



Treading Water, as Long as the Rivers Flow:

**The Current State of Canadian Law on
Aboriginal and Treaty Rights to Water**

Jared Wheeler of Jerch Law, to Wa Ni Ska Tan 2019 Ki Ta Ski Naw Conference



Who Am I? Who is Jerch Law?

Jared Wheeler – lawyer at P. Michael Jerch Law Corporation in Winnipeg

At Jerch Law we mainly work for Indigenous Peoples and Nations and Indigenous-run organizations to provide principled and strategic advice and advocacy to serve their aspirations, development and future.

Jerch Law serves our clients in a variety of ways, including:

- Litigation;
- Corporate Law and Taxation issues;
- Drafting laws in adherence with the ideologies, customs and traditions of the particular Indigenous community;
- Assertion and protection of Aboriginal and Treaty rights;
- Consultation, accommodation and natural resource law; and,
- Administrative and regulatory law.



Disclaimer

Not legal advice



How are we related to Wa Ni Ska Tan?

- Since 2015 Jerch Law has been a partner organization of Wa Ni Ska Tan.
- Wa Ni Ska Tan has developed legal research areas to be examined by members of the legal team – Jerch Law has conducted some of the research.



Work we have completed for Wa Ni Ska Tan in the past

- Legal research on the constitutionality of the Northern Flood Agreements Master Implementation Agreements
- Legal research on the (in)validity of TCN's signature on the Treaty 5 Adhesion
- Represented Wa Ni Ska Tan at the National Energy Board hearing into the Manitoba-Minnesota Transmission Project




What is the purpose of Jerch Law's work on these projects?

- ▶ The purpose of Jerch Law's work related to Wa Ni Ska Tan is to aid Indigenous communities by providing legal resources and information about Canadian Law.
- ▶ Our goal is to support and equip Indigenous communities with legal tools so that if they wish, they will have a starting point to consider whether to take action to protect rights that may be impacted, including by the development of hydro electric projects.

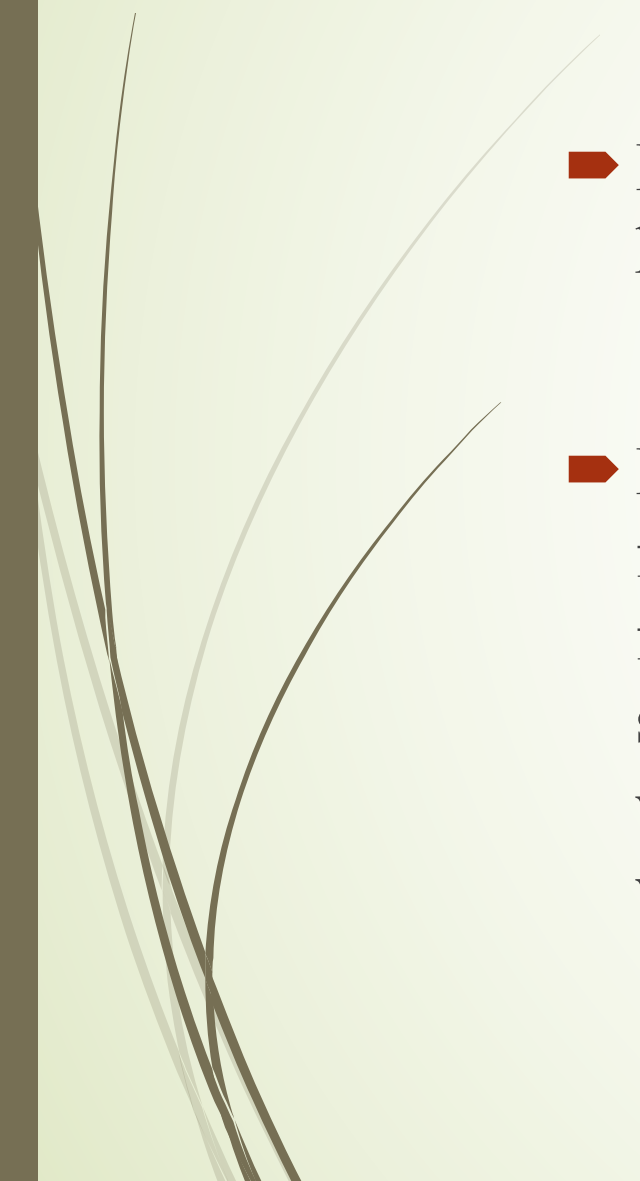


What have we done on this project?

- In January 2018, Jerch Law submitted a proposal, which was approved, to conduct legal research and prepare a legal memorandum on the broad topic of Aboriginal Rights to Water.
 - Following extensive research, in January 2019 we completed and submitted to Wa Ni Ska Tan a 65-page research memorandum/legal opinion regarding the current state of Aboriginal and Treaty Rights to Water in Canadian Law.
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Hypothetical Scenarios Considered

- If Aboriginal or Treaty Rights to Water were established – what kind of impacts to those rights are we looking at?
 - Impacts could arise in many ways, including, for example, from the diversion of water to generate hydro-electric power, from government-approved pollution of waters that are the subject of Treaty Rights, decisions being made with respect to waters that are the subject of Aboriginal or Treaty Rights without the inclusion of the Rights-bearing peoples.
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Potential options for Indigenous Peoples to assert decision-making authority regarding water using Canadian Law.



Distinction Must be Drawn



Indigenous Law



Aboriginal Law



Worldview Has to be Considered

- Focus on Rights (Generalized Western Worldview)
- Focus on Reciprocal Responsibilities (Generalized Indigenous Worldview)
- Tricky to assert an inherent Indigenous Responsibility within a legal system that recognizes and values Rights



Legal Issues Considered

1. Has an Aboriginal Right to water been successfully asserted and established in Canada?
 - a. If not, could an Aboriginal Right to water be established under Canadian law and what is the likelihood of success for asserting such a Right?
2. Has an Aboriginal Right to water stewardship and governance been successfully asserted and established in Canada?
 - a. If not, could an Aboriginal Right to water stewardship be established under Canadian law and what is the likelihood of success for asserting such a Right?
 - i. How could an Aboriginal Right to water stewardship be established (i.e. what are the legal tests, etc.)?



Legal Issues Considered

3. Has water stewardship been successfully asserted and established as being incidental to the exercise of a recognized Aboriginal Right (fishing, hunting, etc.)?
 - a. If not, could water stewardship be established as being incidental to the exercise of a recognized Aboriginal Right, and what is the likelihood of success for such a claim?
4. Has an Aboriginal Title claim to water been asserted and established in Canada?
 - a. If not, could a potential Aboriginal Title claim to water be established under Canadian law and what is the likelihood of success for asserting such a claim?
 - i. How could an Aboriginal Title claim to water be established (i.e. what are the legal tests, etc.)?



Legal Issues Considered

5. Has a Treaty Right to water been asserted and established under Treaty 5?
 - a. If not, could a Treaty Right to water be asserted and established under Treaty 5 and what is the likelihood of success for asserting such a Right?
 - i. How could a Treaty Right to water be established (i.e. what are the legal tests, etc.)?
6. What other potential legal options may exist with respect to the assertion of water Rights?



Not Enough Time to Go Over
Entire Memo/Opinion



Limitation of “Aboriginal Rights”

- Not rights to a resource – but rights to a practice
- Example – Right to Moose / Right to hunting

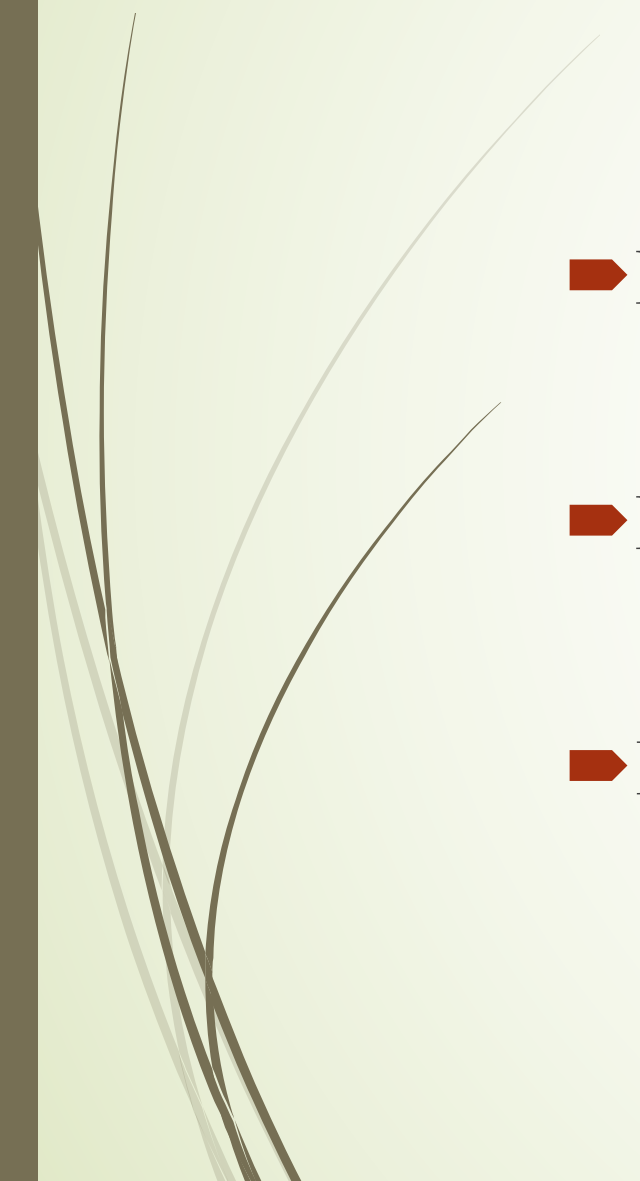


Likelihood of Success for a Claim to an Aboriginal Right to Water?

- ▶ Example – Province informs First Nation that a new Hydro dam is being constructed – First Nation claims Province can't do it because of Aboriginal Right to water
- ▶ Not likely to succeed, but....
- ▶ Aboriginal Right to Water Stewardship?



Aboriginal Right to Water Stewardship and Governance?

- Misnomer – claiming a “right” to a “responsibility”
 - Has not been claimed by anyone to date
 - If the evidentiary basis exists – just might work
- 



Aboriginal Title Claims to Water?

- ▶ Canadian courts have found that Aboriginal Title over water exists
- ▶ Has been claimed by some groups
- ▶ Has not yet been successfully established
- ▶ If a group can establish the firm evidentiary basis for the claim – could be done



Treaty Right to Water in Treaty 5?

- Mmmmmmaybe – but a challenging claim to assert
- Has not been asserted or established to date
- Even if successful, Crown may be able to justify an infringement



What About UNDRIP?



Yeah, what about UNDRIP?





Recommendation in Brief

If a Strong Evidentiary Basis – a Claimant:

- Should claim Aboriginal Title over specific water bodies
- While doing that, should claim Aboriginal Right to Water Stewardship and Governance
- If Treaty 5, should also simultaneously claim Treaty Right to Water



Research Conducted



Reconciliation and a Nation to Nation Relationship

- Requires recognition of and respect for Indigenous laws and worldviews
- Must also recognize and respect the Right (Responsibility) to be involved in decision-making with respect to water



Inherent Right to Water and the Impacts of Colonization on Indigenous Water Rights

- Colonial instruments such as the Canadian Constitution are not sources of Indigenous Rights but a recognition of Indigenous peoples' inherent Rights.
- Rights that originate from the fact of the very existence of Indigenous Peoples as Nations, “residing and governing throughout these territories” are “inherent Rights.”



Inherent Right to Water and the Impacts of Colonization on Indigenous Water Rights

- ▶ Inherent 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.”

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



Complexities of Canadian Laws Relating to Water

- British common law
- Canadian Constitution
- *North-west Irrigation Act*
- *Natural Resources Transfer Agreements*
- What about Treaties?
- Yeah, what about Treaties?



Aboriginal Rights in Canadian Law (super brief overview)



Aboriginal Rights to Water in Canadian Law (super brief overview)

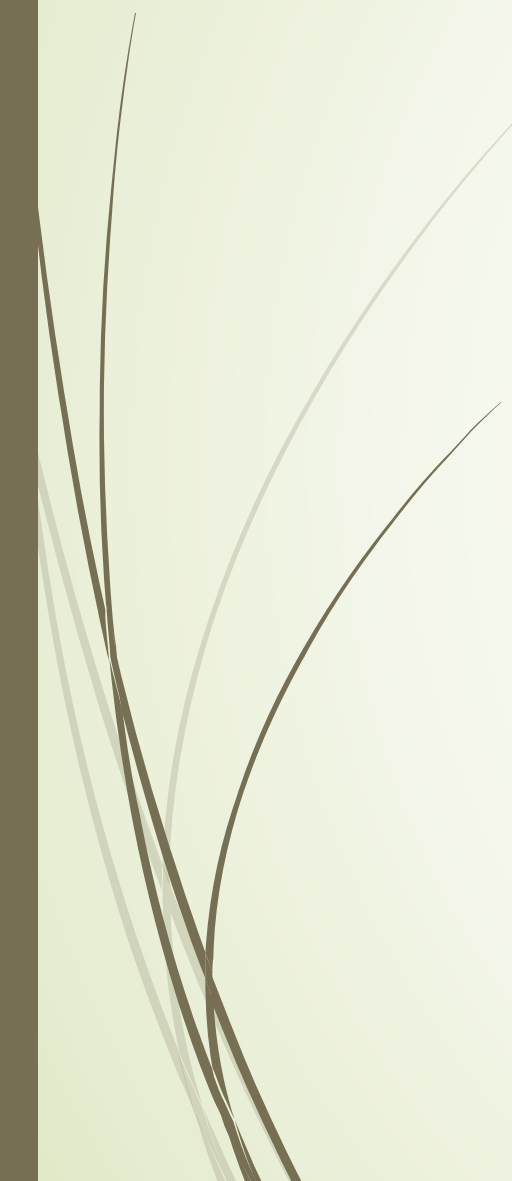



Aboriginal Right to Water Stewardship and Governance



Aboriginal Right to Water Stewardship and Governance

- The practice of being involved at all levels of decision-making with respect to impacts, or potential impacts, to water.
- The Aboriginal Right to protect the waters.
- Calling a Responsibility a Right
- Not about establishing a proprietary Right to water, but about seeking respect for natural laws pursuant to which Indigenous Peoples have a responsibility to protect the water



Recognition of an Aboriginal Right to water stewardship would trigger not only the Crown's duty to consult, negotiate in good faith and potentially accommodate the Indigenous group's interests when Crown action is contemplated that may impact the Right, but also the more stringent requirement for the Crown to seek to justify any impacts prior to acting and a requirement to show that those actions minimally impair Aboriginal or Treaty Rights



Legal Tests for Establishing an Aboriginal Right (in Canadian Law)

Thank you to the Public Interest Law Centre for agreeing to let me use work I had previously completed in which I set out the legal tests

The “Sparrow Test”:

- a. Is there an existing Aboriginal Right?
- b. Has the Aboriginal Right been extinguished?
- c. Has there been a *prima facie* infringement of the Right?
- d. Can that infringement be justified?



Sparrow Test Step 1

Is there an existing Aboriginal Right?

An Aboriginal Right is an activity that is an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the Right. (SCC in *Van der Peet*)

- i. characterizing the claimed aboriginal Right;
- ii. establishing the existence of the ancestral practice, custom or tradition advanced as supporting the claimed Right;
- iii. determining whether the ancestral practices, customs or traditions were integral to the distinctive culture of the claimant's pre-contact society; and
- iv. determining whether reasonable continuity exists between the pre-contact practice and the contemporary claim.



Sparrow Test Step 2

Has the Right Been Extinguished?

- i.** by surrender;
- ii.** by constitutional amendment (prior to 1982); or
- iii.** by clearly worded federal legislation (prior to 1982).



Sparrow Test Step 3

Has there been a *prima facie* infringement of the Right?


- i. is the limitation unreasonable?
- ii. does the limitation impose undue hardship?
- iii. does the regulation deny to the holders of the Right their preferred means of exercising that Right?



Sparrow Test Step 4

Can the Infringement be Justified?

- i. is the infringement in furtherance of a legislative objective that is compelling and substantial?
- ii. is the infringement consistent with the special fiduciary relationship that exists between the Crown and Aboriginal peoples?



Claiming an Aboriginal Right to Water
Stewardship, and an Unjustifiable
Infringement of that Right - may be
just crazy enough to work



Aboriginal Title (in Canadian Law)



What is Aboriginal Title?

- ▶ The SCC has stated that Aboriginal Title is one manifestation of the broader category of Aboriginal Rights. In *Van der Peet*, the Supreme Court defined it as a “sub-category of Aboriginal Rights which deals solely with claims of Rights to land”
- ▶ In *Guerin* the SCC described Aboriginal Title as a legal Right which both pre-dated and survived claims to sovereignty in North America by European Nations, and which arises from historic use and occupation of tribal land independent from British and Canadian acts of recognition.
- ▶ In the case of *R v Calder*, the court found that aboriginal Title included the Right “to enjoy the fruits of the soil of the forest, and of the rivers and streams within the boundaries of said lands” (emphasis added).



Great – So... What is Aboriginal Title?

- Aboriginal Title is a communal Right to occupy, and make decisions with respect to, a particular area exclusively and to use it for various purposes, regardless of whether those uses or purposes would qualify independently as Aboriginal Rights.
- It is a Right to the land itself, including the mineral Rights, conferring “ownership Rights similar to those associated with fee simple, including: the Right to decide how the land will be used; the Right of enjoyment and occupancy of the land; the Right to possess the land; the Right to the economic benefits of the land; and the Right to pro-actively use and manage the land.” It is similar, if not directly on par with Crown Title.



How to Establish Aboriginal Title

To prove sufficiency of occupation, the claimant community:

must show that it has historically acted in a way that would communicate to third parties that it held the land for its own purposes. [...] There must be evidence of a strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belong to, was controlled by, or was under the exclusive stewardship of the claimant group.

SCC in *Tsilhqot'in* (2014)



How to Establish Aboriginal Title

Modified *Sparrow/Van der Peet* test in *Calder/Delgamuukw/Tsilqot'in* for Aboriginal Title:

- Is there existing Aboriginal Title?
 - establish existence of intention and capacity to retain exclusive control over tract of land or body of water;
 - determine whether reasonable continuity between the pre-contact practice and the contemporary claim.
- Has the Aboriginal Title been extinguished?
 - by surrender;
 - by constitutional amendment (prior to 1982); or,
 - by clearly worded federal legislation (prior to 1982).



How to Establish Aboriginal Title

- ▶ Has there been a *prima facie* infringement of the Aboriginal Title?
 - ▶ is the limitation unreasonable?
 - ▶ does the limitation impose undue hardship?
 - ▶ does the regulation deny to the holders of the Right their preferred means of exercising that Right?
- ▶ Can that infringement be justified?
 - ▶ is the infringement in furtherance of a legislative objective that is compelling and substantial?
 - ▶ is the infringement consistent with the special fiduciary relationship that exists between the Crown and Aboriginal peoples?



Aboriginal Title to Water in Canadian Law?

- Canadian courts and academics seem to agree that Aboriginal Title over Water likely exists in Canadian Law
- Has been claimed a few times
- Has never (yet) been successfully established
- Courts have avoided dealing with the issue
- Courts have never definitively said no
- Need a strong evidentiary basis
- It is likely the Crown would argue that the Treaties extinguished Aboriginal Title to water (they are wrong)



Conclusion

- There are potentially very significant opportunities that arise from an assertion of an Aboriginal Right to water stewardship and governance, through whatever means that assertion is made.
- Increased exercise of these Rights could take many forms, including engaging in or ensuring that members, or other parties, cease activities if deemed to be in the best interest of the water body.
- What is in the best interest of the water body?



Conclusion

Water Rights are essential for contemporary needs and economic development, as well as to preserve traditional ways of life. Whether for settlement, domestic use, agriculture, hunting, fishing, trapping, hydroelectric development, transportation, tourism, or industry, water is the lifeblood of Aboriginal communities. Settlement and development has deprived Aboriginal peoples of their water Rights by changing the quality, quantity, and flow of rivers and lakes in Canada, resulting in damage to habitat and boat routes, flooding of traditional land and forced relocation, and loss of control over a vital resource.

Linda Nowlan, *Customary Water Laws and Practices in Canada*, (Rome: Food and Agriculture Organization of the United Nations, 2004) online: http://www.fao.org/fileadmin/templates/legal/docs/CaseStudy_Canada.pdf

- Perhaps asserting Aboriginal Title over waters in an Indigenous community's traditional territory, coupled with an assertion of an Aboriginal Right to water stewardship and governance over those waters, and an assertion of a Treaty Right to water may be a method of gaining back some of that loss of control.



Reminder

- This discussion has only been about methods for asserting decision-making authority using Canadian law/courts, etc. – and thus is flawed from the outset
- This is only one tool in the toolbox. And not a very good one.



Thank you

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