation in the Aboriginal right, the doctrine of priority requires that the government demonstrate it has taken the existence of Aboriginal rights into account in allocating the resource and has allocated the resource in a manner respectful of the fact that Aboriginal rights have priority over the exploitation of the fishery by other users. In other words, the Aboriginal right in this case has priority but is not exclusive.

The SCC also stated that conservation objectives are not the only governmental objectives that can justify an infringement. Because Indigenous societies exist within and are part of the broader social, political, and economic community, there can be other compelling and substantially important objectives such as regional and economic fairness. The SCC ultimately sent the matter back for a new trial because there was an absence of evidence to determine whether or not the regulatory scheme was justified.

It is interesting to note that the DFO recently made the decision to close this fishery on the basis of conservation concerns. This decision was made in the face of objections from the Heiltsuk Nation.[313] The interaction of conservation measures and the exercise of Indigenous harvesting rights are very real, often contentious issues.

Powley

In *Powley*, the SCC considered the Ontario's regulation of Métis subsidence hunting rights.[314] In Ontario moose hunting is strictly regulated, requiring individuals to enter a lottery to obtain a validation tag that specifies whether a bull or cow may be taken and the allowable season and location for hunting. The validation tag and seasonal restrictions are not enforced against Status Indians. Because Powley was Métis he was charged with hunting without the required license. The Crown argued that the need for conservation measures justified the infringement of Métis hunting rights.

The SCC found that there is a Métis right to hunt for food (which is not species-specific) and that that right was infringed by the provincial hunting regulations. The SCC also found that there was

[313] Water Canada, *Fisheries and Oceans Canada to close herring spawn on kelp fishery* (February 22, 2022), online: https://www.watercanada.net/fisheries-and-oceans-canada-to-close-herring-spawn-on-kelp-fishery/. See also Government of Canada website for information of Spawn on Kelp (SOK) herring consultations, online: https://www.pac.dfo-mpo.gc.ca/consultation/pelag/sok-rsv/index-eng.html.

[314] *Powley, supra.* note 115. Also in *Blais*, *supra.* note 66, the SCC found that the NRTA does not include the Métis people for the purposes of the hunting rights provisions but did not make any findings as to whether there an Aboriginal right protected by section 35.

no evidence of a conservation need that justified infringement of the Métis hunting right. There was no evidence that moose population is under threat and, even if there was, the Métis people are still entitled to priority allocation to satisfy their subsistence needs as per *Sparrow.* The SCC said that the hunting rights of the Métis people should track those of the Ojibway in terms of restrictions for conservation purposes and priority allocations where there are threatened species.

Protecting a Way of Life

As can be seen from the foregoing cases, there tends to be a focus on discrete Treaty harvesting rights and regulatory limits placed on those rights as opposed to considering whether a way of life is being protected. This may be because the case-law considering the impact of wildlife regulation on Treaty harvesting rights typically arises in the context of convictions for violations of wildlife regulations. The link between environmental conditions needed to protect a way of life (which includes harvesting activities), and the poor land-use and resource development decision-making which drives the need for conservation regulation is not explored in these cases.

However, this link was more clearly considered in the *Yahey* decision where the B.C. Supreme Court considered whether cumulative effects from taking up in the form of multiple provincially authorized activities, projects and developments could amount to a breach of Treaty rights.[315] Ultimately, the Court determined that the Crown breached its obligation to Blueberry River First Nation (BRFN) under Treaty No. 8, including its honourable and fiduciary obligations. It found that the Crown has "taken up lands to such an extent that there are not sufficient and appropriate lands in the Blueberry Claim Area to allow for [BRFN's] meaningful exercise of their Treaty rights… has therefore unjustifiably infringed [BRFN's] Treaty rights in permitting the cumulative impacts of industrial development to meaningfully diminish [BRFN's] exercise of its Treaty rights".[316] The Court ordered that the Crown was no longer allowed to authorize activities that unjustifiably infringe on BRFN's exercise of its Treaty rights. Furthermore, BRFN and the Crown were directed to "consult and negotiate enforceable mechanisms to assess and manage the cumulative impacts of industrial development on [BRFN's] Treaty rights and to ensure these constitutional rights are respected".[317]

In making its decision, the Court noted that there must be a balance that allows the exercise of rights to remain meaningful in the face of the Crown's ability to take up lands. But, in fact, the Court found that there "is not sufficient appropriate lands in the Plaintiff's traditional territories… to permit the meaningful exercise of their Treaty 8 rights. Sufficient habitat, territory and wildlife have not been preserved to allow Blueberry members to carry out their hunting, trapping, and fishing mode of life."[318] Furthermore, looking at the various industrial regulatory frameworks in

[315] *Yahey, supra.* note 217.
[316] *Ibid.* at para. 1894.
[317] *Ibid.* at para. 1894.
[318] *Ibid.* at para. 1180.

place, there are no substantive measures in place to address or to protect the BRFN's claim area from cumulative impacts.

The decision in *Yahey* reflects an understanding of Treaty rights beyond this narrow view.[319] It expands the rights to hunt, trap and fish to being a right to a way of life (as opposed to discrete, narrow rights to hunt, trap and fish).,[320] As well, rather than just considering the extent of lands taken up, the decision considered the effects of taking up land on surrounding lands and the wildlife populations.[321]

Within Alberta, concerns about the sustainability of resources which form the backbone of Treaty harvesting rights have been raised in other contexts. For instance, in *Bigstone Cree Nation* raised concerns about its ability to continue traditions – including hunting, fishing and harvesting – in its territory in light of a pipeline approval.[322] In this case, the National Energy Board (NEB) conducted an environmental assessment and regulatory process for a pipeline application. The NEB recommended that the pipeline be approved subject to numerous conditions, that recommendation was accepted by the federal Cabinet, and the pipeline was permitted to proceed. The Bigstone Cree Nation challenged the pipeline approval on the grounds of insufficient consultation and accommodation around its concerns with impacts on caribou. Ultimately, the Court found that there was sufficient consultation and accommodation by the Crown and noted that there were several conditions on the approval to mitigate impacts on caribou.

In *Athabasca Chipewyan,* concerns around caribou were raised by the Athabasca First Nation, the Beaver Lake Cree Nation and Enoch Cree Nation.*[323]* In this case, the First Nations along with some environmental organizations sought finalization of a recovery strategy and an emergency order for protection of boreal caribou located in Northeastern Alberta (pursuant to section 80(2) of the *Species at Risk Act*). When the Minister denied the emergency order, that decision was appealed to the Federal Court which ultimately set aside the Minister's decision and remitted it to the Minister for reconsideration.

In making the decision to not issue an emergency order, the Minister stated that the First Nations' Treaty rights and the Crown's obligation to act honourably were not relevant considerations for a section 80(2) decision. The First Nations raised issues respecting the impact of the Minister's interpretation of section 80(2) of the *Species at Risk Act* on their Treaty rights and the honour of the Crown. The Court concluded that the Minister clearly erred in reaching his decision by failing to take into account the First Nations Applicants' Treaty Rights and the honour of the Crown in interpreting his mandate under subsection 80(2)".[324] The Court stated that this alone was a basis to set aside the Minister's decision. The Court went on to state that the Minister must not just consider whether any "active course of conduct may

[319] *Yahey, supra.* note 217.
[320] Killoran et al, *supra.* note 226.
[321] *Ibid*.
[322] *Bigstone Cree Nation v Nova Gas Transmission Ltd.,* 2018 FCA 89 (CanLii) [*Bigstone Cree Nation*].
[323] *Athabasca Chipewyan, supra.* note 203.
[324] *Ibid.* at para. 35.

negatively affect Treaty rights" but must also assess the "extent to which the ongoing violation of the [*Species at Risk Act*] (by failing to post a Recovery strategy) and continued inaction with respect to the boreal caribou would… be consistent with the honour of the Crown".[325]

In another example, the issue of cumulative impacts from land-use and resource development decisions on caribou populations, and the impacts on Treaty rights was raised by six First Nations who sought review of the *Lower Athabasca Regional Plan* (LARP) developed pursuant to ALSA.[326] The Review Panel that considered the First Nations' concerns indicated that it was "concerned that the Government of Alberta is still issuing energy leases in key habitats occupied by the endangered woodland caribou in the Lower Athabasca Region".[327] It suggested that provincial range plans for woodland caribou should be established in consultation with the First Nations residing in the region.

Although much of the caselaw at the intersection of wildlife and Treaty rights arises in the context of conservation regulations and resultant limits on Treaty harvesting rights, this is not the only relevant context. As can be seen in the *Bigstone Cree First Nation* and *Athabasca Chipewyan* cases, decisions pertaining to land-use and resource development have impacts on the sustainability of resources that form the backbone for the exercise of Treaty rights. Regulatory and decision-making processes must be integrated with consideration of Treaty rights to acknowledge the link between environmental condition and meaningful exercise of Treaty rights, and to address cumulative impacts of a multitude of decisions on meaningful exercise of Treaty rights.

Water: Indigenous Ownership, Access and Use

Although there is a fair bit of jurisprudence around Aboriginal and Treaty fishing rights, there is a dearth of case-law pertaining to the water itself. Instead, there are a lot of unanswered questions around Aboriginal title to water, Aboriginal title to the beds and shores of water bodies, and usufructuary and access rights to water.

Ownership of Water, and Beds and Shores

The Government of Alberta has taken the position that title to both water and to the beds and shores of water bodies were transferred to it by virtue of the numbered treaties, the NRTA and the *Northwest Irrigation Act*.[328] Alberta's legislation indicates that the provincial Crown owns all water in the province, and the beds and shores of all permanent and naturally occurring bodies

[325] *Ibid.* at para. 36.
[326] Jeff Gilmour et al., *Review Panel Report 2015: Lower Athabasca Regional Plan* (Edmonton: 2015, Government of Alberta).
[327] *Ibid.* at 211.
[328] Monique M. Passelac-Ross and Christina M. Smith, *Defining Aboriginal Rights to Water in Alberta: Do They Still "Exist"? How Extensive are They?,* CIRL Occasional Paper #29 (Calgary, 2010: Canadian Institute of Resources Law) [Passelac-Ross & Smith]. See also Allison Boutillier, *Water Law In Alberta, A Comprehensive Guide, Chapter 4: Water in Indigenous Communities* (Edmonton: 2022, Environmental Law Centre) [Boutillier].

of water and all naturally occurring rivers, streams, watercourses and lakes. [329] However, it should be noted that the letters patent for the Métis Settlements expressly indicate that the beds and shores within the Métis settlement areas are owned by the Métis Settlements General Council.[330] As well, according to the Government of Alberta, the beds and shores within an Indian reserve are owned by the federal Crown.[331]

Some commentators disagree with the position taken by the Government of Alberta with respect to ownership of water and the beds and shores in the province.[332] However, Canadian courts have not dealt squarely with the issue of Aboriginal title to water and, as such, there is not an unequivocal confirmation or denial of Aboriginal title to water.[333] Aboriginal title to water would give "Aboriginal peoples the right to exclusive use, occupation and possession of the lands submerged by water and entitles them to make use of the waters for a wide variety of purposes not restricted to traditional occupations."[334] This would mean Aboriginal people could use water for traditional purposes (such as fishing, hunting, gathering, domestic or household uses) and for modern uses (such as hydro-electric or irrigation), as well as conveying the right to make water use and management decisions.[335] It also means that if Aboriginal title to water still exists (i.e. has not been ceded by Treaty or extinguished by legislation), then Alberta's provincial legislation of water allocation and management may be called into question.[336]

In terms of ownership of the beds and shores of water bodies, the answer may differ depending on whether the water body is located on a reserve or not. Many reserve lands clearly incorporate rivers and lakes, and boundaries are often described as running along water bodies.[337] The SCC considered the question of whether a river and its bed is part of a reserve in two cases: *Lewis* and *Nikal*.[338] In both cases, the question arose as to whether a band bylaw applied to fishing activities on a river which bounded the reserve (*Lewis*) or which ran through the reserve (*Nikal*). In both cases, the SCC found that the band bylaw was inapplicable to the water bodies and that the federal *Fisheries Act* applied instead. The reason the ban bylaws were held to be inapplicable to fishing activities is because the waters were not considered part of the reserve lands. In both cases, the SCC stated that the evidence showed the Crown never

[329] *Water Act* at s. 3 and *Provincial Lands Act* at s. 3.
[330] Boutillier, *supra*. note 329.
[331] Government of Alberta website, online: https://www.alberta.ca/water-boundaries.aspx. The federal Crown also owns the beds and shores within national parks and military reserves within Alberta.
[332] Passelac-Ross & Smith, *supra.* note 329.
[333] *Ibid*. See also David Laidlaw and Monique Passelac-Ross, "Water Rights and Water Stewardship: What about Aboriginal Peoples? (2010) 107 Resources 1 [Laidlaw & Passelac-Ross] and 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 RGD 515 [Blair].
[334] Passelac-Ross & Smith, *supra.* note 329 at 8.
[335] *Ibid.*
[336] *Ibid.*
[337] *Ibid.*
[338] *R v Lewis*, [1996] A SCR 921 [*Lewis*]; and *R v Nikal*, [1996] 1 SCR 1013 [*Nikal*].

allotted nor intend to allot the river bed or the river to the band. The reserve lands ended at the boundary of the river and, as such, band bylaws did not operate on the rivers.[339]

These SCC decisions suggest that treaties, although they may reference water bodies, do not necessarily reveal an intention to confer ownership of water and the beds and shores to the Indigenous communities. It should be noted that both *Lewis* and *Nikal* originated from BC. An argument that the beds and shores were not surrendered (and thus remain subject to Aboriginal title) was raised in *Tsuu T'ina Nation*, a case originating from Alberta.[340] This issue has not been adjudicated yet and, as such, there remains questions as to the ownership of beds and shores both on and off reserves in Alberta.

Usufructuary Rights and Access Rights

Usufructuary rights and rights to access water are different than questions of Aboriginal title to water and the beds and shores of water bodies. Such rights allow Indigenous peoples to engage in site-specific activities such as travel and navigation along water bodies, use for domestic purposes (drinking, washing, watering stock), or use for spiritual, ceremonial, cultural and recreational purposes.[341] Whether or not such rights attach to reserve lands is an open question.[342] On one hand, the *Northwest Irrigation Act* of 1894 gave all rights to take and use water to the federal government with the exception of riparian rights to take and use water for domestic and limited agricultural purposes.[343] This implies that riparian rights to use water – except for domestic and limited agricultural purposes - were removed from reserve lands. On the other hand, some commentators point out that the *Northwest Irrigation Act* did not explicitly mention Aboriginal water rights and was passed in the same time period in which treaties were being negotiated, such that there was no clear intention to extinguish Aboriginal water rights.[344]

It can be argued that there are implied Treaty rights to water associated with explicit Treaty harvesting rights:

> Fishing is intrinsically linked to the right to access and use waterways in a particular location, and to the continued existence of fish in water bodies. … If the traditional means of survival by way of fishing are to be protected against any infringement, the water necessary to sustain the exercise of the Aboriginal right must remain suitable for that use. Implicit in the right to fish, trap and hunt

[339] These decisions have been criticized, see Blair, *supra.* note 334.
[340] *Tsuu T'ina Nation v Alberta (Environment)*, 2010 ABCA 137 (CanLii) [*Tsuu T'ina Nation*] mentions this claim but notes the "nature and extent of the Treaty and Aboriginal rights of the Tsuu T'ina, at least as they pertain to water rights and water management, are the subject of separate proceedings commenced by Statement of Claim issued on September 7, 2007" at para. 15.
[341] *Ibid.*
[342] Boutillier, *supra.* note 329.
[343] David Percy, "Seventy-five Years of Alberta Water Law: Maturity, Demise & Rebirth" (1996) 35(1) Alta. L. R. 221.
[344] Laidlaw & Passelac-Ross, *supra.* note 334.

> is a right to water quantity and quality similar to the common law riparian owners' right to receive water sensibly undiminished in quantity and quality.[345]

Although Treaty No. 7 does not mention fishing, both Treaties Nos. 6 and 8 do specifically mention a right to fish. Interestingly, Treaty No. 7 explicitly reserves to the Crown the "right to navigate the above mentioned rivers, to land and receive full cargoes on the shores and banks thereof, to build bridges and establish ferries therein" on rivers within lands set aside as reserves. There is no similar statement in either Treaty No. 6 or 8. In the event an implied Treaty right to use and access water can be demonstrated in Alberta, this does not necessarily mean provincial legislation cannot infringe upon this right. Infringement by provincial legislation could be permissible if justified using the test in *Sparrow*.

If an implied Treaty right to use and access water can be demonstrated, this may have implications for a certain level of water quality and quantity to be maintained to allow exercise of the Treaty right. In the *Saanichton Marina* case, the BC Court of Appeal stressed the importance of habitat protection to maintain Treaty rights.[346] In this case, the proponent for construction of a marina held a licence of occupation. The Tsawout Indian Band opposed construction of the marina on the grounds it would interfere with their fishing rights guaranteed in their *1852 Treaty*. The Band indicated that they did not seek to establish a property interest in the sea bed of the Saanichton Bay; rather, they sought to continue their fishing activities in that particular location. The Court found that construction of the marina, including dredging operations, would destroy the crab fishery and restrict access to crabbing areas and remove the most extensive crab habitat in the Saanichton Bay, as well as negatively impact other fish and food organisms. The Court noted that the right to fish in the *1852 Treaty* was not limited in any way, such as being limited to unoccupied lands (unlike harvesting rights under Treaty Nos. 6, 7 and 8), and should not be held to be restricted due to surrounding settlement and development. The Court concluded that the proposed marina would derogate from the Treaty fishery rights because it would limit and impede rights of access, destroy part of the crab fishery, and disrupt other parts of the fishery. As such, the licence of occupation was held to be of no force and effect.

As more clarity emerges around issues of Aboriginal title to water and to beds and shores of water bodies, there may be implications for provincial legislation pertaining to water allocation and management (i.e., the *Water Act*). The *Water* Act, along with legislation such as the provincial *Environmental Protection and Enhancement Act* and the federal *Fisheries Act*, also has implications for water quality in the province. The federal government is also currently in consultation with First Nations to develop legislation addressing safe drinking water on reserve lands.[347]

---

[345] *Ibid.* at 10.

[346] *Saanichton Marina Ltd. v Claxton*, 1989 CanLii 2721 (BC CA) [*Saanichton Marina*].

[347] Developing laws and regulations for First Nations drinking water and wastewater: engagement 2002, Government of Canada website, online: https://www.sac-isc.gc.ca/eng/1330528512623/1533729830801.

Application of Federal and Provincial Water Laws on Reserve Lands and Métis Settlement Lands

Due to section 91(24) of the *Constitution Act,* federal laws relating to water quality do apply on reserve lands. However, the applicability of provincial law on reserves is less clear. Section 88 of the *Indian Act* provides that provincial laws of general application apply to Indians, subject to Treaty terms and federal statute, so long as they are not inconsistent with the *Indian Act*, the *First Nations Fiscal Management Act*, or with Indian Band orders, rules, regulations or laws. However, section 88 does not say that provincial laws apply to lands reserved for Indians. This may mean that "the provisions of statutes… normally applying to land in the province… do not apply on reserve land.[348] In any event, currently provincial law is not being applied to water pollution on reserves.[349]

Aside from applicable federal laws around water quality (and possibly provincial laws), a Band Council may pass bylaws that apply to reserve land.[350] These bylaws may address the construction and use of public wells, cisterns, reservoirs and other water supplies. Band bylaws addressing land zoning may also be made.

Unlike First Nations reserves, Métis Settlement lands are subject to both federal and provincial laws addressing water quality. Métis Settlement Councils may make bylaws relating to the use of wells, springs and other sources of water, and to prevent contamination of water in the settlement.[351] They may also make bylaws for planning, land use and development purposes.[352]

Indigenous Rights and Water Management Planning

As previously mentioned, the *Water Act* sets out the licensing and priority regime for the allocation of water, its diversion, and its use throughout the province as well an approvals system for specified activities that may impact water. The *Water Act* also has provisions for water management planning and establishment of water conservation objectives which are meant to guide decision-making under the Act.*[353]*

The *Framework for Water Management Planning* sets out the requirements for development of a water management plan in Alberta.*[354]* There is no express reference to protection or consideration of Indigenous or Treaty rights in the *Framework for Water Management Planning.* Currently, there are 5 water management plans in the province, each of which incorporate water

[348] John W. Gailus, *Management of Contaminated Sites on Indian Reserve Lands,* (March 7-8, 2013) Site Remediation in British Columbia Conference.
[349] Boutillier, *supra.* note 329.
[350] *Indian Act* at s. 81.
[351] *Métis Settlements Act* at Schedule 1, s. 12.
[352] *Ibid.* at Schedule 1, s. 18.
[353] *Water Act* at Part 2.
[354] *Framework for Water Management Planning* (Edmonton: 2001, Alberta Environment).

conservation objectives.[355] Where there is no applicable water management plan or water conservation objectives in place, then reference may be made to the *Surface Water Allocation Directive*.[356] Like the *Framework for Water Management Planning*, the *Surface Water Allocation Directive* contains no express reference to protection or consideration of Indigenous or Treaty rights. Some consideration of Treaty rights can be seen in the *Bow, Oldman and South Saskatchewan River Basin Water Allocation Order* which effectively closed the Bow, Oldman and South Saskatchewan River Basin to new water allocations with some exceptions.[357] One exception is that a water licence may be issued for use by specified First Nations (the Siksika, Tsuu T'ina, Piikani, Kainai or Stoney Nations) which seems to provide at least some acknowledgement of Indigenous rights to use water.[358]

The decision in *Tsuu T'ina Nation*[359] involved First Nations' concerns with water management planning under the provincial *Water Act*. In particular, the First Nations (Tsuu T'ina and Samson Cree) were concerned with the water management plan developed for the South Saskatchewan River Basin which, among other things, set water conservation objectives establishing the amount and quality of water necessary for protection of the water bodies, and for management of fish and other wildlife.

In the *Tsuu T'ina Nation* case, the First Nations filed judicial reviews seeking a declaration that Alberta had a duty to consult and accommodate and that Alberta failed to discharge that duty, and an order setting aside the water management plan. Upon appeal, the First Nations dropped the request for an order setting aside the water management plan. The Alberta Court of Appeal found that there was a duty to consult and that the duty had been properly discharged by the Crown in this case. The Court found that the duty to consult was at the low end of the scale due to the nature of the government action, the seriousness of the rights and claims, and the potential adverse impacts upon those rights and claims. In making this finding, the Court noted that overall effect of the water management plan was to enhance conservation and improve the aquatic environment and did not change the status quo of the First Nations concerns with water ownership and allocation.

[355] *Approved Water Management Plan for the South Saskatchewan River Basin (Alberta)* (Edmonton: 2006, Alberta Environment); *Water Management Plan – Phase 1: Lesser Slave Lake and Lesser Slave River Basins* (Edmonton: 2009, Lesser Slave Watershed Council); *Cold Lake Beaver Basin Water Management Plan* (Edmonton: 2006, Alberta Environment); *Approved water management plan for the Battle River Basin* (Edmonton: 2014, Alberta Government); and *Wapiti River Water Management Plan* (Edmonton: 2020, Alberta Environment and Parks).
[356] *Surface Water Allocation Directive* (Edmonton: 2021, Alberta Environment and Parks).
[357] *Bow, Oldman and South Saskatchewan River Basin Water Allocation Order*, AR 171/2007.
[358] *Ibid.* at ss. 1, 4, 6 and 8.
[359] *Tsuu T'ina Nation, supra*. note 341.

Land Use and Natural Resource Development Decisions: Cumulative Effects on Treaty Rights

Decision-making around land use and natural resource development in Alberta is quite decentralized. In part, this arises from a sector-by-sector approach to regulating natural resource development in the province along with poor integration of decision-making and assessment of cumulative impacts. This is the case even though Alberta has legislative frameworks in place for both regional land use planning and environmental assessment of proposed projects. Poorly managed and assessed cumulative impacts associated with land use and natural resource development decisions can have significant impacts on Indigenous peoples, in particular on the exercise of Treaty rights on reserves and traditional lands (i.e. unoccupied Crown lands).

Land Use Planning

The legislative framework for regional land use planning is provided by the *Alberta Land Stewardship Act* (ALSA). Ostensibly, this legislation helps manage cumulative effects by enabling land use planning and threshold setting on a regional basis. However, only 2 of 7 regional plans have been completed to date despite the planning framework being in place for well over 10 years. Further, the plans that have been completed provide mostly high level land use direction with few enforceable provisions that limit development or set thresholds for cumulative impacts.

According to Jaremko, land use planning is not a Treaty right, but it does trigger a duty to consult when Indigenous peoples are impacted by the Crown action.[360] So long as consultation with Indigenous peoples occurs, the Crown may make unilateral planning decisions and, depending on the nature of the plan and the potential impacts, there may only be a low level of consultation required. [361]

Concern with the lack of consultation in development of the *Lower Athabasca Regional Plan* (LARP) led to a review request by six First Nations. A Review Panel was appointed by the Minister and its mandate was to determine if the applicant First Nations were directly and adversely affected by the LARP, as well as to consider the First Nations' review requests and to provide recommendations to the Government of Alberta.[362] The Review Panel took the position that it "should take notice of existing constitutional rights in the normal course of its review, to the extent those rights can be related to 'health, property, income, or quiet enjoyment of

[360] For discussion of Indigenous consultation efforts during regional plan development thus far, see Jaremko, *supra.* note 2. See also Monique M. Passelac-Ross and Veronica Potes, *Crown Consultation with Aboriginal Peoples in Oil Sands Development: Is it Adequate, Is it Legal? CIRL Occasional Paper #19* (Calgary: 2007, Canadian Institute of Resources Law) [Passelac-Ross & Potes].
[361] Jaremko, *ibid*.
[362] Jeff Gilmour et al., *Review Panel Report 2015: Lower Athabasca Regional Plan* (Edmonton: 2015, Government of Alberta) [LARP Review Panel Report].

property' as set out in section 5(c) of the [*Alberta Land Stewardship Regulation*]".[363] This includes determining whether Treaty rights are directly and adversely affected by the LARP but the Review Panel noted that is cannot determine if the LARP has infringed Treaty rights (because that is a legal determination).[364] However, the Review Panel stated that it had no jurisdiction to consider the adequacy of Crown consultation (the First Nation Applicants agreed).

The Review Panel provided a detailed summary of the concerns raised by each the six First Nations, as well as Crown responses to each concern. Similar, albeit not identical, concerns were raised by all six First Nations including that:

- LARP does not address the management of ongoing traditional land uses;
- New conservation areas were designated without consideration of the impact on traditional land uses or whether such areas support traditional land uses;
- New tourism and recreation areas were designated without consideration of the impacts on traditional land uses; and
- LARP's inclusion of Aboriginal peoples in land-use planning is not effective or meaningful.

Several of the First Nations raised concerns with LARP's failure to address how reserve lands can be accessed, and peacefully used and occupied. One First Nation raised the concern that the LARP is be applied to effectively rule out the possibility of setting aside areas for the exercise of Treaty rights and traditional land uses. Some of the First Nation applicants requested that a Traditional Land Use Management Plan be developed as part of the LARP.

The Review Panel provided recommendations, along with its reasons, for each concern raised by each of the six First Nations. As an overall observation, the Review Panel noted that traditional land use is a concern for each of the First Nations and has not been addressed in the LARP.[365] The Review Panel also notes that it is meaningless to include Indigenous peoples in land-use planning if "it is not intended to include consideration of the land-based rights of the First Nations' Treaty and Aboriginal rights".[366] Further, the Review Panel noted that "failing to include the impacts of industrial development on First Nations' rights in the LARP is inconsistent with the purposes described in the ALSA".[367] As such, the Review Panel recommended that:

> …for any effective land-use planning to proceed in the Lower Athabasca Region, the Government of Alberta must initiate plans to develop a Traditional Land Use Management Framework. Failing to implement such a framework leaves industry, regulators, stakeholders, governments and First Nations asking important questions about Aboriginal Peoples' constitutionally

[363] *Ibid.* at 23.
[364] *Ibid.* at 27.
[365] *Ibid.* at 172.
[366] *Ibid.* at 183.
[367] *Ibid*. at 183.

> protected rights in their Traditional Land Use territories, which conflict with future development in the Lower Athabasca Region.[368]

The Review Panel made recommendations on the contents of a Traditional Land Use Management Framework. It does not appear such a framework has been yet developed.

The Review Panel also made general observations and suggestions with respect to cumulative effects management. In particular, it noted that the "regulatory regime must look at the overall proliferation of resource development projects and the impact of such major developments on the people living in that area".[369] Interestingly, as context for the discussion of cumulative effects managements, the Review Panel referenced the (at the time) newly filed case *Yahey* and the Alberta based *Lameman* case which is still pending.[370]

Environmental Assessment

The other legislative framework that ostensibly assists with managing cumulative effects is environmental assessment. The provincial environmental assessment is set out in the *Environmental Protection and Enhancement Act* (EPEA). Section 40 of EPEA sets out the purposes of the environmental assessment process which include supporting the goals of environmental protection and sustainable development, integrating environmental protection and economic decision-making, providing for public participation, and predicting and mitigating environmental, social, economic, and cultural consequences of proposed activities. There is no express mention of addressing Indigenous or Treaty concerns in the EPEA despite decisions relating to activities on Crown lands having the potential to impact the exercise of Treaty rights within traditional lands.

There is also a federal assessment process which is set out in the federal *Impact Assessment Act* (IAA).[371] There are numerous purposes set out in the IAA, including fostering sustainability and protecting components of the environment.[372] Specific purposes related to Indigenous peoples include:

- to promote communication and cooperation with Indigenous peoples of Canada with respect to impact assessments;
- to ensure respect for the rights of the Indigenous peoples of Canada recognized and affirmed by section of 35 of the *Constitution Act, 1982*, in the course of impact assessments and decision-making under this Act; and
- to ensure that an impact assessment takes into account… Indigenous knowledge.[373]

[368] *Ibid.* at 183.
[369] *Ibid.* at 198.
[370] *Lameman v Alberta*, 2013 ABCA 148.
[371] *Impact Assessment Act*, S.C. 2019, c. 28, s. 1 [IAA].
[372] IAA at s. 6.
[373] IAA at s. 6.

Further, the IAA sets out a mandate for administration of the Act that requires the Government of Canada, the Minster, the Agency and federal authorities to exercise their powers in a manner that respects the Government's commitments with respect to the rights of Indigenous peoples.[374] The IAA also contains provisions that – among others - clarify that nothing in the Act abrogate or derogates from the protection provided to Indigenous rights by the *Constitution Act, 1982*, recognize proponents' agreements with Indigenous governing bodies, and address use of Indigenous knowledge. Throughout the federal impact assessment process are requirements to consult with Indigenous peoples, as well as consider impacts upon Indigenous peoples.

As reflected in the IAA, Indigenous knowledge is recognized by the federal government as an important part of project and regulatory decision-making. In order to have consistent application of provisions dealing with Indigenous knowledge (under the IAA and in other legislation), the federal government has developed the *Indigenous Knowledge Policy Framework for Project Review and Regulatory Decisions* [*IK Framework*].[375] The *IK Framework* defines Indigenous knowledge as "collective knowledge that encompasses community values, teachings, relationships, ceremony, oral stories and myths" and that is "community specific and place-based, arising from Indigenous Peoples' intimate relationship with their environment and territory over thousands of years".[376] The *IK Framework* sets out five principles that are to be followed when applying Indigenous knowledge provisions of the IAA (and certain other federal legislation), and each principle is accompanied by several guidelines.[377]

> Depending on the nature of a proposed project, it may be subject to provincial environmental assessment or federal impact assessment or both, or may not be required to undergo environmental or impact assessment at all. To learn more about environmental assessment, see All things Considered: Impact Assessment and the Constitution.

Natural Resource Development

Aside from regional land use planning under ALSA and environmental assessment processes, most land use and natural resource development decisions occur within a discrete regulatory regime for the particular natural resource in question. This approach of operational, case-by-case decision-making fails at considering cumulative impacts.[378] So what does this approach mean for Indigenous rights?

---

[374] IAA at s. 6(2).
[375] Government of Canada, *Indigenous Knowledge Policy Framework for Project Review and Regulatory Decisions* (n/d) [*IK Framework*].
[376] *Ibid.* at 6.
[377] The *IK Framework* applies to the IAA, as well as, to the *Canadian Energy Regulator Act*, the *Fisheries Act* and the *Canadian Navigable Waters Act*.
[378] Passelac-Ross & Potes, *supra*. note 361.

All these types of decisions may very well trigger the Crown's duty to consult and accommodate as Indigenous rights are potentially impacted but as pointed out by the courts, the degree of consultation and accommodation required varies on a case-by-case basis. Looking at the decision in *Tsuu T'ina Nation*, it may be that high-level strategic planning might trigger only a low level duty to consult allowing the government to make unilateral planning decisions. Even so, the duty to consult and accommodate is not a decision-making tool that can be inserted into existing public consultation processes.[379] Further, the courts have not definitively ruled on appropriate accommodation measures because they prefer to direct a negotiated resolution between Indigenous groups, the Crown and project proponents.[380] However, the courts have been clear that the duty to consult and accommodate does not operate as a veto on proposed government action.[381]

The Court in *Yahey* considered the impact of multiple operational, case-by-case decisions made without due consideration of cumulative impacts on Treaty rights. As previously mentioned, the *Yahey* decision is very lengthy, reflecting the "extraordinary" amount of evidence regarding "history, ethnography, wildlife science, geology, geography, forestry, land use planning and functioning of various governmental regulatory regimes".[382] It also contains a comprehensive review of the jurisprudence on Treaty rights and infringement, as well as jurisprudence specific to Treaty No. 8. Based on its review of the evidence and jurisprudence, the Court states that while "Treaty 8 did not promise continuity of nineteenth patterns of land use, this did not mean that both foundational and incidental elements of that way of life, including the continued existence of healthy environments used for hunting, trapping and fishing and the continuation of other cultural and spiritual practices connected with those activities were not also promised and protected".[383] The Court concluded that, historically, the perspective of the BRFN was that most of the Treaty area would remain unoccupied and be available for hunting, trapping and fishing.

The Court stated that the right to take up land is not an "independent" right rather it exists in relation to the protection of hunting, fishing and trapping rights[384] and that Indigenous rights are "not subject to, or inferior, to the Crown's right to take up land".[385] There must be a balance that allows the exercise of rights to remain meaningful in the face of the Crown's ability to take up lands. But, in fact, the Court found that there "is not sufficient appropriate lands in the Plaintiff's traditional territories… to permit the meaningful exercise of their Treaty 8 rights. Sufficient habitat, territory and wildlife have not been preserved to allow Blueberry members to carry out their hunting, trapping, and fishing mode of life."[386] Furthermore, looking at the various industrial

[379] *Ibid*.
[380] David K. Laidlaw, *Alberta Energy Projects and Indigenous Accommodation? CIRL Occasional Paper #60* (Calgary: 2021, Canadian Institute of Resources Law).
[381] *Ktunaxa Nation, supra.* note 131.
[382] *Yahey, supra.* note 217 at para. 5.
[383] *Ibid.* at para. 272.
[384] *Ibid.* at para. 275.
[385] *Ibid.* at para. 532.
[386] *Ibid.* at para. 1180.

regulatory frameworks in place, there are no substantive measures in place to address or to protect the BRFN's claim area from cumulative impacts.

Although the decision in *Yahey* is not binding in Alberta (since it is a B.C. Supreme Court decision), it is an interesting decision in that it expands the rights to hunt, trap and fish to being a right to a way of life (as opposed to discrete, narrow rights to hunt, trap and fish).,[387] As well, rather than just considering the extent of lands taken up, the decision considered the effects of taking up land on surrounding lands and the wildlife populations.[388]

Similar actions asserting unjustifiable infringement of Treaty rights due to cumulative effects of development in traditional territories are underway in Alberta. For instance, the claim in *Anderson*[389] asserts that the province improperly allowed its lands to be taken up for industrial and resource development. This claim was commenced in 2008 and a trial is set to commence in January 2024.

More recently, in a Statement of Claim filed on July 18, 2022, the Duncan's First Nation asserts that their Treaty rights have been significantly diminished by the province's decisions with respect to resource development, agriculture, transportation and settlement activities.[390] The Duncan's First Nation assert that Treaty 8 ensures "the right to carry on their way of life free from interference as well as the rights to hunt, fish, trap and gather natural resources in their traditional territory".[391] They seek an order that declares "Alberta's regulatory mechanisms are insufficient to address cumulative effects, directing the province to establish new mechanisms for assessing cumulative impacts of development, and prohibiting the province from permitting any activities that further infringe … Treaty rights".[392]

As pointed out by Audino et al., Indigenous groups typically want to address cumulative impacts in a comprehensive way but in practice single project review processes have become the main forum to discuss cumulative impacts.[393] However, single project review processes are not particularly well suited or effective at addressing cumulative impact issues. It cannot be assumed that an environmental assessment process will meet the requirements for consultation.[394] As well, an environmental assessment may not be required but this does not negate the need for Indigenous consultation.[395] Audino et al. recommend that there be a process outside of the consultation and project review settings to address Indigenous concerns

[387] Killoran et al, *supra.* note 226.
[388] *Ibid*.
[389] *Anderson v Alberta,* 2022 SCC 6 (CanLii). This particular decision pertains to an application for advance costs to fund the litigation.
[390] *Gladue, supra.* note 229.
[391] *Ibid.* at paras. 2 and 3.
[392] Killoran, *supra.* note 226.
[393] Diana Audino, Stephanie Axmann, Bryn Gray, Kim Howard, and Ljubljana Stanic, "Forging a Clearer Path Forward for Assessing Cumulative Impacts on Aboriginal and Treaty Rights" (2019) 57:2 Alta. L.R. 297 [Audino et al.]. See also Matthew Hodgkin, "Pursuing a Reconciliatory Administrative Law: Aboriginal Consultation and the national energy board" (2016) 54:1 Osgoode Hall L J 125 [Hodgkin].
[394] Audino et al., *ibid.*
[395] *Ibid.*

regarding cumulative effects, with the goal that Indigenous peoples continue to be able to exercise their Aboriginal and Treaty rights.[396] Further, according to Hodgkin, evidence suggests that integrating the duty to consult into regulatory processes does not advance the goals of reconciliation. The current piece-meal approach to land use and natural resource development fails to adequately address cumulative impacts on Aboriginal and Treaty rights, may relegate consultation to regulatory processes (that are not focused on Indigenous consultation), and does not advance the goals of reconciliation. The decision in *Yahey* and pending litigation in Alberta reflect these shortcomings with the current decision-making approach.

Regulatory Tribunals: Role in Indigenous Consultation and Accommodation

Regulatory tribunals play a key role in environmental decision-making in Alberta. These tribunals are the Alberta Energy Regulator (AER), the Natural Resources Conservation Board (NRCB) and the Alberta Utilities Commission (AUC). These regulatory tribunals make decisions around licensing (i.e., whether or not an activity may be conducted), operational requirements, and enforcement.

The AER makes decisions pertaining to the exploration and extraction of oil, oil sands, natural gas, and geothermal resources in Alberta.[397] This includes making decisions around water, public lands, and the environment associated with these particular resource activities. The NRCB reviews and makes decisions around major natural resource projects, as well as confined feeding operations.[398] Natural resource projects include those involving mining (not coal), forestry, water management, and recreation. The AUC regulates natural gas, electric and water utilities, as well as renewable power generation.[399]

In addition to the Alberta regulators, the federal Canada Energy Regulator (CER) and Impact Assessment Agency of Canada (IAA) may also make environmental decisions related to activities in Alberta. The CER makes regulatory decisions pertaining to interprovincial and international pipelines and power lines.[400] The IAA is responsible for conducting federal impact assessments looking at environmental, social and health impacts of proposed projects.[401] Both the CER and IAA are directed by their respective legislation to consider impacts on Indigenous rights in their decision-making. For large project proposals that require decision-making at both the federal and provincial level, as well as environmental/impact assessment, joint review panels may be established.

[396] *Ibid.*
[397] *Responsible Energy Development Act*, S.A. 2012, c. R-17.3.
[398] *Natural Resources Conservation Board Act*, R.S.A. 2000, c. N-3.
[399] *Alberta Utilities Commission Act*, S.A. 2007, c. A-37.2.
[400] *Canadian Energy Regulator Act*, S.C. 2019, c. 28, s. 10.
[401] *Impact Assessment Act*, S.C. 2019, c. 28. s. 1.

While not a regulatory decision-maker, the Alberta Environmental Appeals Board (AEAB) hears appeals of some decisions made pursuant to environmental legislation such as EPEA and the *Water Act.*[402]

The SCC addressed the role of regulatory tribunals in Indigenous consultation in its *Carrier Sekani* decision.[403] This case arose from the authorization of an Alcan dam and reservoir in the 1950s which altered the flows in the Nechako River. Since 1961, excess energy was sold by Alcan to B.C. Hydro pursuant to energy purchase agreements and the B.C. government sought approval for the 2007 agreement from the B.C. Utilities Commission (Commission). The Carrier Sekani First Nations (CSFN) claim the Nechako Valley as their ancestral home and the right to fish in the Nechako River but were not consulted about the dam and reservoir project. The CSFN asserted that the 2007 agreement ought to be subject to consultation, but the Commission found consultation was not an issue because the 2007 agreement would not adversely affect any Aboriginal interest.

The SCC found that regulatory tribunals are confined to the powers conferred on them by their constituent legislation which may delegate the power to consult or to determine whether consultation was adequate. The power to consult cannot be inferred from a mere power to consider questions of law. In order to engage in consultation, a regulatory tribunal must be expressly or impliedly granted power to do so and must be granted the necessary remedial powers. Consultation is a constitutional process, not a question of law.

In this particular case, the SCC found that the Commission had the power to consider whether adequate consultation had taken place because it had the power to consider questions of law which implies a power to decide constitutional issues properly before it, as well the power to consider any factor that the Commission considered relevant to the public interest. But it was not delegated the duty to consult. The SCC found that the Commission correctly accepted that it had the power to consider adequacy of consultation and was correct in finding that the 2007 agreement would not have physical impacts on the Nechako River or the fishery and that there were no impacts that might adversely affect the claims of the CSFN. Failure to consult on the initial dam and reservoir project was an underlying infringement and the 2007 agreement was not sufficient to trigger a duty to consult.

A more recent decision made by the Federal Court of Appeal – *Bigstone Cree Nation* - in part considered whether or not the Crown could rely on regulatory processes conducted by the National Energy Board, at least in part, to fulfil its duty to consult.[404] The Federal Court of Appeal states that the "case law is clear that existing regulatory processes are reasonable and a practical means of undertaking consultation, and Aboriginal groups have a responsibility to make use of such processes if they wish voice their concerns".[405] The Crown may rely on existing regulatory and environmental assessment processes to fulfil its duty to consult but, in so doing, must come to its own conclusions. The Court noted that "the Crown's duty to consult

[402] *Environmental Appeal Board Regulation*, Alta. Reg. 114/1993.
[403] *Carrier Sekani*, *supra.* note 126.
[404] *Bigstone Cree Nation, supra.* note 323.
[405] *Ibid.* at para. 52.

and accommodate does not come to an end once the approval of a project has been given but subsists at later stages of the development process".[406]

In order to determine the role of Alberta's regulatory tribunals in Indigenous consultation, it is necessary to look at the relevant legislation. Section 21 of the REDA expressly states that the AER has no jurisdiction to assess the adequacy of Crown consultation. The legislation for the AUC and NRCB does not make any express statements about authority to consider adequacy of Crown consultation. However, under the *Administrative Procedures and Jurisdiction Act* [APJA], both the AER and the AUC have been granted jurisdiction to consider all questions of constitutional law.[407] However, the NRCB and the AEAB have not been granted the authority to determine questions of constitutional law under the APJA.

The impact of the APJA and section 21 of REDA is discussed in *Prosper Petroleum*:[408]

> [40] …issues of constitutional law outside the parameters of consultation remain within the AER's jurisdiction, including as they relate to the honour of the Crown. Section 21 of REDA does not prevent the AER from considering other relevant matters involving Aboriginal peoples when carrying out its mandate to decide if a particular project is in "the public interest".
>
> [41] Nor is the AER confined to considering "questions of constitutional law" as that term is defined in the [AJPA]. Section 11 of the AJPA provides that "a decision maker has no jurisdiction to determine a question of constitutional law unless a regulation made under section1 6 has conferred jurisdiction on that decision maker to do so". In the case of the AER, it has been the jurisdiction to determine "all questions of constitutional law"…subject to notice requirements being complied with under section 12 of APJA. However, not all constitutional questions that arise in an AER hearing will fall within the definition of "questions of constitutional law" in the APJA, meaning that the AER will at times be asked to consider constitutional issues for which it has not received formal notice under APJA.
>
> [42] In other words, a statute like the APJA should not be read as confining the AER's jurisdiction to consider constitutional issues as they relate to the "public interest"… Indeed, the AER itself acknowledges its responsibility to address such issues, having considered under "the public interest" the potential adverse impacts of the Project on Aboriginal rights under s. 35 of the *Constitution Act, 1982*. This broad jurisdiction to consider Treaty rights outside the scope of the APJA is itself recognized in Ministerial Order (Energy 105/2014 and ESRD 53/2014).

[406] *Ibid.* at para. 59.
[407] *Administrative Procedures and Jurisdiction Act,* R.S.A. 2000, c. A-3 [APJA] and *Designation of Constitutional Decision Makers Regulation*, A.R. 69/2006.
[408] *Prosper Petroleum, supra.* note 211.

> [43] The AER therefore has a broad implied jurisdiction to consider issues of constitutional law, including the honour of the Crown, as part of its determination of whether an application is in the "public interest".

It should be noted that the AER and the ACO have entered into an agreement called the *Joint Operating Procedures for First Nations Consultation on Energy Resource Activities* (*Consultation JOP*).[409] Essentially, the *Consultation JOP* outlines the procedures established to administer and coordinate the operations of both bodies on matters relating to Indigenous consultation arising from applications, including those for renewal or amendment, made to the AER. As stated in the *Consultation JOP*:

> The AER has no jurisdiction regarding the adequacy of Crown consultation associated with the rights (such as Treaty rights) of Aboriginal peoples as recognized and affirmed under Part II of the *Constitution Act, 1982*. Disputes regarding adequacy of consultation are out of scope in AER-facilitated ADR. The ACO will not participate in an ADR process.[410]

As such, there is a standing request from the AER to the ACO for a determination of whether or not the Province of Alberta has found consultation to be (1) adequate, (2) adequate pending outcome of the AER's process, or (3) not required. As well, the AER seeks information as to whether actions may be required to address potential adverse impacts on existing Treaty rights and traditional uses.

Like the AER, the AUC has been granted authority to determine questions of constitutional law under the APJA however, unlike the AER, its constituting legislation does not expressly remove authority to consider questions of the adequacy of consultation. Applying the reasoning in *Carrier Sekani*, the AUC can consider the adequacy of consultation and potential impacts on Indigenous rights protected by section 35 of the Constitution.[411] The AUC itself states that it has "the authority to consider and address potential adverse impacts to Aboriginal and Treaty rights… when deciding whether approval of an electric facility or gas utility facility is in the public interest".[412] It further states that the AUC is "committed to ensuring that Indigenous groups whose constitutionally protected rights may be directly and adversely affected by development have the opportunity to have their concerns heard, considered, understood and accommodated".[413] The AUC's Rule 007 sets out its participant involvement program guidelines

---

[409] Alberta Energy Regulator, *Joint Operating Procedures for First Nations Consultation on Energy Resource Activities* (October 31, 2018) [*Consultation JOP*]. See also Ministerial Order Energy 105/2014 and Environment and Sustainable Resource Development 53/2014 (October 31, 2014).

[410] *Consultation JOP* at s. 4.6.

[411] An example of the AUC considering consultation and impacts is *Buffalo Plains Wind Farm Inc., Decision 26214-D01-2022* (February 10, 2022). See also AUC's *Indigenous engagement* webpage, online: https://www.auc.ab.ca/Indigenous-engagement-directory/#hq=indigeno.

[412] *Rule 007: Applications for Power Plants, Substations, Transmission Lines, Industrial System Designations, Hydro Developments and Gas Utility Pipelines* (Calgary: 2022, Alberta Utilities Commission) [Rule 007] at 136.

[413] *Ibid.* at 136.

for project proponents.[414] Under Rule 007, project proponents must discuss the project with Indigenous groups and explore accommodation measures. If resolution of concerns is not possible, then the project proponents must submit a record of the consultation to the AUC.

Relying on the SCC decisions in *Chippewas of the Thames First Nation* and in *Clyde River (Hamlet) v Petroleum Geo-Services Inc.,* the NRCB does consider Indigenous matters in its process.[415] These two SCC decisions held that for decisions made by regulatory tribunals, the regulatory approval process and decision is Crown conduct which implicates the Crown's duty to consult. Accordingly, the NRCB's *Indigenous Engagement* webpage indicates that the NRCB will identify how its considers and addresses Indigenous concerns in its decisions and determine whether consultation has adequately identified and sufficiently accommodated a project's adverse effects on Indigenous rights.[416]

The AEAB has interpreted section 11 of the APJA, and the lack of regulations conferring constitutional jurisdiction, to mean that it cannot determine the effectiveness of consultation in its processes and decisions.[417]

The Failure of Alberta Environmental Regulation and Decision-Making to Honour Indigenous Rights

Looking at the legislation and regulations governing land use and resource development decision-making in Alberta, it is apparent that Treaty rights are not a primary consideration. As previously discussed, there is some acknowledgement of Treaty rights in Alberta's wildlife regulatory systems. There is also a fair amount of governmental guidance relating to Indigenous consultation and accommodation (previously discussed). There are a few other examples of environmental or resource legislation referencing Indigenous peoples:

- The preamble of the *Forests Act* states "Alberta's vast and abundant forests are an important part of the province's diverse ecosystem that contribute to biodiversity and clean air and water for the benefit of current and future generations of Albertans, including Indigenous peoples".[418]

[414] *Rule 007: Applications for Power Plants, Substations, Transmission Lines, Industrial System Designations, Hydro Developments and Gas Utility Pipelines* (Calgary: 2022, Alberta Utilities Commission) [Rule 007].
[415] *Chippewas of the Thames First Nation v Enbridge*, [2017] 1 S.C.R. 1099 and *Clyde River (Hamlet) v Petroleum Geo-Services Inc.,* [2017] S.C.C. 40.
[416] NRCB website, online: https://www.nrcb.ca/natural-resource-projects/Indigenous-engagement.
[417] *Jansen v Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks, re: Alberta Agriculutre and Forestry, 17-064-D*, 2018 ABEAB 11 (CanLii).
[418] *Forests Act* at preamble.

- Section 15.3 of the EPEA requires establishment of a Indigenous Wisdom Advisory Panel to "provide advice to the Chief Scientist and the Minister about how to incorporate traditional ecological knowledge into the environmental science program".[419]
- The *Public Lands Act* provision addressing entry and occupation of Crown land indicates that "[n]othing in this section is to be construed as in any way derogating from or adding to the rights of aboriginal peoples recognized and affirmed under Part 2 of the Constitution Act, 1982 or the rights of Indians under the Transfer Agreement".[420]
- The stated purposes of ALSA include providing a "a means to plan for the future, recognizing the need to manage activity to meet the reasonably foreseeable needs of current and future generations of Albertans, including aboriginal peoples".[421] As well, it is expressly stated that Regional Advisory Councils may include individuals who are "members of aboriginal peoples".[422]

However, these examples illustrate only a passing reference to Indigenous peoples without fulsome legislative acknowledgement that decision-making under these pieces of legislation may potentially impact Treaty rights. Many pieces of legislation do not even include a passing reference to Indigenous peoples or Treaty rights.

Slightly more fulsome consideration of Treaty rights can be seen in the *Bow, Oldman and South Saskatchewan River Basin Water Allocation Order*.[423] This Order effectively closed the Bow, Oldman and South Saskatchewan River Basin to new water allocations with some exceptions. One exception is that a water licence may be issued for use by specified First Nations (the Siksika, Tsuu T'ina, Piikani, Kainai or Stoney Nations).[424] This Order seems to provide at least some acknowledgement of Indigenous rights to use water.

The *Moose Lake Access Management Plan* (MLAMP) also provides an example of land use planning approach designed to address Indigenous concerns around cumulative impacts on traditional lands. The MLAMP indicates that it was "developed to address concerns of the Fort McKay First Nation related to increased development pressures and associated environmental impacts on the exercise of Treaty rights, traditional land uses, cultural practices and associated interests on and near their Moose Lake reserves".[425] The purpose of the MLAMP is to "define outcomes and ***management actions*** to maintain ecological integrity and ***biodiversity*** within the 10KMZ to support the exercise of ***section 35 rights***, traditional land uses and cultural practices while simultaneously enabling well-managed, responsible, development of resources".[426]

---

[419] EPEA at s. 15.3.
[420] *Public Lands Act* at s. 20(9).
[421] ALSA at s. 1(2).
[422] ALSA at s. 52(2).
[423] *Bow, Oldman and South Saskatchewan River Basin Water Allocation Order*, AR 171/2007.
[424] *Ibid.* at ss. 1, 4, 6 and 8.
[425] *Moose Lake Access Management Plan* (Edmonton: 2021, Government of Alberta) [MLAMP] at 15. It should be noted that there was some litigation around approval applications which were pending prior to finalization plan but these did not consider the plan itself: *Prosper Petroleum*, *supra*. note 211.
[426] MLAMP at 14.

Despite these examples, by and large, there is a lack of legislative acknowledgement of Treaty rights in Alberta which seems at odds with both the honour of the Crown and specific Treaty promises. There is no clear Treaty right impact consideration integrated into Alberta's legislative schemes for environmental and resource development decision-making. This is exacerbated by the current piece-meal approach to land-use and natural resource development which fails to adequately address cumulative impacts on Treaty rights.

However, there is opportunity to implement and administer existing legislative frameworks to better consider Indigenous concerns as a matter of policy. For example, the approach taken with the MLAMP need not be an isolated example. Negotiations could be undertaken to create plans to manage cumulative impacts of land-use and resource decision-making on the exercise of Treaty rights and taking up of lands (these could be sub-regional plans or policy documents pending completion of regional planning under ALSA). However, full implementation of such agreements may necessitate legislative amendment.

Water management planning under the *Water Act* also presents an opportunity to better address Indigenous concerns. Approved water management plans guide decision-making under the Act by establishing "matters and factors" that must be considered by the Director. As an example, the *Approved Water Management Plan for the South Saskatchewan River Basin (Alberta)* does mention First Nation Rights and Traditional Uses as one of the matters and factors that must be considered albeit primarily as a matter for consultation and accommodation.[427] Specific Indigenous concerns associated with allocations of water, including allocations for conservation purposes, could be incorporated into approved water management plans as "matters and factors" guiding decision-making under the Act. Further, Indigenous communities could lead creation of water management plans which is a step toward shared governance.

Aligning environmental regulation with UNDRIP

The Truth and Reconciliation Commission of Canada (TRC)[428] set out the first steps along the reconciliation path and has stated that it is essential that all levels of government endorse and implement the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).[429] The TRC also, as a Call to Action, urged the corporate sector to adopt UNDRIP as a reconciliation framework and apply its principles, norms and standards to corporate policy and core operational activities affecting Indigenous peoples and their lands and resources.[430] So what is UNDRIP?

---

[427] *Approved Water Management Plan for the South Saskatchewan River Basin (Alberta)*, (Edmonton: 2006, Alberta Environment).

[428] Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: 2015, Truth and Reconciliation Commission of Canada) [TRC Summary] at Call to Action 43.

[429] United Nations, *United Nations Declaration on the Rights of Indigenous Peoples* (07-58681 – March 2008 – 4,000), 61/295 [UNDRIP].

[430] TRC Summary, *supra.* note 429 at Call to Action 92.

The UNDRIP was adopted in 2008 as a resolution of the United Nations General Assembly.[431] It should be noted that the final version of UNDRIP does not reflect all the principles presented by Indigenous representatives to the United Nations Working Group on Indigenous Peoples, and changes were made after a draft version left the Working Group.[432]

UNDRIP affirms the unique rights of Indigenous peoples and provides a framework for reconciliation. As a document, UNDRIP has several preamble statements and consists of 46 articles. These articles affirm numerous Indigenous rights including:

- the right to self-determination which allows for free determination of political status, free pursuit of economic, social and cultural development, and autonomy or self-government in matters relating to internal and local affairs;[433]
- the right to not be subject to forced assimilation or destruction of culture;[434] and
- the right to not be forcibly removed from lands or territories, and no relocation without free, prior and informed consent.[435]

When considering the intersection of environmental regulation and UNDRIP, several articles stand out:

- Article 19: States shall consult and cooperate in good faith to obtain free, prior and informed consent before adopting and implementing legislative or administration measures that may affect Indigenous peoples.
- Article 25: Indigenous peoples have a right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas, and other resources. Indigenous peoples also have a right to uphold their responsibilities to future generations in this regard.
- Article 26: Indigenous peoples have the “right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired”. There is also a right to “own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired”.
- Article 27: States are required to establish and implement a process to recognize and adjudicate the rights of Indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or

[431] United Nations, *United Nations Declaration on the Rights of Indigenous Peoples* (07-58681 – March 2008 – 4,000), 61/295 [UNDRIP].
[432] For a history of Indigenous peoples, the United Nations and UNDRIP, see Sharon H. Venne, “The Road to the United Nations and Rights of Indigenous Peoples” (2011) 20:3 Griffith Law Review 557.
[433] UNDRIP at Art. 3 and 4.
[434] *Ibid.* at Art. 8.
[435] *Ibid.* at Art. 10.

used. This process must give due recognition to Indigenous peoples' laws, traditions, customs and land tenure systems.

- Article 28: Indigenous peoples have a right to redress – that is, restitution or compensation - for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
- Article 29: Indigenous peoples have a "right to conservation and protection of the environmental and the productive capacity of their lands or territories and resources". This requires States to establish and implement assistance programmes for Indigenous peoples for such conservation and protection, and to take effective measures to ensure no storage or disposal of hazardous materials in their lands or territories without free, prior and informed consent.
- Article 32: Indigenous peoples have a "right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources". Free and informed consent must be obtained "prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources". This means States must "provide effective mechanisms for just and fair redress for any such activities, and take appropriate measures to mitigate adverse environmental, economic, social, cultural or spiritual impact.

It should be noted that these declarations of Indigenous rights are tempered by Article 46 which states:

> Nothing in this Declaration may be interpreted as implying any State, people, group or person any right to engage in any activity or to perform any contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

In 2010, Canada endorsed UNDRIP but only as "non-legally binding aspirational document".[436] It was not until 2018 that Canada fully endorsed UNDRIP.[437] In 2015, the Government of Alberta announced it would adopt UNDRIP but it is not clear exactly how this is being implemented as no legislative steps have been taken.[438]

[436] TRC Summary, *supra*. note 429 at 242.
[437] Government of Canada website, online: https://www.justice.gc.ca/eng/declaration/what-quoi.html.
[438] Cheryl Sarvit, "Chapter 22: Aboriginal Law in the Context of Regulatory Prosecutions" in Allen E. Ingelson (ed.), *Environment in the Courtroom* (Calgary: 2019, University of Calgary Press) at 299.

Federal Action on UNDRIP

Following from its endorsement of UNDRIP in 2018, the federal government has set out principles respecting its relationship with Indigenous peoples and has passed legislation requiring an action plan to implement UNDRIP.

In its *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples* document, the Government of Canada sets out 10 principles for fair and just reconciliation, and for meeting UNDRIP.[439] There is recognition that section 35 of the *Canada Constitution* represents a "full box of rights", and a promise that Indigenous nations become partners in Confederation. The principles include acknowledgement that reconciliation is a fundamental purpose of section 35,[440] that honour of the Crown guides conduct of the Crown in all its dealings with Indigenous peoples and gives rise to different legal duties in different circumstances including fiduciary obligations and diligence,[441] and that any infringement of section 35 rights must by law meet a high threshold of justification which includes Indigenous perspectives and satisfies the Crown's fiduciary obligations.[442]

Free, prior and informed consent is discussed in Principle 6. In particular, Principle 6 notes that meaningful engagement with Indigenous peoples aims to secure free, prior and informed consent. In the case of Aboriginal title lands, the standard to secure consent is the strongest since Aboriginal title gives the holder the right to use, control and manage the land, and the right to the economic benefits of the land and its resources.[443] In the case of Aboriginal title lands, the Indigenous Nation decides how to use and manage its lands for both traditional activities and modern purposes subject to limitation that cannot be developed in such a way as to deprive future generations of the benefit of the land.[444] However, free, prior and informed consent extends beyond title lands and ensures a role for Indigenous peoples and their governments in public decision-making as part of Canada's constitutional framework and to recognize Indigenous rights, interests and aspirations in decision-making.[445]

The federal *United Nations Declaration on the Rights of Indigenous Peoples Act* (UNDRIP Act) – which became law on June 21, 2021 - affirms UNDRIP as an international human rights instrument and provides a framework for implementation of the declaration in Canada.[446] The UNDRIP Act requires that the Government of Canada take all measures necessary to ensure the laws of Canada are consistent with UNDRIP.[447] As well, the Minister of Justice is required to prepare and implement an action plan to achieve the objectives of UNDRIP (the specific

[439] Government of Canada, *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples* (Ottawa: 2018, Minister of Justice and Attorney General of Canada).
[440] *Ibid.* at Principle 2.
[441] *Ibid.* at Principle 3.
[442] *Ibid.* at Principle 7.
[443] *Ibid.* at Principle 6.
[444] *Ibid.* at Principle 6.
[445] *Ibid.* at Principle 6.
[446] *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14 [UNDRIP Act] at s. 4.
[447] UNDRIP Act at s. 5.

requirements of the action plan are enumerated in the UNDRIP Act).[448] There are requirements to report to Parliament on measures taken to ensure consistency with UNDRIP and on preparation and implementation of the action plan.[449] All these actions must be done in consultation and cooperation of Indigenous peoples.

The first annual progress report under the UNDRIP Act was released in June 2022 (Progress Report).[450] The Progress Report notes that the action plan must be completed by June 2023. It notes that even before passage of the UNDRIP Act, references to UNDRIP have been incorporated into several pieces of federal legislation, with the most relevant to environmental matters being the *Canadian Energy Regulator Act* and the *Impact Assessment Act*. For both of these acts, UNDRIP is referenced in the preambles. The *Canada Regulator Act* indicates that part of the Regulator's mandate includes exercising its powers and performing its duties in a manner that respects the Crown's commitments with respect to Indigenous rights, and must consider adverse impacts on Indigenous rights when making decisions under the Act.[451] In addition, there are requirements to include Indigenous representation within the Regulator, to engage with Indigenous peoples in its processes, and to consider Indigenous Knowledge.[452] Similarly, the *Impact Assessment Act* explicitly requires consultation with Indigenous peoples, consideration of Indigenous knowledge, assessment of impacts on Indigenous peoples.

The Progress Report addresses actions being developed or taken to integrate UNDRIP in a variety of contexts including environmental matters.[453] Actions identified include increasing Indigenous representation on the Sustainable Development Advisory Council (which provides advice to the Minister of Environment and Climate Change Canada under the Federal Sustainable Development Strategy), using Indigenous-led community-based initiatives that combine science and traditional knowledge to guide decision-making and advance understanding of climate change, and providing mechanisms for collaborative Indigenous engagement in the development of economic strategies that advance growth on resource projects which support a transition to a net-zero economy via Natural Resources Canada's Regional Energy and Resources Tables.

[448] UNDRIP Act at s. 6.
[449] UNDRIP Act at s. 7.
[450] Department of Justice, *Annual progress report on implementation of the United Nations Declaration on the Rights of Indigenous Peoples Act* (Ottawa: 2022, Government of Canada), online: https://www.justice.gc.ca/eng/declaration/report-rapport/2022/pdf/UNDA_AnnualReport_2022.pdf [Progress Report].
[451] *Canada Energy Regulator Act* at ss. 11, 56, 183, 262 and 298.
[452] *Canada Energy Regulator Act* at ss. 14, 26, 57, 58, 74, 77 and 95
[453] Progress Report, *supra.* note 451 at 45 to 46.

UNDRIP and Environmental Regulation: Self-determination, Collective Rights, and Free, Prior and Informed Consent

From an environmental regulation perspective, three key UNDRIP principles are particularly relevant: self-determination, collective rights, and free, prior and informed consent. Self-determination includes the right to political self-determination and the right to dispose freely of a Indigenous people's natural resources (permanent sovereignty over natural resources).[454] While there is no precise definition of self-determination, one view is that "self-determination includes the right of a people, whether or not they already constitute a state, to choose freely their own political system and pursue their own economic, social, and cultural development".[455] Self-determination is the international remedy to colonization (and is recognized in other international instruments and agreements, not just in UNDRIP).[456] Self-determination is "intrinsically tied to [I]ndigenous peoples' rights over lands and natural resources".[457]

The prominence of collective rights in UNDRIP is to a "degree unprecedented in international human rights law".[458] This is because "individual rights are not always adequate to give full expression to [I]ndigenous peoples' rights" due to the collective character of Indigenous cultures and societies.[459]

As stated in the *Aboriginal Law Handbook*, free, prior and informed consent (FPIC) does not confer a right to Indigenous peoples to veto development decisions rather it is "about the process and substance of decision-making and ensuring that Aboriginal peoples have a voice when it comes to determining how social or resource development concerning their rights will move forward".[460] As stated by Adkins et al., the "rights articulated in UNDRIP are not absolute

[454] Nicolas Schrijver, "Chapter 5: Self-determination of peoples and sovereignty over natural wealth and resources" in United Nations Human Rights Office of the High Commissioner, *Realizing the right to development: essays in commemoration of 25 years of the United Nations Declaration on the Right to Development* (New York; Geneva: 2013, United Nations).
[455] Teaku Frere, Clement Yow Mulalap and Tearinaki Tanielu, "Climate Change and Challenges to Self-Determination: Case Studies from French Polynesia and the Republic of Kiribati" (2020) 129 Yale L.J. 648 at 653.
[456] Eugenia Recio and Dina Hestad, "Policy Brief #36, Indigenous Peoples: Defending an Environment for All" (2022) IISD Earth Negotiations Bulletin, online: https://www.iisd.org/system/files/2022-04/still-one-earth-Indigenous-Peoples.pdf.
[457] United Nations, *The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions* (Sydney, Australia: 2013, Asia Pacific Forum of National Human Rights Institutions) at 23.
[458] *Ibid.* at 15.
[459] *Ibid.* at 15.
[460] *Aboriginal Law Handbook*, *supra.* note 22 at 226.

and must be balanced against other important societal priorities, including the rights of others".[461]

Some have suggested that incorporation of UNDRIP principles – such as self-determination and FPIC – will increase both regulators' and proponents' requirements to seek consensus from Indigenous peoples in relation to proposed development projects.[462] This means that project proponents may need earlier engagement with Indigenous communities, and may enter into impact and benefit agreements and capacity agreements with Indigenous communities (the latter agreements allow more fulsome participation and consideration of Indigenous interests).[463] However, it is likely that regulators will maintain the ability to exercise ultimate decision-making power even in the face of Indigenous opposition (since FPIC does not confer a right to veto).[464]

The decision in *Thomas and Saik'uz First Nation* provides some insight into how UNDRIP principles may be incorporated into regulatory processes.[465] This case involved a civil claim by the Saik'uz First Nation against a private company, Rio Tinto Alcan, for impacts on fisheries and water association with construction and operation of a dam. The main issue considered by the Court was whether Aboriginal rights could support civil claims against private entities. Ultimately, the Court found that the Suik-uz First Nation did have an Aboriginal right to fish which could form the basis for a common law action in private nuisance; however, in this case Rio Tinto Alcan was immune from liability since it has complied with all government imposed regulatory requirements.

Although the trial commenced before the adoption of UNDRIP related legislation, there was provincial and federal UNDRIP legislation in place by the time of concluding arguments and, as such, was briefly mentioned in the decision.[466] The Court states:

> [208] In essence, then, *UNDRIP* states in plain English that Indigenous peoples such as the plaintiff First Nations in this case have the right to own, use, and control their traditional lands and territories, including the waters and other resources within such lands and territories.
>
> …
>
> [212] It remains to be seen whether the passage of *UNDRIP* legislation is simply vacuous political bromide or whether it heralds a substantive change in the common law respecting Aboriginal rights including Aboriginal title. Even if it is simply a statement of future intent, I agree that it is one that supports a robust interpretation of Aboriginal rights.

[461] Sam Adkins, Lisa Jamieson, Terri-Lee Oleniuk and Sabrina Spencer, "UNDRIP as a Framework for Reconciliation in Canada: Challenges and Opportunities for Major Energy and Natural Resources Projects", (2020) 58(2) Alberta L. R. 340 [Adkins et al.] at 348.
[462] *Ibid.*
[463] *Ibid.*
[464] *Ibid.*
[465] *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc.* (2022) BCSC 15 (CanLii).
[466] *Ibid.* at paras. 205 to 213.

> Nonetheless, as noted above, I am still bound by precedent to apply the principles enunciated by the Supreme Court of Canada to the facts of this particular case and I will leave it to that Court to determine what effect, if any, *UNDRIP* legislation has on the common law.[467]

While it will probably be years before the Supreme Court of Canada provides guidance on the impact of UNDRIP in Canadian domestic law, it is foreseeable that courts will support a "robust interpretation of Aboriginal rights" while still remaining within established principles of Aboriginal law. This likely means requiring extensive, meaningful consultation with and accommodation of Indigenous peoples by both proponents and the Crown although not to the extent of requiring Indigenous consent or conferring a veto over development decisions. Furthermore, a distinction may be made when dealing with lands that are subject to historical treaties (as in Alberta) versus lands that are not subject to either historic or modern treaties.

Rethinking Settler Law, Recognizing Indigenous Law

Up to this point, this report has outlined the intersection of environmental law and Indigenous rights within the box of the settler legal paradigm. This box currently does not centre Indigenous knowledge, processes and laws, embrace Indigenous sovereignty or allow a pluralistic legal landscape. Walking the path of reconciliation will require breaking free of this box.

The 94 Calls to Action made by the Truth and Reconciliation Commission of Canada set out the first steps along the reconciliation path.[468] Some Calls to Action challenge the foundations of the settler legal paradigm. For instance, one Call to Action is that all levels of government repudiate concepts used to justify European sovereignty over Indigenous peoples and lands (such as the doctrines of discovery and *terra nullius*), and to reform those laws, government policies, and litigation strategies that continue to rely upon such concepts.[469] Another urges federal, provincial and territorial governments to adopt, as legal principles:[470]

- Aboriginal title claims are accepted once the Aboriginal claimant has established occupation over a particular territory at a particular point in time; and
- once Aboriginal title has been established, the burden of proving any limitation on any rights arising from the existence of that title shifts to the party asserting such a limitation.

In the context of environmental law, it is also important to escape the box of the settler mindset which adopts a human-nature dichotomy in understanding human relationships to the natural

[467] *Ibid*. at paras. 2008 and 212.
[468] TRC Summary, *supra*. note 444.
[469] *Ibid.* at Call to Action 47.
[470] *Ibid.* at Call to Action 52.

world.[471] According to Gorrie, "it is essential that reforms in the environmental law context centre and support indigenous sovereignty, law revitalization and relationships to land".[472]

A shift is required to ensure Indigenous peoples can apply their own laws, knowledge and practices, as well as guiding planning, management and decision-making.[473] It is not a solution to "take slices of those Indigenous worldviews and laws and insert them into a legal theory and a legal system that has colonial roots that are premised on the domination and oppression of people and the natural world".[474]

The following discussion highlights some key considerations in the shift to an environmental law approach that centres Indigenous knowledge, processes and laws, embraces Indigenous sovereignty, and allows a pluralistic legal landscape. Most certainly, walking the path of reconciliation requires the active participation and reformation of settler institutions and frameworks, as well as shedding the settler mindset on an individual level. However, this path must be led and directed by Indigenous peoples otherwise it will be a continued perpetuation of settler ideology and harms against Indigenous peoples.

The Legal Effect of Treaties: Doctrine of Discovery and *Terra Nullius*

The common law view is that treaties operate to extinguish Aboriginal title with certain discrete rights – such as hunting, fishing and trapping rights – being retained. These Treaty rights are protected by section 35 of the *Constitution* and cannot be extinguished by government action (although they could be prior to 1982 before constitutional protection was put into place). However, the government has authority to place limitations on the exercise of these rights so long as they can be justified in accordance with the principles set in *Sparrow*.[475] As well, a significant alteration of the treaties occurred in 1930 with the adoption of the NRTA (namely, eliminating commercial harvesting rights but extending harvesting rights to Crown lands).

The decision in *Yahey* reflects an understanding of Treaty rights beyond this narrow view.[476] It expands the rights to hunt, trap and fish to being a right to a way of life (as opposed to discrete, narrow rights to hunt, trap and fish).,[477] As well, rather than just considering the extent of lands taken up, the decision considered the effects of taking up land on surrounding lands and the wildlife populations.[478]

[471] Gorrie, *supra.* note 3.
[472] *Ibid.* at 104.
[473] *Ibid.*
[474] *Ibid.* at 190.
[475] *Sparrow*, *supra.* note 12.
[476] *Yahey, supra.* note 217.
[477] Killoran et al, *supra*. note 226.
[478] *Ibid*.

It should be noted that the common law view that treaties operate to extinguish Indigenous title to land is not accepted by everyone.[479] As noted by Collins and Murtha, "reports of Treaty commissioners indicate that most First Nations signatories understood the treaties as a means to secure their traditional livelihood".[480] In other words, from the perspective of the First Nations, Treaty negotiations were undertaken to preserve a way of life, not to extinguish Indigenous rights to the land.

Implicit in the common law view that the treaties resulted in a cessation of land are colonial conceptions such as the doctrines of discovery and *terra nullius* (which the TRC calls to be repudiated). These conceptions take the position that, prior to arrival of settlers, Canada was unoccupied or did not belong to another political entity. As such, some argue that the way in which the Canadian Crown assumes its acquisition of sovereignty is problematic.[481] Either willing cession of land is presumed (in the case of treaties) or extinguishment of Indigenous sovereignty is presumed by mere assertion of Crown sovereignty.[482] Asch argues that post-colonial thinking requires affirmation of existing Indigenous sovereignty as one of three sovereigns in Canada (the others being provincial and federal Crowns), founded on a just relationship.[483]

As well, it should be noted that there is substantial debate about the correctness of the accepted common law interpretation of the NRTA with respect to Treaty rights in Alberta, Saskatchewan and Manitoba. The basis for this debate is that, both historically and legally, the Courts have misinterpreted the NRTA vis a vis Treaty rights.[484] Many argue that the NRTA did not extinguish, or subsume and replace harvesting rights that are guaranteed in the numbered treaties.[485]

Even if the common law views on the legal effect of the treaties and the NRTA are not challenged, there remain questions. There is significant uncertainty about water ownership and rights under the treaties as the courts have not addressed whether or not a cessation of land included the water running over and under those lands. It is clear, however, that the provincial Crown has asserted ownership of all water located in the province, as well as the beds and shores of permanent and naturally occurring bodies of water and all naturally occurring rivers, streams, watercourses and lakes (although water on reserves is owned by the federal Crown).[486]

It cannot be assumed that due to the fact that the entirety of Alberta is covered by historical treaties that questions of Aboriginal rights will not be raised in the province. Not all Indigenous peoples in Alberta are signatories to numbered treaties. For example, Métis peoples have been

[479] See for example, Monique M. Ross, *Aboriginal Peoples and Resource Development in Northern Alberta, CIRL Occasional Paper #12* (Calgary: 2003, Canadian Institute of Resources Law).
[480] Collins and Murtha, *supra.* note 292 at 971.
[481] Michael Asch, "From Terra Nullius to Affirmation: Reconciling Aboriginal Rights with the Canadian Constitution" (2002) 17:2 Can. JL & Soc. 23 [Asch].
[482] *Ibid.*
[483] *Ibid.*
[484] For more discussion, see the special issue of *Review of Constitutional Studies,* 12(2) (2007) 127.
[485] *Ibid.*
[486] *Water Act* at s. 3 and *Public Lands Act* at s. 3.

confirmed to possess Indigenous rights (although as previously discussed there is a significant level of legislation and Métis-Alberta and Métis-Federal agreements in place which address these rights).

Indigenous Governance and Decision-Making for Land Use and Resource Development

Numerous recommendations have been made to improve Indigenous participation in land use and resource development decision-making. These include undertaking comprehensive reviews of resource legislation to assess impacts on harvesting rights, and to ensure protection and accommodation of Indigenous rights.[487] Another suggestion is establishment of a specialized tribunal dedicated exclusively to evaluating the adequacy of consultation.[488] In the context of forestry operations in Alberta, it has been suggested that innovative approaches to tenure and co-management should be adopted.[489]

Indeed, the decision in *Yahey* seems to follow a similar path: adjusting existing regulatory processes to better protect and accommodate Indigenous rights within the existing legal system. In *Yahey*, the Court prohibited the province from authorizing further development activities that infringe on Treaty rights, a prohibition which was suspended to allow the province and the Blueberry River First Nations (BRFN) to negotiate changes to the regulatory regime to ensure recognition and protection of Treaty rights. In other words, the decision "signals a potential shift toward shared decision-making on land management decisions to address cumulative impacts on ongoing Treaty rights".[490]

Following the decision, the BC government and the BRFN entered into negotiations culminating in the *Blueberry River First Nations Implementation Agreement* (BRFN Agreement) being signed in January 2023.[491] Under the agreement, there are initiatives related to wildlife management, land-use plans, petroleum and natural gas planning, adoption of ecosystem-

[487] Monique M. Passelac-Ross, *The Trapping Rights of Aboriginal Peoples in Northern Alberta*, *CIRL Occasional Paper #15* (Calgary: 2005, Canadian Institute of Resources Law) and Monique M. Ross, *Aboriginal Peoples and Resource Development in Northern Alberta, CIRL Occasional Paper #12* (Calgary: 2003, Canadian Institute of Resources Law).
[488] Matthew Hodgkin, "Pursuing a Reconciliatory Administrative Law: Aboriginal Consultation and the National Energy Board" (2016) 54:1 Osgoode Hall L J 125.
[489] Monique Passelac-Ross, *Access to Forest Lands and Resources: The Case of Aboriginal Peoples in Alberta*, CIRL Occasional Paper #23 (Calgary: 2008, Canadian Institute of Resources Law).
[490] Killoran et al., *supra.* note 226.
[491] *Blueberry River First Nations Implementation Agreement between His Majesty the King in Right of the Province of British Columbia as represented by the Minister of Energy, Mines and Low Carbon Innovation, the Minister of Water, Land and Resource Stewardship, the Minister of Indigenous Relations and Reconciliation, the Minister of Forests and the Minister of Environment and Climate Change Strategy AND Blueberry River First Nations* (January 18, 2023) [BRFN Agreement]. See also Government of BC, *News Release: Province, Blueberry River First Nations reach agreement* (January 18, 2023), online: https://news.gov.bc.ca/releases/2023WLRS0004-000043.

based forest management, and funding for land restoration, wildlife stewardship and cultural and capacity investment.

The BRFN Agreement sets a variety of purposes and goals including initiation "of a new approach to resource management and protection of Treaty Rights" and a cumulative effects goal to "enhance restoration to heal the land", to create new areas protected from impacts of industrial development and to support and constrain certain development activities while a Cumulative Effects Management Regime is being implemented.[492] Other articles address matters of wildlife management with specific references to grizzly bear, caribou herd and moose management,[493] and land protections related to forestry and oil and gas activities.[494] As well, the BRFN Agreement establishes requirements for a Restoration Fund, a Cumulative Effects Management Regime, watershed basin land use planning, and water use.[495] The BRFN Agreement sets out specific rules for oil and gas development, notably establishing land disturbance caps for specified areas, disturbance fees (paid into the Restoration Fund) and setbacks.[496] There are numerous Schedules to the BRFN Agreement that, among other things, set out the boundaries of the claim area (to which the BRFN Agreement applies), identify high value areas, set disturbance caps, set requirements for an ecosystem based management framework for forest management, identify watershed management basins, set out an environmental flow needs framework for water management, and set out a revenue sharing formula.

Some additional implementation detail can be gleaned from the *BRFN Agreement – Rules for Oil and Gas Development* issued by the BC Oil & Gas Commission.[497] THE BRFN Agreement is meant to develop a new approach to resource management and protection of Treaty rights, with a focus on limiting new disturbances (there is an annual cap of 750 hectares per year within the claim area with sub-caps set for certain parts of the claim area). Certain areas have been identified as being high value areas which will be protected from new disturbances (depending on the category, 100%, 80% or 60% protection) with accelerated restoration. In addition, priority watershed management basins have been identified for planning as integral to future development in the area. As well, BRFN traplines have been identified and increased engagement expectations have been set for oil and gas activities in those areas. In addition, there are disturbance fees payable and setbacks for certain values (such as grizzly bear dens, BRFN cabins, and wetlands). The BC Oil & Gas Commission also indicates that it will be transforming the application and permitting processes.

[492] BRFN Agreement at Art. 2.
[493] *Ibid.* at Art. 4.
[494] *Ibid. at* Art. 5, 6, 7, 8 and 9.
[495] *Ibid.* at Art. 10, 11, 12, 13 and 17.
[496] *Ibid.* at Art. 14.
[497] BC Ministry of Energy, Mines and Low Carbon Innovation and BC Oil & Gas Commission, *BRFN Agreement – Rules for Oil and Gas Development* (n/d), online: https://www.bcogc.ca/files/documents/20230126_FINAL-PNG-Info-Bulletin-detailed-document.pdf.

The BC government has also entered agreements with other Treaty 8 First Nations (which at this time remain confidential).[498] These agreements represent a "consensus on a collaborative approach to land and resource planning, and to advance regional solutions to benefit everyone living in northeastern B.C. and Treaty 8 territory".[499] Initiatives under this consensus include a new approach to wildlife co-management, new land use plan, a cumulative effects management systems, a restoration fund, a new revenue-sharing approach, and education actions.

In Alberta, the *Moose Lake Access Management Plan* (MLAMP) provides an example of approach designed to address Indigenous concerns around cumulative impacts on traditional lands. The MLAMP is intended to be adopted as a subregional plan under the ALSA for the larger Moose Lake watershed and in the interim, it has been adopted as policy.[500] The plan applies to all Crown lands in a specified Moose Lake 10km zone (10KZ) extending from the boundaries of the Fort McKay First Nations reserves and includes portions of the Birch Mountains Wildland Provincial Park and portions of the Red Earth Caribou Range. The area is identified as a place of importance by the Fort McKay First Nations who "see this as their last meaningful place to practice Treaty rights and traditional uses". [501] It is also valued by the Fort McKay Métis and other Indigenous groups for traditional uses.

The MLAMP was "developed to address concerns of the Fort McKay First Nation related to increased development pressures and associated environmental impacts on the exercise of Treaty rights, traditional land uses, cultural practices and associated interests on and near their Moose Lake reserves".[502] The purpose of the MLAMP is to "define outcomes and ***management actions*** to maintain ecological integrity and ***biodiversity*** within the 10KMZ to support the exercise of ***section 35 rights****,* traditional land uses and cultural practices while simultaneously enabling well-managed, responsible, development of resources".[503] There are provisions for land management actions, footprint management, air quality, water quality and quantity, wetland abundance and health, fish and wildlife management, monitoring, and governance within the MLAMP.

While the primary activity in the 10KZ and surrounding area is bitumen extraction, forestry, aggregate and petroleum and natural gas operations also take place. While existing resource dispositions will be honoured, for most industries no new dispositions will be made within the 10KZ.

The MLAMP limits the total amount of buffered footprint for industrial resource development to 15% (15,537 ha) with disturbance limits allocated by resource sector. Developers are required to manage their development footprints within acceptable parameters by measuring interior habitat along with sector-specific components of land and footprint management actions with interior habitat being the percentage of native terrestrial and aquatic cover that is a specified

[498] Government of BC, *News Release: B.C., Treaty 8 First Nations build path forward together* (January 20, 2023).
[499] *Ibid.*
[500] MLAMP, *supra.* note 426.
[501] *Ibid.* at 6.
[502] *Ibid.* at 15.
[503] *Ibid.* at 14.

distance from development footprint (i.e., specified distance is the buffer). In addition, the MLAMP sets out recovery milestones which, as they are met, reduces the buffer and eventually the footprint is removed (creating new footprint to work into).

Aside from modifications to existing legal systems designed to allow some level of co-management, there are growing pushes for self-government by Indigenous communities. According to the *Aboriginal Law Handbook*, both Canadian and international law have given some recognition to an Indigenous right to self-government although the courts are hesitant to apply the principle in practice.[504] They note that Indigenous communities have achieved self-government through modern treaties or land claim agreements.[505] Depending upon the community, Indigenous self-government may consist of the ability to provide services to community members or may be the ability to make laws that override provincial and federal legislation.[506] Hopefully, more clarity on the nature and extent of Indigenous self-government rights will be provided by the forthcoming SCC decision in *Cindy Dickson v Vuntut Gwitchin First Nation* (heard on February 7, 2023).[507]

A Plurality of Legal Systems: Settler Law and Indigenous Law

Moving beyond ideas of improved consultation and accommodation and co-management arrangements, which are modifications to the existing settler legal framework, is the idea of plural legal systems. In a pluralistic legal system, settler law and Indigenous co-exist with both being part of Canadian law. Importantly, this is not just a matter of Canadian law recognizing Indigenous law but also of Canada being recognized as part of the Indigenous legal order.[508]

It is important to be clear that Indigenous laws are well developed with depth and complexity. Five sources of Indigenous law have been identified: sacred, natural, deliberative, positivistic

[504] *Aboriginal Law Handbook*, *supra.* note 22 at chap. 8.
[505] *Ibid.*
[506] *Ibid.*
[507] *Cindy Dickson v Vuntut Gwitchin First Nation*, 2022 CanLii 32895 (SCC). See also Kate Gunn, *Indigenous Jurisdiction and Bill C-92 at the Supreme Court of Canada* (September 14, 2022) Ablawg.ca, online: https://ablawg.ca/2022/09/20/Indigenous-jurisdiction-and-bill-c-92-at-the-supreme-court-of-canada/ and Holly Lake, "The power of law: recognition of Indigenous law is making gains in Canada, but the courts remain timid" (June 21, 2022) CBA National.
[508] Alan Hanna, "Reconciliation through Relationality in Indigenous Legal Orders" (2019) 56:3 Alta. L.R. 817.

and customary.[509] Further, these laws may be "recorded and promulgated in various forms, including stories, songs, practices, and customs".[510] As stated by Friedland and Napoleon:[511]

> The Canadian justice system and Aboriginal justice are often discussed in starkly dichotomous terms. This oversimplified dichotomy cuts both ways. Flattening the complexity of Indigenous legal traditions can make it appear as if their applicability and utility is limited to minor offences rather than to cases of repeated or serious harms…. While there is no question that important differences do exist at practical, conceptual, and aspirational levels, our research results also suggest that when Indigenous legal traditions are considered in their full complexity, there are also points of connection and confluence with Western legal traditions.

Obviously, there needs to be space made within existing legal and regulatory frameworks to accept Indigenous law as an equally valid source of law despite its different format and approaches. As noted by Fabris, "Indigenous communities are often forced to find ways to creatively articulate our own spatial relationships with our waters and lands *through* the limited terms and frameworks that are available to us within settler colonial law".[512] Legal and regulatory processes need to be changed to allow articulation and respect for Indigenous law.

Some guidance on how legal pluralism may operate can be found in a fairly recent New Zealand case. In *Ellis,*[513] the New Zealand Supreme Court considered the role of *tikanga Māori* in the common law.[514] Interestingly, this consideration occurred in the context of a criminal appeal matter that did not involve any Indigenous people. Although the Indigenous law was treated differently by each of the three judgments, it was unanimously agreed that Indigenous law is part of New Zealand's common law where it is relevant, and that it "may be a relevant consideration in the exercise of discretions and it is incorporated in the policies and processes of public bodies".[515] The majority held that "the relationship between tikanga and the common law will evolve contextually and as required on a case by case basis" and further that "[c]are must be taken not to impair the operation of tikanga as a system of law and custom in its own right".[516]

---

[509] Hadley Friedland, "Chapter 7: Practical Engagement with Indigenous Legal Traditions on Environmental Issues: Some Questions" in Allen E. Ingelson (ed.), *Environment in the Courtroom* (Calgary: 2019, University of Calgary Press) at 299. See also Borrows, John. *Canada's Indigenous constitution*. University of Toronto Press, 2010.
[510] *Ibid.* at 85.
[511] Hadley Friedland and Val Napoleon, "Gathering the Threads: Developing a Metholdogy for Researching and Rebuilding Indigenous Legal Traditions" (2015) 1:1 Lakehead LJ 16.
[512] Michale Fabris, "Articulating Indigenous Law as "Environmental Protection"? The Piikani Nation and the Oldman River Dam Environmental Assessment Review Process" (2022) Annals of American Assoc. of Geographers 1 at 2.
[513] *Ellis v. The King,* [2022] NZSC 114 (7 October 2022) [*Ellis*].
[514] Kent McNeil, "Tikanga Māori: The Application of Māori Law and Custom in Aotearoa/New Zealand" (November 17, 2022), ABlawg, online: https://ablawg.ca/wp-content/uploads/2022/11/Blog_KM_Tikanga_Maori.pdf.
[515] *Ellis*, *supra.* note 514 at para. 19.
[516] *Ibid.* at paras. 21 and 22.

LOOKING FORWARD: A POSSIBLE STEPPING STONE

Despite the inextricable link between Indigenous land-based rights and ecosystem health, there is no clear Treaty right impact consideration integrated into Alberta's legislative schemes for environmental and resource development decision-making. This is exacerbated by the current piece-meal approach to land-use and natural resource development which fails to adequately address cumulative impacts on Treaty rights. This lack of legislative acknowledgement of Treaty rights in Alberta is at odds with both the honour of the Crown and specific Treaty promises.

While there are some opportunities to create Indigenous centred land and water use plans, there are no co-governance mechanisms available in Alberta's existing environmental and natural resource frameworks. Decision-making with respect to resource dispositions, land use, water use and allocations, and activity authorizations remain with the provincial government. The onus remains on Indigenous peoples to demonstrate the existence of a Treaty right and a negative impact on that right. Once the Treaty right and impact is shown, then there is a requirement for consultation and accommodation which remains a procedural right and does not confer authority to veto a development decision. Ultimately, the decision remains with provincial government.

The ELC proposes that legislation – *An Act for Respecting Historical Treaties in Alberta* – ought to be developed and implemented in Alberta. It is imperative that this legislation be developed on a Nation-to-Nation basis. This legislation would have two main objectives:

- expressly endorse UNDRIP as part of Alberta law; and
- establish a framework for Nation-to-Nation negotiation of First Nation Traditional Land Use Management Frameworks.

As stated by the LARP Review Panel, the "management framework should honour the deep and wholistic connection that Aboriginal Peoples have with the land and the critical role that this connection plays in the physical and spiritual health of Aboriginal peoples, for the past, present and future".[517] These management frameworks may ultimately bear a resemblance to the recent agreements negotiated in BC with Treaty 8 First Nations as a result of the *Yahey* decision.

Key elements for the legislative framework for negotiation of First Nation Traditional Land Use Management Frameworks include:

1. Express recognition that reserve lands are small areas within larger territorial lands and that Treaty rights extend to these territorial lands. On a Nation-to-Nation basis, there must be negotiation to clarify the boundaries of these territorial lands for each First Nation.

[517] LARP Review Panel Report, *supra.* note 363 at 184.

2. Express recognition that meaningful exercise of Treaty rights, which includes the protection of a way of life, is linked to environmental condition. This includes cumulative impacts of land-use and resource development decisions.
3. Express recognition that Treaty rights have paramountcy meaning the Crown's right to take up land under a Treaty exists in relation to the protection of hunting, fishing and trapping rights and that those Treaty rights are not subject to, or inferior, to the Crown's right to take up land.
4. Within territorial lands, the onus is on the Crown to demonstrate that land-use or resource development decisions do not infringe upon the meaningful exercise of Treaty rights within the territorial lands, or that any infringement arises from negotiations with the relevant First Nation.
5. A First Nation Traditional Land Use Management Framework must be negotiated on a Nation-to-Nation basis. Such frameworks could address matters such as:

- limiting new disturbances within the traditional territory;
- identifying certain high value areas which will be protected from new disturbances with accelerated restoration;
- identifying priority watershed management basins for planning as integral to future development in the area;
- increasing engagement expectations for resource development activities;
- setting requirements for payment of disturbance fees and setbacks for certain values (such as grizzly bear dens, traplines, cabins, and wetlands);
- changing resource application and permitting processes;
- creating wildlife co-management arrangements;
- creating cumulative effects management arrangements;
- establishing monitoring and restoration funds; or
- establishing revenue-sharing approaches.

6. Establish timelines for initiating negotiation of Traditional Land Use Management Frameworks.
7. Express acknowledgement of the role and participation of First Nations in the development and amendment of key environmental and resource development legislation, regulations and policy.

As Traditional Land Use Management Frameworks are developed, it is foreseeable that conflicts with existing land-use and resource development legislation may arise as the frameworks are implemented. This means the proposed legislation should grant paramountcy to Traditional Land Use Management Frameworks on relevant lands.