

ARTICLE

THE WATER SUSTAINABILITY ACT, GROUNDWATER REGULATION, AND INDIGENOUS RIGHTS TO WATER: MISSED OPPORTUNITIES AND FUTURE CHALLENGES

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INTRODUCTION

On February 29, 2016, British Columbia (alternatively, the “Province”) updated its *Water Sustainability Act* (“WSA”) and the first phase of the WSA’s regulations came into force.¹ The WSA introduces licensing requirements for groundwater, which was previously unregulated. While many celebrate the end of a system dubbed the “Wild West for groundwater,” the new regulations also pose challenges, particularly for Indigenous Peoples.²

Although all Canadian water law is limited by pre-existing Indigenous water rights,³ in British Columbia, the WSA largely maintains the status quo colonial water regime. On May 10, 2016, Canada officially adopted the United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”); and article 32(1) of UNDRIP states “Indigenous Peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.”⁴ But British Columbia continues to assume jurisdiction over water and ignore the “prior, superior and unextinguished water rights of Indigenous Nations of British Columbia.”⁵ The WSA represents a missed opportunity to right a historic wrong perpetrated against Indigenous Peoples and develop an equitable and sustainable nation-to-nation water governance model.

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1 *Water Sustainability Act*, SBC 2014, c 15 [WSA].

2 West Coast Environmental Law, “Underground and Under Pressure: Groundwater in BC’s Northeast” (16 April 2015), online: <<https://www.wcel.org/blog/underground-and-under-pressure-groundwater-bcs-northeast>> archived at <<https://perma.cc/Y9D9-75R7>>.

3 Merrell-Ann S Phare, *Denying the Source: The Crisis of First Nations Water Rights* (Surrey: Rocky Mountain Books, 2009) at 62.

4 *United Nations Declaration on the Rights on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/61/49 (2007) at 15.

5 Union of British Columbia Indian Chiefs, “UBCIC Submission BC Water Act Modernization Initiative” (30 April 2010), online: <<https://engage.gov.bc.ca/app/uploads/sites/71/2013/10/Union-of-BC-Indian-Chiefs.pdf>> archived at <<https://perma.cc/GY7P-J92L>> [UBCIC].

This paper will consider how the *WSA*'s groundwater regulations impact Indigenous water rights, specifically: (i) does British Columbia have jurisdiction to regulate groundwater on reserves and unceded title lands, (ii) how will prior allocation of groundwater licences impact Indigenous water rights, and (iii) what challenges will the regulations pose to meaningful consultation between the Province and Indigenous Peoples?⁶

Part I will begin with a brief history of the Province's colonial water regime and a description of the *WSA*'s groundwater regulations. Part II will review the foundations of Indigenous water rights, and Part III will consider how the groundwater regulations will affect those rights. Finally, this paper concludes by arguing that the *WSA* is inconsistent with UNDRIP and the Crown's "unique contemporary relationship" with Indigenous Peoples.⁶

I. BRITISH COLUMBIA'S COLONIAL WATER REGIME AND THE WATER SUSTAINABILITY ACT

A. A Brief History of Water Governance in British Columbia

Indigenous Peoples have used and occupied the lands we now know as Canada since time immemorial. Despite this fact, Europeans justified the imposition of settler state sovereignty based on the notion of *terra nullius*, which rejected the legitimacy of Indigenous land use and declared their territories to be "unused, empty, and put to waste."⁷ In 1865, the newly created Crown Colony of British Columbia asserted jurisdiction over surface water and began to issue water licences under the *Crown Colony Land Ordinance*; and in 1909, British Columbia introduced the *Water Act*, a water allocation regime based upon the principles of prior allocation.⁸ The principles of prior allocation include: (i) assertion of Crown ownership over water and prohibition of diverting water without a licence; (ii) appurtenance, the requirement that licences must be attached to land or "works"; (iii) beneficial use, which enabled a licence to be canceled if the water under the licence was not used or used for an improper purpose; (iv) prior allocation or "first in time, first in right" ("FITFIR"), which gives older licences precedence over newer ones; and (v) pay for use, which introduced fees for water use.⁹ Indigenous Peoples could not apply for a water licence until 1888.¹⁰ Though the *Water Act* provided for a Board of Investigations to resolve issues of priority and access, numerous Indigenous licences were improperly recorded and were often altered or cancelled by the Province.¹¹ When "Indian" lands were transferred from provincial to federal jurisdiction in 1930 and 1938, British Columbia continued to claim jurisdiction over the water in those lands.¹² In 2016, the former *Water Act* was replaced by the *WSA*, which introduced licensing and regulation of groundwater in British Columbia, among other changes.

6 *R v Sparrow*, [1990] 1 SCR 1075 at para 1114 [*Sparrow*].

7 Beatrice Rose Simms, "All of the water that is in our reserves and that is in our territory is ours': Colonial and Indigenous water governance in unceded Indigenous territories in British Columbia" (MA Thesis, University of British Columbia (Resource Management and Environmental Studies), 2014) at 24 [unpublished].

8 Jody Wilson-Raybould & Tim Raybould, "Section 3.31—Water" in *British Columbia Assembly of First Nations Governance Toolkit: A Guide to Nation Building*, 2nd ed (West Vancouver: British Columbia Assembly of First Nations, 2014), 5, online: <www.bcafn.ca/wp-content/uploads/2016/06/Governance-Toolkit.pdf> archived at <<https://perma.cc/Y8TN-GK8E>>.

9 Deborah Curran, "British Columbia's New *Water Sustainability Act*—Waiting for the Details" (13 May 2014), online: <<https://poliswaterproject.org/files/2017/06/Bill-18-2014-Summary-May-13-2014.pdf>> archived at <<https://perma.cc/D6M8-UQXQ>>.

10 Wilson-Raybould & Raybould, *supra* note 8 at 5.

11 *Ibid* at 6.

12 *Ibid*.

B. Groundwater Regulation under British Columbia's *Water Sustainability Act*

The *WSA* came into force on February 29, 2016.¹³ The *WSA* introduces some innovative measures for environmental protection, but largely maintains the principles of prior allocation and neglects to acknowledge Indigenous rights to water.¹⁴ Section 5(2) of the *WSA* vests property in and right to the use, percolation, and flow of British Columbia groundwater in the Crown. Groundwater is defined in the *WSA* as “water naturally occurring below the surface of the ground.”¹⁵ Under the *WSA*, all irrigators, industries, waterworks, and others who divert and use groundwater for non-domestic purposes must apply for a water licence.¹⁶ Groundwater users who were using groundwater on or before February 29, 2016 will receive licences based on prior allocation.¹⁷ The *WSA* sets out a three-year transition period for existing groundwater users to apply for a licence with an earlier precedence date based on evidence of when the groundwater was first used.¹⁸ Groundwater licensing on “First Nations reserve or treaty lands” is required for non-domestic use; however, First Nations individuals are generally exempt from water fees and rentals.¹⁹

The *WSA* maintains the status quo of the former *Water Act*, which was enacted during a period of imperialism, colonialism, and natural resource exploitation based on the oppression of Indigenous Peoples.²⁰ The Crown's relationship with Indigenous Peoples has since changed; however, the *WSA* continues to assume provincial ownership of water and ignore Indigenous water rights. Part II will review the foundations of Indigenous rights to water, and Part III will follow with a discussion of how the *WSA*'s groundwater regulations infringe those rights.

II. FOUNDATIONS OF INDIGENOUS RIGHTS AND TITLE TO WATER

According to the Union of British Columbia Indian Chiefs (“UBCIC”),

[a]s an incidence of our Aboriginal title to our territories, Indigenous Peoples have jurisdiction over the waters in our territories. Aboriginal title rights and treaty rights carry significant legal implications, and are priority interests.²¹

This section will explore the foundations of Indigenous rights to water including Aboriginal rights and title, treaty rights, and inherent Indigenous rights.

13 *WSA*, *supra* note 1.

14 Curran, *supra* note 9.

15 *WSA*, *supra* note 1, s 1(1).

16 British Columbia, Ministry of Environment and Climate Change Strategy, “Licensing Groundwater Users” (Victoria: Ministry of Environment and Climate Change Strategy, 2016), online: <www2.gov.bc.ca/assets/gov/environment/air-land-water/water/laws-rules/gw_licensing_brochure.pdf> archived at <<https://perma.cc/U789-QWET>> [Ministry of Environment and Climate Change Strategy].

17 *Ibid.*

18 *Ibid.*

19 *Ibid.*

20 UBCIC, *supra* note 5.

21 Council of Canadians, “Water Rush: Why BC’s Water Sustainability Act fails to protect water” (January 2016) at 10, online: <<https://canadians.org/water-rush>> archived at <<https://perma.cc/5GRG-FAXR>>.

A. Aboriginal Rights and Title in Canadian Law

Section 35(1) of the *Constitution Act, 1982* recognizes and affirms the existing Aboriginal and treaty rights of Aboriginal peoples in Canada based on the fact that “when Europeans arrived in North America, Aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries.”²² Section 35(1) is to be given a “generous, liberal interpretation” that recognizes the “trust-like” relationship between the Crown and Indigenous Peoples.²³ Aboriginal rights are those that are “integral to the distinctive culture” of the claimant group.²⁴ They are not “frozen rights” but “must be interpreted flexibly so as to permit their evolution over time.”²⁵ Once an Aboriginal right is established, that right “generally encompasses other rights necessary to its meaningful exercise.”²⁶

Aboriginal title is a communal right to occupy a particular area of land exclusively and use it for various purposes.²⁷ The test for Aboriginal title is proof of exclusive occupation of the territory at the time the Crown asserted sovereignty.²⁸ In *Tsilhqot’in Nation v British Columbia* (“*Tsilhqot’in*”), the Supreme Court of Canada (“SCC”) made the first ever declaration of Aboriginal title and stated that “the right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders.”²⁹

Any infringement of unextinguished Aboriginal or treaty rights must be justified by the Crown. The Crown must prove that: (i) a valid legislative objective exists, and (ii) the chosen method of achieving that objective upholds the honour of the Crown.³⁰ The honour of the Crown includes a constitutional duty to consult and potentially accommodate Indigenous Peoples.³¹ The duty to consult arises “when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.”³² The content of the duty is contextual and proportionate to the strength of the claim and the seriousness of the potential adverse effect upon the Aboriginal right or title in question.³³

Aboriginal rights to water flow from the use and occupation of territories since time immemorial.³⁴ An Aboriginal right to water can be recognized either as a general, stand-alone right or as incidental to another Aboriginal right such as the right to fish. No Canadian court has explicitly established or denied an Aboriginal right to water; however, Canadian case law confirms that uses of water vital to the existence of an Aboriginal community can receive constitutional protection.³⁵ These rights can include “travel and navigation, rights to use water for domestic purposes such as drinking, washing, tanning

22 *R v Van der Peet*, [1996] 2 SCR 507 at para 30 [*Van der Peet*]; *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 35(1).

23 *Sparrow*, *supra* note 6.

24 *Van der Peet*, *supra* note 22 at para 46.

25 *Ibid* at para 64.

26 *Mitchell v Minister of National Revenue*, 2001 SCC 33, at para 22.

27 *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 [*Delgamuukw*].

28 *Ibid*.

29 *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44 at para 76 [*Tsilhqot’in*].

30 *Sparrow*, *supra* note 6 at para 1114.

31 *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 24.

32 *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 35.

33 *Ibid* at para 39.

34 David Laidlaw, “Water Rights and Water Stewardship: What About Aboriginal Peoples?” (2010) at 2, online: <ablawg.ca/wp-content/uploads/2010/07/blog_dl_mpr_waterrights_july2010.pdf> archived at <<https://perma.cc/CFS3-FCM7>>.

35 *Ibid* at 3.

hides and watering stock, as well as rights to use water for spiritual, ceremonial, cultural or recreational purposes.”³⁶ Water may also be incidental to harvesting activities such as fishing, gathering, hunting, trapping, and lumbering, which the SCC has recognized are all “land and water based.”³⁷

In *Tsilhqot’in*, the SCC found that Aboriginal title includes “the right to decide how the land will be used; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.”³⁸ However, submerged lands were excluded from the *Tsilhqot’in* title claim.³⁹ While the *Tsilhqot’in* decision does not explicitly mention possession and ownership of water as incidental to Aboriginal title, previous cases have suggested that Aboriginal interests in land include “adjacent waters.”⁴⁰ According to some commentators, *Tsilhqot’in* lays the foundation for Aboriginal title claims to water in the future.⁴¹

B. Treaty Rights to Water

Indigenous rights to water can also be recognized by treaty. Treaties are solemn agreements that define the respective rights of Indigenous Nations and the Crown to use and enjoy lands that Aboriginal people traditionally occupied.⁴² The “historic treaties” were concluded between 1701 and 1923, and the modern treaties, or comprehensive land claims, are those concluded since 1975.⁴³ The only historic treaties in British Columbia are the Douglas Treaties on Vancouver Island and Treaty 8 in northeastern British Columbia.⁴⁴ The historic treaties do not mention water; however, the modern treaties often include specific water allocations that are subject to provincial water law.⁴⁵

One frequently cited case regarding treaty-based water rights is *Winters v United States* (“*Winters*”).⁴⁶ In *Winters*, the United States Supreme Court held that when an Indian reservation is created, a quantity of water sufficient to fulfill the purposes of the reservation is impliedly reserved as well.⁴⁷ Water rights under *Winters* cannot be extinguished by non-use as their priority date is the date the reservation was created, and the right includes a quantity of water necessary to satisfy the object of the reservation.⁴⁸

36 *Ibid.*

37 *R v Sappier*, 2006 SCC 54 at para 51.

38 Mandell Pinder LLP, “*Tsilhqot’in Nation v British Columbia 2014 SCC 44*” (June 2014), Case Comment, online: <www.mandellpinder.com/tsilhqotin-nation-v-british-columbia-2014-scc-44-case-summary/> archived at <<https://perma.cc/H5AY-RVKQ>>.

39 *Tsilhqot’in*, *supra* note 29 at para 9.

40 *Van der Peet*, *supra* note 22 at 518.

41 Raluca Hlevca, Megan Spencer & Savannah Carr-Wilson, “*Tsilhqot’in Nation v BC: Summary of Panel Discussions on the Supreme Court of Canada Decision*” (October 2014), online: <https://poliswaterproject.org/files/2015/07/TsilhqotinPanelBrief_FINAL.pdf> archived at <<https://perma.cc/S7NX-H7ZA>>.

42 Indigenous and Northern Affairs Canada, “Treaties with Aboriginal people in Canada”, online: <<https://www.aadnc-aandc.gc.ca/eng/1100100032291/1100100032292>> archived at <<https://perma.cc/NF9E-NA5P>>.

43 *Ibid.*

44 Simms, *supra* note 7 at 23.

45 *Ibid* at 60.

46 *Winters v United States*, 207 US 564 (1908).

47 Kristy Pozniak, “Indian Reserved Water Rights: Should Canadian Courts ‘Nod Approval’ to the *Winters* Doctrine and What are the Implications for Saskatchewan if they Do?” (2006) 69 Sask L Rev 251; see also Jennele Morris O’Hair, “The Federal Reserved Rights Doctrine and Practicably Irrigable Acreage: Past, Present, and Future” (1996) 10 BYUJ Pub L 263.

48 O’Hair, *supra* note 47 at 278.

Although *Winters* is American jurisprudence, some argue it should apply in Canada as well.⁴⁹ According to Kate Kempton, author of *Bridge over Troubled Waters: Canadian Law on Aboriginal and Treaty “Water” Rights, and the Great Lakes Annex*, Canadian courts often adopt principles from American jurisprudence in Aboriginal and treaty rights cases.⁵⁰ Kempton argues reserves in Canada and the United States were created to serve similar purposes, including residence and cultivation, both of which require assured access to water.⁵¹ She cites *Burrard Power Co v The King* (“*Burrard Power*”), a 1911 decision of the Privy Council, as authority for the argument that the principles enumerated in *Winters* are applicable in Canada. In *Burrard Power*, the Privy Council considered whether the conveyance of “public lands” by the Province of British Columbia to the Dominion Government included water rights.⁵² The Court refused to sever water rights from the land, stating that this would “defeat the whole object of the agreement.”⁵³ There is also evidence the Canadian government understood the creation of reserves to include an implied reservation of paramount water rights.⁵⁴ In 1920 (a decade after the *Winters* decision), the Canadian Department of Indian Affairs released a policy document which stated:

I am satisfied that the courts in construing the treaties between the Crown and the Indians under which reserves were set apart would follow the view already taken by the American Courts that there must be implied in such treaties an implied undertaking by the Crown to conserve for the use of the Indians the rights to take for domestic, agricultural purposes *all such water as may be necessary, both now and in the future development of the reserve from the waters which either traverse or are the boundaries of reserves.*⁵⁵

Finally, in *Saanichton Marina Ltd v Claxton*, the British Columbia Supreme Court (“BCSC”) issued an injunction against the construction of a marina in waters adjacent to a reserve. The Court found an implied right to water in relation to the treaty right to “carry on their fisheries as formerly.”⁵⁶

There is also scholarship suggesting the *Winters* doctrine is inapplicable in Canada.⁵⁷ While Canadian jurisprudence confirms that treaties should be given a generous and liberal interpretation to realize the intention of the reservation, Hopley and Ross, authors of “Aboriginal Claims to Water Rights Grounded in the Principle *Ad Medium Filum Aquae*, Riparian Rights and the *Winters* Doctrine,” argue *Winters* is inapplicable in Canada because of differences in the development of water law between the two jurisdictions. In the western United States, rights to water were governed by the doctrine of “prior appropriation,” whereby the first person to make beneficial use of a water source *appropriated* the rights to that water.⁵⁸ In western Canada, the law of riparian rights applied in the North-West Territories until 1894. Under a system of riparian rights, water is a public resource that

49 See Kate Kempton, *Bridge over Troubled Waters: Canadian Law on Aboriginal and Treaty “Water” Rights, and the Great Lakes Annex* (Toronto: Walter and Duncan Gordon Foundation, 2005) at 59-61.

50 *Ibid* at 59.

51 *Ibid*.

52 Richard H Bartlett, *Aboriginal Water Rights in Canada: A Study of Aboriginal Title to Water and Indian Water Rights* (Calgary: Canadian Institute of Resources Law, 1986) at 21.

53 *Ibid*; *Burrard Power Co v The King*, [1911] AC 87 [*Burrard Power*].

54 Kempton, *supra* note 49 at 60.

55 As *Williams to Scott*, Black (Western) Series (July 27 1920), Ottawa, Library and Archives Canada (RG 10, vol 3660, file 9755-4), cited in Bartlett, *supra* note 52 at 36.

56 *Saanichton Marina Ltd v Claxton* (1987), [1988] 43 DLR (4th) 481 [*Saanichton Marina*]; Bartlett, *supra* note 52 at 36.

57 Scott Hopley & Susan Ross, “Aboriginal Claims to Water Rights Grounded in the Principle *Ad Medium Filum Aquae*, Riparian Rights and the *Winters* Doctrine” (August 2009) 19:3 JELP at 225.

58 *Ibid* at 263.

cannot be reserved, owned, or sold.⁵⁹ Instead, riparian rights to water are usufructuary; granting the legal right to use property that belongs to another with an obligation to preserve it.⁶⁰ Thus, the concept of “reserving” rights to water in Canada was, according to Hopley and Ross, not legally possible prior to 1894.⁶¹

Turning to the issue of treaty rights in relation to groundwater, under the *WSA*, non-domestic groundwater users on reserves now require a licence, which is subject to the principles of prior allocation. There has been minimal Canadian jurisprudence considering rights to groundwater on reserve lands. In *Halalt First Nation v British Columbia (Environment)*, the Halalt First Nation (“Halalt”) challenged the environmental assessment certificates for three groundwater wells along the Chemainus River within its reserve lands. Halalt argued it was not adequately consulted and the wells would infringe their Aboriginal rights and title. The BCSC held that Halalt was not adequately consulted and that Halalt had “an arguable case that the groundwater in the Aquifer was conveyed to the federal Crown in order to fulfill the objects for which the reserve lands were set aside” and “the Province cannot purport by legislative act to expropriate the groundwater.”⁶² The British Columbia Court of Appeal (“BCCA”) overturned the BCSC decision and held that Halalt was adequately consulted; however, the comments of the BCSC regarding groundwater on reserve may still be relevant.⁶³

While the existence of a general treaty right to water is unclear, there has been jurisprudence recognizing water as “necessarily incidental” to the exercise of a treaty right.⁶⁴ In *R v Simon*, the appellant, a registered Micmac Indian, was convicted under Nova Scotia’s *Lands and Forests Act* for possession of a rifle and shotgun cartridges. The appellant argued that he was protected by a treaty right to hunt under the Treaty of 1752. The SCC held in favour of the appellant and stated, “the right to hunt to be effective must embody those activities reasonably incidental to the act of hunting itself.”⁶⁵ In *R v Sundown*, a member of a Cree First Nation party to Treaty 6 cut down trees and built a cabin within a provincial park to use for hunting and smoking fish. The SCC found that certain activities necessary for the exercise of a treaty or Aboriginal right, such as shelter for hunting, are constitutionally protected.⁶⁶ According to the SCC, “[i]ncidental activities are not only those which are essential, or integral, but include, more broadly, activities which are meaningfully related or linked.”⁶⁷ In British Columbia, the Tsawout First Nation successfully prevented the construction of a marina by arguing it threatened their treaty right to fish.⁶⁸ The Fort Nelson First Nation succeeded in cancelling a water licence due *inter alia* to inadequate consultation regarding the impact on their treaty rights to fish, hunt, trap, etc.⁶⁹ Thus, according to the jurisprudence (and applying the jurisprudence), water necessary for the exercise of a treaty right may be constitutionally protected.

59 *Ibid.*

60 *Ibid* at 233.

61 *Ibid* at 264.

62 *Halalt First Nation v British Columbia (Environment)*, 2011 BCSC 945 at para 553.

63 *Halalt First Nation v British Columbia (Environment)*, 2012 BCCA 472.

64 Phare, *supra* note 3 at 52-53.

65 *R v Simon*, [1985] 2 SCR 387 at para 31.

66 *R v Sundown*, [1999] 1 SCR 393 at para 29.

67 *Ibid* at para 30.

68 *Saanichton Marina*, *supra* note 56.

69 *Sharleen Gale and Fort Nelson First Nation v Assistant Regional Water Manager*, 2012-WAT0013(c) (BC EAB) at para 7 [Sharleen Gale].

C. Inherent Indigenous Rights

Aboriginal and treaty rights are not the only source of Indigenous rights to water. According to Indigenous Peoples, rights that “originate from the fact of their own existence as Nations, residing and governing throughout these territories” are their “inherent rights.”⁷⁰ Inherent rights may also be referred to as “reserved rights,” which Indigenous Peoples never relinquished to European settlers through treaties or any other means.⁷¹ Inherent Indigenous rights are distinguishable from Aboriginal and treaty rights because their validity does not stem from Canadian courts or governments. Inherent Indigenous rights are “given and limited by the Creator’s laws and responsibilities, including the laws of stewardship and reciprocity with nature [...] they] cannot be altered or narrowed by other humans, their governments or their laws [...] [n]either can Indigenous Peoples themselves shed the responsibilities placed upon them by the Creator.”⁷² While a fulsome discussion of the nature of inherent Indigenous rights to water is beyond the scope of this paper, it is important to recognize that Indigenous rights are not restricted to those recognized by colonial governments and legal systems.

III. IMPACT OF GROUNDWATER REGULATION ON INDIGENOUS RIGHTS TO WATER

This section will explore how the *WSA*’s groundwater regulations will impact Indigenous rights to water. Three interrelated issues will be considered: (i) whether the province has jurisdiction to regulate groundwater on reserves or unceded title lands, (ii) the impact of prior allocation of groundwater licensing on Indigenous rights to water, and (iii) the challenges the regulations pose to meaningful consultation between the Province and Indigenous Peoples.

A. Jurisdiction over Groundwater

The first issue this paper will consider in relation to British Columbia’s new groundwater regulations is whether the Province has the jurisdiction to regulate groundwater on reserve or unceded title lands. The Province argues that Indigenous Peoples gave up their rights to water when they negotiated treaties with the Crown.⁷³ The position of the UBCIC is that where Aboriginal title and rights have not been expressly ceded, the Province has no jurisdiction to assert ownership over water.⁷⁴ Thus, unless water rights have been negotiated explicitly, the Province does not have ownership or control over water. The *WSA* expressly violates this principle by purporting to regulate all groundwater, including on reserve and unceded title lands.

By purporting to regulate all groundwater in the province, British Columbia is assuming Indigenous rights to water (including Aboriginal, treaty, and inherent rights) have been extinguished. However, because inherent Indigenous rights flow from the occupation and use of land since time immemorial, and not from Canadian courts or governments, it is not possible for those same courts and governments to extinguish inherent Indigenous rights. Further, the Province likely does not have the constitutional authority to extinguish Aboriginal rights since they fall under the federal authority over “Indians, and Lands reserved for the Indians.”⁷⁵ Before 1982, the Crown was required to demonstrate a “clear

70 Phare, *supra* note 3 at 36.

71 *Ibid.*

72 *Ibid* at 37.

73 *Ibid* at 49.

74 UBCIC, *supra* note 5.

75 *Delgamuukw*, *supra* note 27; *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(24).

and plain intention” to extinguish an Aboriginal or treaty right.⁷⁶ After the ratification of the *Constitution Act, 1982*, Aboriginal rights and title have constitutional protection and cannot be extinguished.⁷⁷ Failure to recognize or grant protection to Aboriginal or treaty rights to water does not constitute a clear and plain intention to extinguish those rights.⁷⁸ Additionally, an Aboriginal or treaty right cannot be extinguished through government regulation.⁷⁹ The historic treaties make no mention of water, and have generally been interpreted as including water sufficient to meet the purposes of the reservation (such as, for the purposes of agriculture).

In a review of the water rights of Treaty 7 Indigenous Peoples in Alberta, Vivienne Beisel, author of *“Do not take them from myself and my children forever”: Aboriginal Water Rights in Treaty 7 Territories and the Duty to Consult*, concludes that no government action, including entering into Treaty 7, the transfer of natural resources from the federal to provincial government, or any other legislation, extinguished those rights.⁸⁰ Although the federal government did transfer authority over natural resources to British Columbia in 1930, this transfer was “subject to any trusts existing in respect thereof, and to any interest other than that of the Crown in the same.”⁸¹ In *Denying the Source: The Crisis of First Nations Water Rights*, Merrell-Ann Phare argues this provision appears to guarantee Indigenous water rights in British Columbia and the other Western Provinces.⁸² Thus, it is unlikely that the Province has jurisdiction to regulate groundwater on lands that are subject to historic treaties, reserves or unceded title lands. The situation is different for the modern treaties, which are generally subject to provincial water law. For example, section 8.1.1. of the Maa-Nulth First Nation Final Agreement states “storage, diversion, extraction or use of water and groundwater will be in accordance with Federal Law and Provincial Law.”⁸³ The Agreement provides for five water reservations that have priority over all third party licences except those granted prior to October 2003.⁸⁴

Aboriginal title may or may not include rights to water. In *Tsilhqot’in*, the only case where a court has made a declaration of Aboriginal title, submerged lands were expressly excluded from the title claim.⁸⁵ However, there are ongoing title claims that do include submerged lands. For example, in 2002, the Haida Nation brought a claim for Aboriginal title to Haida Gwaii, including the land, inland waters, seabed, archipelagic waters, and air space.⁸⁶ The Haida claim is currently in abeyance; thus, it remains to be seen how a claim to Aboriginal title to waters and submerged lands will fare in court.

Based on the above, British Columbia may have overstepped its jurisdiction by purporting to regulate all groundwater on reserve and unceded title lands. In the next section, this paper will explore how these regulations may lead to the infringement of Indigenous water rights.

76 *Sparrow*, *supra* note 6 at 1099.

77 *Van der Peet*, *supra* note 22.

78 *R v Gladstone*, [1996] 2 SCR 723 at para 36.

79 *Sparrow*, *supra* note 5.

80 Phare, *supra* note 3 at 50; Vivienne Beisel, *“Do not take them from myself and my children forever”: Aboriginal Water Rights in Treaty 7 Territories and the Duty to Consult* (Saarbrücken: VDM Verlag Dr. Müller Aktiengesellschaft & Co KG, 2008).

81 Phare, *supra* note 3 at 52.

82 *Ibid.*

83 Indigenous and Northern Affairs Canada, “Maa-Nulth First Nations Final Agreement”, online: <https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-BC/STAGING/texte-text/mna_fa_mnafa_1335899212893_eng.pdf> archived at <<https://perma.cc/5764-A7PN>>.

84 *Ibid.*

85 *Tsilhqot’in*, *supra* note 29.

86 *Haida Nation v British Columbia*, 2004 SCC 73 (Statement of Claim), online: <www.haidanation.ca/wp-content/uploads/2017/03/Statement_of_Claim.pdf> archived at <http://www.haidanation.ca/wp-content/uploads/2017/03/Statement_of_Claim.pdf>.

B. Indigenous Water Rights and Prior Allocation of Groundwater

Under the *WSA*, Indigenous Peoples using groundwater for non-domestic purposes are required to apply for groundwater licences subject to the principles of prior allocation.⁸⁷ Therefore, groundwater licences obtained by Indigenous Peoples may be subject to third party licences with earlier precedence dates. In British Columbia, water scarcity is becoming an ever-increasing threat. Much of the Province experienced drought conditions in 2015, and many water sources are already fully or over-allocated.⁸⁸ Further, there are approximately 20,000 existing non-domestic groundwater users who will be brought under the *WSA* groundwater licensing regime over the next few years.⁸⁹ The confluence of increasing water scarcity and competing groundwater licences sets the scene for infringement of Indigenous water rights.

FITFIR grants priority water rights to users who are “first in time.” Interpreted literally, Indigenous Peoples are clearly the first users of water in British Columbia. As discussed, Indigenous Peoples have inherent rights, including rights to water, which have never been extinguished. Thus, the groundwater licences of Indigenous Peoples should have priority over all other third party licences. However, British Columbia has chosen to interpret FITFIR narrowly, only recognizing water rights once a provincial water licence has been issued (and again, Indigenous Peoples were barred from applying for water licences until 1888, 23 years after British Columbia began issuing licences). A “generous and liberal” interpretation of FITFIR would give precedence to Indigenous groundwater licences in recognition of their inherent rights to water.

Prior allocation of groundwater licences also has the potential to infringe constitutionally protected Aboriginal and treaty rights, or water uses which are necessarily incidental to the exercise of those rights. In times of water scarcity, Indigenous Peoples may be unable to exercise their Aboriginal and treaty rights to water. In *Sharleen Gale and Fort Nelson First Nation v Assistant Regional Water Manager* (“*Sharleen Gale*”), the Fort Nelson First Nation (“FNFN”) sought judicial review of a decision to issue a conditional water licence to Nexen Inc. within Treaty 8 territory. The licence authorized Nexen Inc. to divert water for storage and industrial use in oilfield injection.⁹⁰ Treaty 8 guarantees FNFN the right to “pursue their usual vocations of hunting, trapping and fishing.”⁹¹ The Environmental Assessment Board cancelled the water licence based on failure to adequately consult with FNFN regarding the potential impact on their treaty rights.⁹² *Sharleen Gale* is an example of the issuance of a water licence by a province that threatened to infringe constitutionally protected treaty rights.

Large gaps exist in understanding groundwater use and aquifer sustainability in British Columbia.⁹³ Given the lack of data and increasing scarcity of water in the Province, Aboriginal and treaty rights are at risk of being infringed. This is inconsistent with the

87 Ministry of Environment and Climate Change Strategy, *supra* note 16.

88 R Simms & OM Brandes, “Top 5 Water Challenges that will Define British Columbia’s Future” (September 2016) at 2, online: <<https://poliswaterproject.org/files/2016/09/POLIS-Top5-final-web.pdf>> archived at <<https://perma.cc/S7GL-567G>>; see also O Brandes & D Curran, *Water licences and conservation future directions for land trusts in British Columbia* (Victoria: POLIS Project on Ecological Governance, 2008).

89 British Columbia, Ministry of Environment and Climate Change Strategy, “New Requirements for Groundwater Users”, online: <www2.gov.bc.ca/gov/content/environment/air-land-water/water/water-licensing-rights/water-licences-approvals/new-requirements-for-groundwater-users> archived at <<https://perma.cc/3SQ3-B6UF>>.

90 *Sharleen Gale*, *supra* note 69 at para 1.

91 *Ibid* at para 10.

92 *Ibid*.

93 Simms & Brandes, *supra* note 88 at 11.

honour of the Crown. The Crown must justify any infringement of Aboriginal and treaty rights by demonstrating that a valid legislative objective exists and is in keeping with its “unique contemporary relationship” with Indigenous Peoples.⁹⁴ The next section will discuss how consultation with Indigenous Peoples on *Water Act* modernization was flawed from the beginning, and it will argue that current consultation procedures are insufficient to meet the Crown’s duty to consult.

C. Groundwater Regulation and the Duty to Consult

Groundwater licences granted without proper consultation with Indigenous Peoples may lead to infringement of Aboriginal and treaty rights. Indigenous Peoples state that British Columbia failed to adequately consult with them prior to enacting the *WSA*. During the public engagement process, Indigenous organizations and communities emphasized the need to recognize Indigenous rights to water, to negotiate on a nation-to-nation basis, and to acknowledge the priority of Indigenous water rights.⁹⁵ According to the UBCIC “the proposed *Water Act* amendments continue with the province’s history of denial, which is damaging both to Indigenous Peoples and Cultures, and also to the waters and all life that depends upon the water.”⁹⁶ The consultation process neither recognized Indigenous jurisdiction nor constitutionally protected Aboriginal and treaty rights.⁹⁷ According to the First Nations Summit, the Province’s engagement process on *Water Act* modernization “failed to engage First Nations in a distinct and direct process” and “cannot be deemed to constitute meaningful consultation with First Nations.”⁹⁸

Consultation between the Province and Indigenous Peoples prior to enacting the *WSA* was inadequate. The result is legislation that grants priority groundwater licences to third parties over Indigenous Peoples, potentially infringing Aboriginal and treaty rights. The Province now proposes to consult with Indigenous Peoples on a case-by-case basis when considering groundwater licences that impact Indigenous communities. There are two problems with this approach. First, the Province’s “on the ground” consultation procedures have proven ineffective.⁹⁹ In a review of British Columbia’s policies on consultation and accommodation, the First Nations Leadership Council (“FNLC”) outlined certain deficiencies in British Columbia’s approach.¹⁰⁰ The FNLC found British Columbia’s policies were developed in reaction to court decisions and have been legally narrow and reductionist, ignoring and in some cases setting back the spirit of reconciliation that underpins section 35 of the *Constitution Act, 1982*.¹⁰¹ Other deficiencies include the fact that provincial policy is aimed at preserving the legislative and operational status quo and is primarily procedural, not substantive.¹⁰²

94 *Sparrow*, *supra* note 6 at para 1110.

95 Council of Canadians, *supra* note 21 at 10.

96 UBCIC, *supra* note 5.

97 *Ibid.*

98 The First Nations Summit, “A Water Sustainability Act for BC: Legislative Proposal” (December 2013) at para 19, online: <<https://engage.gov.bc.ca/app/uploads/sites/71/2013/12/First-Nations-Summit.pdf>> archived at <<https://perma.cc/YXB3-TWRC>>.

99 *Ibid* at para 14.

100 First Nations Leadership Council, “Advancing an Indigenous Framework for Consultation and Accommodation in BC” (2013) at 87-101, online: <fns.bc.ca/wp-content/uploads/2016/10/319_UBCIC_IndigActionBook-Text_loresSpreads.pdf> archived at <<https://perma.cc/5N7N-74ZJ>>; see British Columbia, “Updated Procedures for Meeting Legal Obligations when Consulting First Nations—Interim” (7 May 2010), online: <<https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations>> archived at <<https://perma.cc/3B2Z-EPFJ>>.

101 First Nations Leadership Council, *supra* note 100 at 93-94.

102 *Ibid* at 96-97.

The second problem with a case-by-case approach to consultation is a capacity issue: the capacity of Indigenous Peoples to respond to these types of consultation requests is already over-burdened. The Crown referral process has been characterized as “[o]ne of the greatest logistical difficulties facing Aboriginal communities today” and a “death of a thousand cuts.”¹⁰³ Upholding the honour of the Crown requires meaningful consultation from the beginning of the law reform process, not as an afterthought to avoid liability once unjust colonial water governance principles are already in place.

CONCLUSION

In conclusion, the *WSA* represents a missed opportunity for British Columbia to retire its colonial water regime and recognize the “prior, superior, and unextinguished water rights” of Indigenous Peoples in British Columbia.¹⁰⁴ The former *Water Act* was developed in the context of colonialism, imperialism, and natural resource exploitation based on the oppression of Indigenous Peoples.¹⁰⁵ In enacting the *WSA*, the Province chose to maintain the status quo. This is not in keeping with Canada’s recent adoption of UNDRIP, section 35 of the *Constitution Act, 1982*, or Canada’s “unique contemporary relationship” with Indigenous Peoples.

The *WSA*’s groundwater regulations pose numerous challenges to Indigenous water rights. Where water rights have not been explicitly negotiated through treaty or Aboriginal title declarations, British Columbia has no jurisdiction to assert ownership or control over water.¹⁰⁶ Further, granting groundwater licences based on the principles of prior allocation will result in the infringement of both inherent Indigenous rights and constitutionally protected Aboriginal and treaty rights. Finally, Indigenous Peoples were not meaningfully consulted during the *Water Act* modernization process. Current consultation procedures have proven ineffective and are insufficient to further reconciliation. By ignoring Indigenous water rights and allocating water based on the colonial system of prior allocation, British Columbia risks conflict over water resources and the infringement of Indigenous, Aboriginal, and treaty rights.

103 Maria Morellato, *The Crown’s Constitutional Duty to Consult and Accommodate Aboriginal and Treaty Rights* (West Vancouver: National Centre for First Nations Governance, 2008).

104 UBCIC, *supra* note 5.

105 *Ibid.*

106 *Ibid.*