

INDIAN WATER RIGHTS ON THE PRAIRIES

RICHARD H. BARTLETT*

The substance of this paper is an examination of the rights of the Indian people of Alberta, Manitoba, and Saskatchewan to the use and control of water on or adjacent to reserve lands. Such a study entails consideration of the right to use the water itself, including the operation of hydro-electric power, ownership of the waterbed, the control of flooding, and the ambit of public rights of navigation and floating. Historically, such a study must examine the aboriginal rights of the Indian people in relation to water, their rights promised by treaty, and the impact of federal and provincial water control and public lands legislation. A common feature of the law of the three provinces is the conflict between the treaty undertakings of the Crown and the water control legislation first declared in the form of the *North-west Irrigation Act*¹ of 1894.

The Treaties²

Prior to treaty, the Indians of the Prairies were recognized as entitled by way of a "personal and usufructuary"³ tenure to their aboriginal lands. In the leading case of *Johnson v. McIntosh*,⁴ Chief Justice Marshall in the United States Supreme Court declared that the Indians were "the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion." In 1973, the Supreme Court of Canada in *Calder v. Attorney General of British Columbia*⁵ recognized Indian title to land as arising independently of any government proclamation, statute or document. "[T]he fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means."⁶ Hall, J. described Indian title as a "usufructuary right and a right to occupy the lands and to enjoy the fruits of the soil, the forest and of the rivers and streams."⁷

The Indians surrendered their traditional title in the Prairies in a series of "numbered" treaties. The treaties were modeled upon the 1850 Robinson treaties signed in Ontario and offer minimal variations in wording or substance. The treaties followed the pattern of settlement in the West. Indian title in Southern Manitoba and Saskatchewan was surrendered by Treaties #1 (1871), #2 (1871), #3 (1873) and #4 (1874). Central Manitoba, Saskatchewan and Alberta was surrendered by Treaties #5 (1875) and #6 (1876). Title to Southern Alberta was surrendered by Treaty #7 in 1877. Northern Alberta, Saskatchewan and Manitoba was surrendered by Treaty #8 (1899), #10 (1906), and by adhesion to #5 in 1909. The language of the surrender provisions was common to all treaties, for example, Treaty #1 provided:

* Professor of Law, University of Saskatchewan

1. S.C. 1894, c. 30, as am. by S.C. 1895, c. 33.

2. Copies of the Treaties are available through the Federal Queen's Printer in Ottawa. Treaties #1-7 are also reproduced in the Appendix to A. Morris, *The Treaties of Canada with the Indians* (1880).

3. *St. Catherine's Milling and Lumber v. The Queen* (1889), 14 A.C. 46 (P.C.).

4. (1823), 21 U.S. 240 at 253.

5. (1973), 34 D.L.R. (3d) 145 (S.C.C.).

6. *Id.*, at 156.

7. *Id.*, at 173-4.

The Chippewa and Swampy Cree Tribes of Indians, and all the other Indians inhabiting the district hereinafter described and defined, do hereby cede, release, surrender, and yield up to Her Majesty the Queen, and her successors for ever, all the lands included within the following limits, that is to say: Beginning at the International boundary line near its junction with the Lake of the Woods, at a point due north from the centre of Roseau Lake, thence to run due north to the centre of Roseau Lake; thence northward to the centre of White Mouth Lake, otherwise called White Mud Lake; thence by the middle of the lake and the middle of the river issuing therefrom, to the mouth thereof in Winnipeg River; thence by the Winnipeg River to its mouth; thence westwardly, including all the islands near the south end of the lake, across the lake to the mouth of the Drunken River; thence westwardly, to a point on Lake Manitoba, half way between Oak Point and the mouth of Swan Creek; thence across Lake Manitoba, on a line due west to its western shore; thence in a straight line to the crossing of the Rapids on the Assiniboine; thence due south to the International boundary line, and thence easterly by the said line to the place of beginning; to have and to hold the same to Her said Majesty the Queen, and her successors for ever;

The limits were always drawn so as to include the lakes and rivers and parts thereof of the territory within them.

The Terms of the Treaties

Treaties #1, #2, #5 and #7 specifically provided lots of land to be laid aside as reserves along the shores of designated rivers and lakes. Treaty #5 (1875) provided that Her Majesty reserved the free navigation of all lakes and rivers and free access to the shores thereof with respect to the Berens River and the Otter Island bands. Treaty #7 (1877) which provided for reserves on both sides of the Bow and Saskatchewan River reserved:

the right to navigate the above mentioned river to land and to receive fuel and cargoes on the shores and banks thereof, to build bridges and establish ferries thereon, to use the fords thereof and all the trails leading thereto, and to open up such other roads through the said reserves as may appear to Her Majesty's Government . . . necessary for the ordinary travel of her Indian and other subjects.

Treaties #3, #4, #5, #6, #7 and #10 provided that Indians:

shall have the right to pursue their avocations of hunting, trapping and fishing throughout the tract surrendered, subject to regulations as may from time to time be made by the Government of the country acting under authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, and other purposes under grant, or other rights given by Her Majesty's said Government.

The Understanding of the Treaties

The Official Reports of the Commissioners nowhere refer specifically to water per se in the treaty negotiations, neither in reference to surrender by the Indians nor as property of the Crown. The Reports indicate the dual purpose intended by the Crown of encouraging the Indians to develop agriculture but to reserve to them their traditional practice of hunting and fishing insofar as the land was not otherwise taken up. Thus Lieutenant-Governor Archibald of the North West Territories declared in the negotiation of Treaties #1 and #2:

'Your Great mother wishes the good of all races under her sway. She wishes her red children to be happy and contented. She wishes them to live in comfort. She would like them to adopt the habits of the whites, to till land and raise food, and

store it up against a time of want. She thinks this would be the best thing for her red children to do, that it would make them safer from famine and distress, and make their homes more comfortable.

'But the queen, though she may think it good for you to adopt civilized habits, has no idea of compelling you to do so. This she leaves to your choice, and you need not live like the white man unless you can be persuaded to do so of your own free will.

...
'These reserves will be large enough, but you must not expect them to be larger than will be enough to give a farm to each family, where farms shall be required. They will enable you to earn a living should the chase fail.'

In the negotiations concerning Treaty #4, Lieutenant-Governor Morris of the North West Territories assured the Indians that they would "have the right of hunting and fishing just as you have now until the land is actually taken up."⁹ The Official Reports of the other treaties repeat such remarks. The Treaty Commissioner of Treaty #10 "guaranteed them that the treaty would not lead to any forced interference with their mode of life."¹⁰

Indian organizations in Alberta and Saskatchewan have maintained that the treaties were not understood by the Indians as entailing a surrender of the water. The Treaty and Aboriginal Rights Research Board of the Indian Association of Alberta, upon the basis of an extensive program of interviews and research into the Indian history of treaties, has observed:

There was universal agreement amongst the interviews that the animals, birds and fish were not surrendered. . . . Amongst those who dealt with water (lakes and rivers) and the mountains, all said they had not been given up . . .

Many of the informants said that water and mountains had not been mentioned at the treaty negotiations.¹¹

A publication of the Curriculum Studies and Research Department of the Saskatchewan Indian Cultural College concerning Treaty #6 observes:

[The elders] understood through verbal agreement that the land which was given to the white settlers was only to the extent of the depth a plough would furrow . . . The rest was to be retained by the Indian people. Thus, the birds of the air, fish in the sea, the trees, the rivers, the minerals were not given up."¹²

A report entitled *Aski-puko the Land Alone*,¹³ prepared on behalf of the Peter Ballantyne and Lac La Ronge bands of Saskatchewan, gathers the understanding of members of those bands. The emphasis of the band members is on the perpetuation of the right to hunt and fish. The references to water are typified by the following:

Daniel McKenzie:

Q. — *When the land was sold, what exactly was sold, was that dry land only or did that include the lakes and the rivers?*

A. — *In the Treaties there was no mention of water being sold, because that is where the people make their living, mostly from the water, and of course, also from the land. But in the Treaties, no mention of water.*

9. *Id.*, at 96.

10. *Official Report, Treaty #8*, (Federal Queen's Printer Cat. # Ci 72-1066), at 7.

11. J.L. Taylor, *Understanding the Treaties* (1975) (Indian Association of Alberta).

12. *Treaty #6* (1976) (Sask. Indian Cultural College) 27.

13. *Aski-Puko the Land Alone, Report on Effect of Churchill River Hydro Project* (Sept., 1976) (Peter Ballantyne and Lac La Ronge Bands).

Martha Roberts:

Q. — *When the people sold the land what did that include. Does that include the rivers, lakes also?*

A. — *No, I did not hear them mention the lakes and rivers. Only the land was sold. The people made their living from the land and the waters. They did not get any ration or help, at that time.*

Q. — *So did the people give up their rights to the land only? Not to the animals of the water.*

A. — *Yes, because that was the only way they made their living.*

Isaiah Roberts:

Q. — *Did you ever hear James Roberts say anything in regards to the land? When the old people sold the land, was it dry land only or did it include also the lakes and the rivers?*

A. — *I understand that he didn't sell the water because he didn't sell his fishing rights.¹⁴*

The Report concludes that the Indians understood that they retained ownership of the water because they had not given it up.¹⁵ It is suggested that the understanding of the Indians is conditioned by the assurances offered in regard to the right to fish, which incidentally entailed the right of use of the water. The Indians themselves do not allude to ownership of the water. It is suggested that the understanding of the Indians, as indicated in the responses obtained, was that water was not considered subject to ownership, and this could neither be given up nor retained. Water was merely subject to the right to its use, including the right to fish. As observed by Black Hawk:

My reason teaches me that land cannot be sold. The Great Spirit gave it to his children to live on and cultivate as far as necessary for their subsistence; and so long as they occupy and cultivate it, they have a right to the soil, but if they voluntarily leave it, then any other people have the right to settle upon it. Nothing can be sold but such things as can be carried away.¹⁶

The Effect of Treaties

The language of the treaties provides for the surrender of rights to *lands* included within the specific limits. At common law, a grant of land was subject to the presumption *cuicumque aliquid conceditur, conceditur etiam id sine quo res ipsa non esse potuit* — when anything is granted, all the means to attain it, and all the fruits and effects of it are granted also; and shall pass inclusive, together with the thing, by the grant of the thing itself.¹⁷ A surrender of title to land at common law presumatively entailed a surrender of water rights appertaining to the land, subject to the expression of a contrary intention.¹⁸ At common law, as in Indian traditional law, water itself was not the subject of property or ownership.

It is, accordingly, submitted that the effect of the surrender provision of the treaties was not to surrender the water itself, but that it did operate as an extinguishment of rights to the water except to the extent indicated in the treaties. The denial of the surrender of the water itself is, of course, considered to reconcile Indian and Crown understanding of the treaties.

14. *Id.*, at 63.

15. *Id.*

16. Black Hawk, "The Life of Black Hawk", in *Indians and Their Lands — A Legacy of Broken Promises* (B. Lauschway ed.) 4-5. See also, E. Bennett, *Customary Law of the Cree*, (1978) unpublished paper College of Law, University of Saskatchewan).

17. 11 *Hals.* (3d) para. 694. See also *Earl of Cardigan v. Armitage* (1823), 2 B. & C. 197.

18. See 39 *Hals.* (3d) para. 658.

Indian rights to water are considered to be expressly retained by treaty in two areas: reserves, and fishing and trapping regions. With respect to reserves, it is clear that it was intended that they should form a land base appropriate for the development of farming, even including those areas in Northern Saskatchewan subject to treaties #8 and #10. Specific reference is made in the treaties to "farming lands" and to the provision of farming equipment. It is submitted that the treaties assured the Indian bands water rights sufficient for the economic development of the reserve lands particularly with respect to farming. Since riparian ownership of land would not entitle an Indian band to sufficient water for irrigation without injury to a lower riparian owner,¹⁹ the treaties purported to authorize such usage.

The decisions of the United States Supreme Court appear directly applicable and most helpful in the construction of the treaties. In *Winter v. United States*,²⁰ the Court concluded that water rights to irrigate the Fort Belknap Reservation in Montana on the Milk River were reserved by an agreement or treaty with the Indians in 1888, thereby enabling the Indians "to become a pastoral and civilized people."²¹

The case involved a suit brought by the United States to restrain Henry Winter, *et al.*, from constructing or maintaining dams or reservoirs on the Milk River in the State of Montana, or in any manner preventing the water of the river, or its tributaries from reaching the Fort Belknap Indian reservation. The Milk River, a non-navigable stream, was designated as the northern boundary of the reservation pursuant to an agreement with the Indians, which was ratified by Act of Congress on May 1st, 1888. Since July 5th, 1898, the Indians had diverted water of the Milk River for the purpose of irrigating 30,000 acres. The defendants had sought to divert the water by the construction of dams and reservoirs in 1900 under state appropriate laws.

The United States Supreme Court declared the absolute power of the federal government to withdraw lands and rights to water from state appropriation.

The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. *The United States v. Rio Grande Ditch & Irrig. Co.*, 174 U.S. 690; *United States v. Winans*, 198 U.S. 371. That the Government did reserve them we have decided, and for a use which would be necessarily continued through years. This was done May 1, 1888, and it would be extreme to believe that within a year Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste — took from them the means of continuing their old habits, yet did not leave them the power to change to new ones.²²

The issue in the case turned on the interpretation of the agreement of May, 1888, resulting in the creation of Fort Belknap Reservation. In language which is most appropriate to the consideration of the treaties in the prairies in Canada, the Court observed:

19. See *Id.*, para. 690.

20. (1908), 207 U.S. 564; 52 L.Ed. 340; 28 S. Ct. 207.

21. *Id.*, at 576; 52 L.Ed. at 346; 28 S. Ct. at 211.

22. *Id.*, at 577; 52 L.Ed. at 346-7; 28 S.Ct. at 212.

In the construction of this agreement there are certain elements to be considered that are prominent and significant. The reservation was a part of a very much larger tract which the Indians had the right to occupy and use and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the Government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such the original tract was too extensive, but a smaller tract would be inadequate without a change of conditions. The lands were arid and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the Government. The lands ceded were, it is true, also arid; and some argument may be urged, and is urged, that with their cession there was the cession of the waters, without which they would be valueless, and 'civilized communities could not be established thereon'. And this, it is further contended, the Indians knew, and yet made no reservation of the waters. We realize that there is a conflict of implications, but that which makes for the retention of the waters is of greater force than that which makes for their cession. The Indians had command of the lands and the waters — command of all their beneficial use, whether kept for hunting, 'and grazing, roving herds of stock', or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?²³

The Supreme Court had no difficulty in concluding that the water rights on the Milk River were reserved to ensure the ability of the Indians "to become a pastoral and civilized people" through irrigation. The Supreme Court buttressed its conclusion by reference to the relationship of the Indians and the federal government:

By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it. On account of their relations to the Government, it cannot be supposed that the Indians were alert to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the Government, even if it could be supposed that they had the intelligence to foresee the 'double sense' which might some time be urged against them.²⁴

Subsequent decisions²⁵ have affirmed the decision in *Winter*. Most recently the United States Supreme Court in *Arizona v. California*²⁶ applied the doctrine in considering the water rights of the Colorado River Indian Reservation created partly by Act of Congress and partly by executive order. The Court declared:

Most of the land in these reservations is and always has been arid. If the water necessary to sustain life is to be had, it must come from the Colorado River or its tributaries. It can be said without overstatement that when the Indians were put on these reservations they were not considered to be located in the most desirable area of the Nation. It is impossible to believe that when Congress created the great Colorado River Indian Reservation and when the Executive Department of this Nation created the other reservations they were unaware that most of the lands were of the desert kind — hot, scorching sands — and that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised The question of the Government's implied reservation of water rights upon the creation of an Indian Reservation was before this Court in *Winters v. United States*, 207 U.S. 564 decided in 1908. Much the same argument made to us was made in *Winters* to persuade the Court to hold that Congress had created in In-

23. *Id.*, at 575-6; 62 L.Ed. at 346; 28 S.Ct. at 211.

24. *Id.*, at 576-7; 52 L.Ed. at 346; 28 S.Ct. at 211-12.

25. See *United States v. Winans* (1905), 198 U.S. 371; 49 L.Ed. 1089; 25 S.Ct. 662; *Skeem v. United States* (1921), 273 F. 93 (Idaho C.A. -9); *United States v. Powers* (1939), 305 U.S. 527; 83 L.Ed. 330; 59 S.Ct. 344.

26. (1963), 373 U.S. 546; 10 L.Ed. (2d) 542; 83A S.Ct. 1468.

dian Reservation without intending to reserve waters necessary to make the reservation livable. The Court rejected all of the arguments. . . . The Court in *Winters* concluded that the Government, when it created that Indian Reservation, intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless. *Winters* has been followed by this court as recently as 1939 in *United States v. Powers*. We follow it now and agree that the United States did reserve the water rights for the Indians effective as of the time the Indian Reservations were created. This means, as the Master held, that these water rights, having vested before the Act [Boulder Canyon Project Act] became effective on June 25, 1929, are 'present perfected rights' and as such are entitled to priority under the Act.²⁷

The quantity of water reserved for the use of the Indians is dependent upon the intent of the Government in the treaty, agreement, statute, or executive order. In *Arizona v. California*, with regard to the reservation therein concerned, it was observed "that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage."²⁸

The treaties of the Prairies can readily be construed, as in the United States, to require the reservation of water rights upon the selection of reserve lands, so as to further the design of the treaties. Support for this analysis is found in a commentary on the 1969 Atlas of Saskatchewan:

The land [reserves] was chosen by the Indians themselves, government surveyors helping only to ensure that they had a reasonably well-balanced array of natural resources such as land, timber and water. This is an important reason why, aside from security they were generally located or relocated away from the semi-arid south-western part of the province.²⁹

Water rights on reserves should not be confined to irrigation, but should be determined in accordance with the intent and purpose of the treaty — "reserving for them the waters without which their lands would have been useless."³⁰ Such water rights might be construed to extend to hydro electric power and other aids to economic development, especially in instances of contemporary reserve land selection.

Indian rights to hunt, trap and fish were assured to them in the treaties and in the oral explanations thereof. To that extent, the treaties clearly reserved Indian water rights outside reserve lands. Such treaty rights are subject to the Natural Resources Agreements which sought only to protect from provincial jurisdiction the right to hunt, trap and fish for food. The federal *Fisheries Act*³¹ and regulations have gone far to deny even that limited protection. Water rights with respect to trapping and fishing have clearly been violated by such federal and provincial legislation. A more appropriate result would be the analysis adopted in the furtherance of the fishing rights of treaty Indians in the State of Washington:

The state may [only] interfere with the Indians' right to fish when necessary to prevent the destruction of a run of a particular species in a particular stream

. . . .

27. *Id.*, at 596-600; 10 L.Ed. (2d) at 577-8; 83A S.Ct. at 1497-8.

28. *Id.*, at 601; 10 L.Ed. (2d) at 578; 83A S.Ct. at 1498; *But cf. United States v. Walker River Irrigation* (1939), 104 F. (2d) 334 (C.A.-9); *Cappaert v. United States* (1976), 426 U.S. 128; 48 L.Ed. (2d) 523; 96A S.Ct. 2062.

29. S. Raby, "Saskatchewan Indian Communities" in *Atlas of Saskatchewan* (J. Richards and K. Fung eds. 1969), at 176.

30. *Supra* n.28, at 600; 10 L.ed. (2d) at 578; 83A S.Ct. at 1498.

31. R.S.C. 1970, c. F-14.

Direct regulation of treaty Indian fishing in the interests of conservation is permissible only after the state has proved unable to preserve a run by forbidding the catching of fish by other citizens under its ordinary police power jurisdiction.³²

No further comment will be offered upon Indian trapping and fishing rights. Such rights have been the subject of extensive consideration elsewhere and are not governed by the water control legislation which is of such great significance in the remainder of this study.

Indian Rights to Use Water: The North-west Irrigation Act and the Breaking of the Treaty Promises

Indian Bands as Riparian Owners

The Indian treaty right to water use is in addition to that right which may be founded upon ownership of land adjoining a river, stream or lake, i.e., riparian rights. The *Indian Act* defines a reserve as "a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band."³³ And pursuant to section 18(1), "subject to this Act reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart." The *Act* further provides for band allotment of reserve lands to band members,³⁴ the use of the reserve for band projects,³⁵ and the harvesting of reserve resources for the land and band members.³⁶

The *Indian Act* was derived from the Indian land policy declared in the Royal Proclamation of 1763 and its recognition of "Indian title." It is, therefore, not surprising that in construing Quebec legislation providing for the establishment of reserves the Supreme Court of Canada should have declared, in obiter, "that the right recognized by statute is a usufructuary right only and a personal right in the sense that it is in its nature inalienable except by surrender to the Crown."³⁷ This suggestion of the scope of Indian title to reserve lands has been criticized by Berger J. in *Mathias v. Findlay*, wherein the learned judge observed that the "idea of the usufruct . . . was never regarded as a means for defining, even by analogy, the tenure of Indian bands to reserve lands."³⁸ The court concluded that by interest and by statute possession of reserve lands was in the band not the Crown. In conformity with such opinion the Exchequer Court declared in *Brick Cartage v. The Queen*³⁹ that the Crown had a bare legal title and that "[F]or all practical purposes, possession by an Indian band of land is of the same effect in relation to day to day control thereof as possession of land by any person owning the title in fee simple."

It is not possible to state the current precise quality of the property interest of a band in reserve lands as recognized by the courts. It is necessary

32. *United States v. Washington* (1975), 520 F. (2d) 676, at 685-6 (C.A.-9); cert. denied (1976), 423 U.S. 1086; 47 L.Ed. (2d) 97; 96 S.Ct. 877.

33. R.S.C. 1970, c. 1-6, s.2(1).

34. R.S.C. 1970, c. 1-6, ss.20-28.

35. R.S.C. 1970, c. 1-6, ss.18(2), 19.

36. R.S.C. 1970, c. 1-6, ss.57, 58, 62.

37. *A.G. for Quebec v. A.G. for Canada* (Star Chrome Case), [1921] 1 A.C. 401, at 408 (P.C.). See also *St. Ann's Island Shooting and Fishing Club v. The King*, [1950] S.C.R. 211, at 219; *Isaac v. Davey* (1974), 51 D.L.R. (3d) 170 (Ont. C.A.); aff'd. on another ground (1977), 77 D.L.R. (3d) 481 (S.C.C.).

38. [1978] 4 W.W.R. 653 (B.C.S.C.), at 656.

39. [1965] 1 Ex. C.R. 102, at 106-07.

to determine, however, whether the possible variations described above deny the status of a riparian owner to an Indian band. It has been suggested that riparian rights are founded upon the right of access to the water.⁴⁰ Accordingly, riparian rights have been recognized in tenants-at-will⁴¹ and lessees.⁴² Upon such authority LaForest declared that riparian rights were possessed by whoever lawfully occupied riparian land.⁴³ It is submitted that the *Indian Act* provides for possession of reserve lands in the band and by band members. Section 20 provides for lawful possession of individual band members upon the allocation by the band council of reserve land, and section 31(3) specifically preserves the common law rights of an Indian or band to prevent unlawful occupation. This was the conclusion reached by Berger J. in *Mathias v. Findley*.⁴⁴ A band has possession of all reserve land, including riparian land, subject to its allotment to an individual member or appropriation for band purposes. Such possession obviously includes the right of access upon which riparian rights are founded.

Riparian rights accrued at common law to the riparian tenement adjoining the river, stream or lake. Treaties #1, #2, #5 and #7 specifically provided that reserves were to be set apart upon the shores of designated rivers. Reserves were set apart pursuant to the other treaties after consultation with the Indian bands who often desired to be located upon the shore of a particular body of water. For example, the surveyed boundaries of the reserves set apart in the Qu'Appelle Valley follow the banks of the Qu'Appelle River and lakes.

Indian bands may claim water rights on the basis of both treaty and ownership of riparian land. The treaty right to water is an ill-defined right to use of water for the development of reserve lands. Riparian rights have been classified by LaForest as follows:⁴⁵

- 1) right of access to water
- 2) rights of drainage
- 3) rights relating to flow of water
- 4) rights relating to quality of water
- 5) rights relating to use of water
- 6) right of accretion.

The right to flow and quality of water has been classically described as the entitlement of the riparian owner to have the flow of water reach his lands "without sensible alteration in its character or quality."⁴⁶ At common law, the riparian owner did not, of course, own the water, but might make use of it for domestic purposes without incurring liability to other owners. Extraordinary use of the water, for example, for irrigation or driving a mill, was only permissible if reasonable and if the water was restored to the stream substantially undiminished in quality and quantity. It is submitted

40. See *Re Snow and Toronto* [1924] 4 D.L.R. 1023 (Ont. S.C. App. Div.), at 1027; *Lyon v. Fishmonger's Co.* [1875-6] 1 A.C. 662 (H.L.).

41. See *Phair v. Venning* (1882), 22 N.B.R. 362; *Burgess v. City of Woodstock* [1955] O.R. 814.

42. See *Byron v. Stimpson* (1878), 17 N.B.R. 697.

43. LaForest "Water Law in Canada" (1973) 201.

44. *Supra* n.38.

45. *Supra* n.43.

that Indian treaty right to water is considerably in excess of that permitted upon the basis of riparian ownership of land.

The North-west Irrigation Act 1894

In 1894, the Federal Government enacted legislation designed to abolish the common law notions of riparian ownership and introduce governmental regulation of water use upon the basis of a "prior appropriation" licensing scheme. The Minister of the Interior, in introducing the *North-west Irrigation Act*, declared:

It has been found in regard to irrigation in California that the question of riparian rights has given rise to more litigation than any other matter, and millions have been expended on it. The necessity for irrigation has arisen in the North-west Territories in that portion lying between the international boundary on the south and the Missouri Coteau on the east, which would cross the Canadian Pacific Railway at Mortlake, and run up the Bad Hills and from there to the Rockies, covering forty-three million acres, and, therefore, it is necessary that measure [sic] of this kind should be passed and particularly as regards that portion of the North-west to which the Bill will be applicable. Irrigation has been commenced there on a small scale and has been productive of much benefit. At a meeting of the Irrigation League at Calgary resolutions were passed as follows: —

That this Convention, consisting of representatives of the agricultural and commercial of Central and South Alberta, desirous to impress upon the Dominion Government the importance of irrigation to the portion of the North-west Territories in question and the desirability of all action possible being taken by the Dominion Government and Parliament for the promotion thereof.

That in the opinion of this Convention it is most desirable in the best interests of the North-west Territories that a statute should be passed of the Dominion of Canada in which it shall be enacted that from and after the passing of such statute no person or corporation shall take, acquire, receive, or become entitled to any riparian right in any rivers free, watercourse, lake, creek, canyon, lagoon, swamp or marsh.

That this Convention impresses on Parliament the necessity of adequate protection of all existing water rights in the events of applications of irrigation charters. The clauses in the present Bill will meet the views expressed by the Irrigation League at their convention.

. . . .
It was found that unless the principle was laid down that the right to the use of water at any time in any river, stream, watercourse or body of water vested in the Crown, should be held by the Crown to be disposed of as it saw fit, that it would lead to interminable litigation and to the troubles the people of Carlifornia [sic] had experienced.⁴⁷

Initially the *Act* applied throughout the North West Territories, which at the time did not include Keewatin. Keewatin was the District created in 1876 and governed by the Lieutenant Governor of Manitoba⁴⁸ which comprised the territory that is now Northern Manitoba. In 1905, Keewatin was annexed to the North West Territories by proclamation⁴⁹ and, thus, became subject to the *North-west Irrigation Act*. The *Act* continued to apply to the Provinces of Alberta and Saskatchewan upon their creation in 1905.⁵⁰ The

46. *Young v. Bankier Distillery Co.*, [1893] A.C. 691, at 698 (per Lord MacNaughten).

47. H.C. Debates., June 25, 1894, at p. 4950-51.

48. *Keewatin Act*, S.C. 1876, c. 21.

49. Proclamation July 24, 1905, S.C. 1905-6, p. xiv, Canada Gazette, Vol. 39, p. 371.

50. *Irrigation Act*, R.S.C. 1906 c. 61; *Alberta Act*, S.C. 1905, c.3, s.21; *Saskatchewan Act*, S.C. 1905, c.42, s.21.

*Manitoba Boundaries Extension Act 1912*⁵¹ extended the boundaries of Manitoba to the sixtieth degree of north latitude including much of the territory that had comprised Keewatin. The *Act* provided, as had the *Alberta Act* and the *Saskatchewan Act*, that "the interest of the Crown under the Irrigation Act in the waters within such territory, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada." Southern Manitoba, delineated in the 1881 *Manitoba Boundaries Extension Act* as lying north of the fifty-third degree of north latitude, was never subject to the *Irrigation Act*.

The North-west Territories Irrigation Act, 1894,⁵² deemed all property and rights of use in any river or waterbody to be vested in the Crown except to the extent an inconsistent private right of use was established. Any person holding water rights "for domestic, irrigation or other purposes" was required to obtain a license in respect of such right by July 1, 1896; failing the obtaining of such license the water rights were forfeited to Her Majesty. After the passing of the *Act*, acquisition by riparian title or Crown grant of water rights was barred except in pursuance of an "agreement or undertaking" existing at the time of passing of the *Act*. The effect of the statute was to abrogate the common law notion that water was not the subject of ownership and the common law concept of riparian rights.

51. S.C. 1912, c. 32.

52. S.C. 1894, c. 30 as am. by S.C. 1895, c. 33. Sections 4-9 provide:

4. The property in and the right to the use of all the water at any time in any river, stream, watercourse, lake, creek, ravine, canon, lagoon, swamp, marsh or other body of water shall for the purposes of this Act, be deemed to be vested in the Crown unless and until and except only so far as some right therein, or to the use thereof, inconsistent with the right of the Crown and which is not a public right or a right common to the public, is established; and save in the exercise of any legal right existing at the time of such diversion or use, no person shall divert or use any water from any river, stream, watercourse, lake, creek, ravine, canon, lagoon, swamp, marsh or other body of water, otherwise than under the provisions of this Act.

5. Except in pursuance of some agreement or undertaking existing at the time of the passing of this Act, no grant shall be hereafter made by the Crown of lands or of any estate, in such terms as to vest in the grantee any exclusive or other property or interest or in any exclusive right or privilege with respect to any lake, river, stream or other body of water, or in or with respect to the water contained or flowing therein, or the land forming the bed or shore thereof.

6. After the passing of this Act, no right to the permanent diversion or to the exclusive use of the water in any river, stream, watercourse, lake, creek, ravine, canon, lagoon, swamp, marsh or other body of water, shall be acquired by any riparian owner or any other person by length of use or otherwise than as it may be acquired or conferred under the provisions of this Act, unless it is acquired by a grant made in pursuance of some agreement or undertaking existing at the time of the passing of this Act.

7. Except for domestic purposes, as hereinafter described, every person who holds water rights of a class similar to those which may be acquired under this Act or who, with or without authority, has constructed or is operating works for the utilization of water, shall obtain a license or authorization under this Act before the first day of July, one thousand and eight hundred and ninety-six.

2. If such license or authorization is obtained within the time limited, the exercise of such rights may thereafter be continued, and such works may be carried on under the provisions of this Act, otherwise such rights or works, and all the interest of such person therein, shall without any demand or proceeding be absolutely forfeited to Her Majesty and may be disposed of or dealt with as the Governor in Council sees fit.

3. The application for such license or authorization shall be made in the same manner as for other licenses or authorization under this Act, and the like proceedings shall be had thereon and the like information furnished in connection therewith.

8. Any water the property in which is vested in the Crown may be acquired, for domestic, irrigation, or other purposes, upon application therefor as hereinafter provided; and all applications made in accordance with the provisions of this Act shall have precedence, except applications under section seven, according to the date of filing them with the agent, if for the same purpose, but not otherwise.

2. The purposes for which the right to water may be acquired are of three classes, namely: First, domestic purposes, which shall be taken to mean household and sanitary purposes and the watering of stock, and all purposes connected with the working of such railways or factories by steam, but shall not include the sale or barter of water for such purposes; second, irrigation purposes; and third, other purposes.

3. Applications shall have precedence in this order irrespective of the date of filing, so that all applications for domestic purposes shall have precedence of all those for irrigation and other purposes, and all applications for irrigation purposes shall have precedence of all those for purposes within the third class.

9. No application for any purpose shall be granted where the proposed use of the water would deprive any person owning lands adjoining the river, stream, lake or other source of supply of whatever water he requires for domestic purposes.

The Breaking of the Treaty Promises

Section 7 of the *Irrigation Act* declared a forfeiture to the Crown of "water rights of a class similar to those which may be acquired under this Act" which were not authorized by license by July 1, 1896. It does not appear that the Department of Indian Affairs applied for any licenses to protect Indian water rights in the Prairies. Accordingly, Indian treaty and riparian rights to water appear to have been confiscated by federal legislation shortly after having been granted. In *Western Canada Ranching v. Department of Indian Affairs*,⁵³ the Kamloops Band was denied an allotment of water flowing through the reserve on the basis of riparian rights because they failed to establish any record or license to the water under the governing legislation.

The question arises whether the abolition of water rights of the Indian bands represents a violation of the surrender provisions of the *Indian Act*. Riparian rights constitute proprietary rights attaching to ownership of the land adjoining the water.⁵⁴ The *Indian Act* has always contained a provision barring the disposition of reserve lands without a formal surrender by a band. For example, section 25 of the 1876 Act provided "No reserve or portion of a reserve shall be sold, alienated or leased until it has been released or surrendered to the Crown for the purposes of this Act."⁵⁵ "Reserve" was defined as "a tract of land set apart by treaty or otherwise."⁵⁶ The surrender provisions of the *Indian Act* sought to maintain the Crown policy established by the Royal Proclamation of 1763 which avoided abuse of Indian land rights by barring disposition except to the Crown under prescribed circumstances. Only in 1951 was statutory protection from expropriation under federal or provincial authority introduced. It is submitted that the surrender provisions afford no bar to the application of the system of water rights established by the *Irrigation Act*.⁵⁷ Such confiscation of expropriation of riparian interest lies outside the ambit of the surrender provisions. Federal authority, if clearly enough expressed, may accordingly deny the Indian interest.⁵⁸ The *Irrigation Act* appears to be a statute of general application which makes no provision whatever for special groups. Unlike the *Dominion Lands Act*,⁵⁹ enacted earlier, it makes no special provision for Indian lands. It is difficult to argue that the Indian riparian interest is distinct from those of other riparian owners and was not intended to be subject to the *Act*. It may be suggested that there is not a sufficiently "clear and plain" intention to apply the *Irrigation Act* to Indian lands in violation of the treaties, but previous decisions by the Supreme Court⁶⁰ in the reconciliation of Indian treaties and federal legislation do not favour such an argument.

53. [1921] 2 W.W.R. 834 (B.C.C.A.).

54. *Supra* n.43.

55. S.C. 1876, c. 18, s. 25.

56. S.C. 1876, c. 18, s.3(b).

57. See *Western Canada Ranching v. Dept. of Indian Affairs* (1921), 60 D.L.R. 360; [1921] 2 W.W.R. 834; 30 B.C.L.R. 25 (C.A.).

58. See *Calder v. A.G. of British Columbia*, [1973] S.C.R. 313; 34 D.L.R. (3d) 145 (S.C.C.).

59. S.C. 1872, c.23.

60. See e.g., *Queen v. George* [1966] S.C.R. 267; 55 D.L.R. (2d) 386.

The forfeiture of Indian water rights by the *Irrigation Act* is confined to reserves established before July 1, 1896, in the areas surrendered by Treaties #4, #5, #6 and #7. The legislation was also effective, despite the promises of the Treaty Commissioner, to deny the accrual of treaty or riparian rights to water in the Northern reaches of the prairie provinces pursuant to treaties or adhesion signed after July 23, 1894, i.e., adhesion to treaty #5 in Northern Manitoba (1909), Treaty #8 (1899) and Treaty #10 (1906).

The *Irrigation Act* excepted "agreement[s] or undertaking[s] existing at the time of the passing of this Act"⁶¹ from the ban upon the acquisition or grant of water rights after the passing of the *Act*. The exception created an anomalous category of reserve lands set apart after July 1, 1896, but pursuant to a treaty existing on July 23, 1894. The treaties with the Indians of the Prairies readily may be considered an "agreement or undertaking" within the ambit of the exception. Following the language of Lord Watson in *A.G. of Canada v. A.G. of Ontario*⁶² the treaties with the Indians have repeatedly been recognized as being in the nature of a "promise and agreement." Accordingly, the setting apart of reserve lands after July 1, 1896 pursuant to treaties or adhesion thereto signed before July 23, 1894 entailed the treaty and riparian rights to water incidental thereto.

The area surrendered by Treaties #1, #2 and #3 was within the border of Manitoba at the time of the enactment of the *North-west Irrigation Act*. Indian treaty and riparian rights in that region were accordingly not abrogated by the legislation.

The *Irrigation Act* did preserve limited water rights for riparian landowners. Section 9 of the 1894 *Act* barred the issuance of a license for a proposed use of water if it would deprive a riparian landowner of "whatever water he requires for domestic purposes." "Domestic" as defined by section 8 contemplated house-hold and sanitary uses, stock-watering, and use in steam engines in railways and factories. It did not include irrigation.

Provincial Regulation of Indian Water Rights

(a) Ultra Vires

The provisions of the *Irrigation Act*, described above, remained substantially unchanged until they ceased to apply upon the enactment of the *Natural Resources Transfer Agreements* in 1930. The *Agreements* declared that "the interest of the Crown in the waters . . . under the North-west Irrigation Act, 1898 . . . shall . . . belong to the province, subject to any trusts existing in respect thereof and to any interest other than that of the Crown."⁶³

The interest of the Crown was subject to the anomalous rights of bands possessed or entitled to reserves set apart after July 1, 1896 but pursuant to a treaty signed prior to July 23, 1894. It is submitted that provincial legislation is *ultra vires* to the extent that it would seek to expropriate, confiscate

61. S.C. 1894, c. 30 as am. by S.C. 1895, c. 33, s.5.

62. [1897] A.C. 199 (P.C.).

63. S.S. 1930, c. 87, as am. by S.S. 1938, c. 14; S.M. 1930, c. 30, as am. by S.M. 1938, c. 27; S.A. 1930, c. 21 as am. by S.A. 1938, c. 14.

or regulate the water rights of reserve lands in that anomalous category. Such conclusion is applicable, *a fortiori*, to reserves set apart pursuant to outstanding treaty land entitlement after 1930.

In order to satisfy outstanding Indian treaty land entitlement, the *Natural Resources Transfer Agreements* provided:

... the Province will from time to time, upon the request of the Superintendent General of Indian Affairs, set aside, out of the unoccupied Crown lands hereby transferred to its administration, such further areas as the said Superintendent General may, in agreement with the appropriate Minister of the Province, select as necessary to enable Canada to fulfill its obligations under the treaties with the Indians of the Province, and such areas shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province under the provisions hereof.⁶⁴

The *Natural Resources Transfer Agreement* imposes an obligation upon each of the Prairie Provinces to set aside areas selected by the Superintendent General "in agreement" with the Province. The obligation is imposed by Imperial and concurrent Federal and Provincial statutes and can only be varied by concurrent statutes of the Federal and Provincial legislatures. It is well settled that a Province cannot unilaterally vary the obligations imposed by the *Agreement*.⁶⁵ It is arguable, of course, that, despite any understanding at the time of treaty, the only obligation on the Provinces is to set aside land *not* water rights incidental thereto. Moreover, treaty entitlement cannot claim to be a trust to which the Provinces' property in water is subject; the Privy Council rejected any such suggestion in *A.G. for Canada v. A.G. for Ontario*.⁶⁶ However, it is submitted that the better conclusion is that water rights attaching to lands set aside *are* within the ambit of the Provincial obligation. Certainly, the *Agreements*, in referring to "areas", did not intend to deny the obligation in respect of treaty or riparian rights. Water rights were specifically transferred to the Provinces by the *Agreements* but only by the 1938 amendments which sought to quiet doubts that this had not clearly been done. The canons of construction of the common law demand that the obligation extend to the water rights appurtenant to the "areas" set aside.⁶⁷ Clause 11 of the Alberta and Saskatchewan *Agreements* and Clause 12 of the Manitoba *Agreement* specifically refer to that clause of the 1924 Ontario *Agreement*⁶⁸ which provides for the disposition of hydro power upon Indian reserves and states that it applies to "lands" included in Indian reserves. Such reference assumes that the term "lands" embraces treaty or riparian rights incidental thereto. Most significantly, the provisions of the *Agreements* seek to "enable Canada to fulfill its obligations under the treaties with the Indians;" this surely demands a construction of the obligation imposed upon the Provinces that extends to the water rights promised by treaty.

A peculiarity of the water use regime in Manitoba is that the *Irrigation Act* was never applied in Southern Manitoba. Accordingly, upon the enactment of the first *Water Rights Act*⁶⁹ in Manitoba, provision was made for a

64. S.M. 1930, c.30, s.10; S.A. 1930, c.21, s.10; S.S. 1930, c.87, s.10.

65. *Daniels v. The Queen*, [1969] 2 D.L.R. (3d) 1 (S.C.C.).

66. *Supra* n.62.

67. 39 *Hals.* (3d) para. 658; 11 *Hals* (3d) para. 694.

68. S.C. 1924, c.48.

69. S.M. 1930, c.47, s. 9(2).

2 year period during which a license might be obtained to authorize previous uses of water. Apart from such authorization the statute provided that "no right to impound, divert, or use water for any purpose . . . shall exist by virtue only of a riparian ownership of land."⁷⁰ It is doubtful that such legislation contemplates Indian treaty rights to water, but it is, in any event, clearly *ultra vires* the provincial legislature to confiscate or abrogate water rights appurtenant to reserve lands. Since federal legislation never operated to restrict such rights in Southern Manitoba it is now beyond the competence of the Manitoba legislature to do so.

In summation, it is submitted that Indian treaty and riparian rights to water use in respect of (a) reserves set apart after 1896 pursuant to a treaty signed before 1894, (b) outstanding treaty reserve land entitlement after 1930, and (c) reserves in Southern Manitoba, are not subject to provincial water use legislation.

(b) The Provincial Statutes

Upon the transfer of the interest in the lands and waters within the provinces to Alberta, Manitoba and Saskatchewan, the provinces enacted legislation almost identical to the *Irrigation Act* regulating water use in their respective provinces. The provisions have remained substantially unaltered to the present. A Table of Concordance appears as follows:

Irrigation Act 1894 Provision (Canada)	ALTA.		MAN.		SASK.		
	S.S. 1931 c. 71	R.S.A. 1970 c. 388	S.M. 1930 c. 47	R.S.M. 1970 c. W80	S.S. 1931 c. 17	R.S.S. 1938 c. W-8	
Crown Ownership & Right to Use	s. 4	s. 5(1)	s. 5(1)	s. 6(1)	s. 7(1)	s. 6	s. 7(1)
Bar on Crown Grants Thereafter	s. 5	s. 7	s. 8	s. 7	s. 9	s. 8	s. 11
Bar on Acquisition of Riparian Rights Thereafter	s. 6	s. 8	s. 9	s. 8	s. 10	s. 9	s. 12
Crown Forfeiture of Existing Rights if Not Provided by License	s. 7	— —	— —	s. 9(2)	s. 11(2)	— —	— —
Preservation of Riparian Domestic Use	s. 9	s. 5(2)	s. 5(7)	s. 11	s. 13	s. 15	s. 16

All three provinces also introduced an absolute bar upon Crown disposition of water rights, except in accordance with the provincial water rights legislation, by specific provision in the respective provincial lands statutes.⁷¹ This provision appears redundant in light of the bar upon Crown grants enacted in the water rights legislation and may explain the deletion of the section from the Manitoba legislation.⁷²

70. S.M. 1930, c.47, s. 9(4); R.S.M. 1970, c. W80, s.11(2).

71. *The Provincial Lands Act*, S.S. 1931, c.14, s.11, R.S.S. 1978, c.P31, s.16; *The Provincial Lands Act*, S.A. 1931, c.43, s.7; *The Provincial Lands Act*, S.M. 1930, c.32, s.11.

72. *The Crown Lands Act*, R.S.M. 1970, c. C340.

The significance of the provincial water use legislation regarding Indian water rights is its application to waters adjacent to reserve lands or which were promised by treaty for use by the band but which were vested in the Crown by *The North-west Irrigation Act*. This would apply to all reserves in Alberta, Saskatchewan and Northern Manitoba set apart prior to 1930 except those set apart after 1896 pursuant to treaty signed before 1894.

In common with their precursor, *The North-west Irrigation Act*, the water rights legislation of the three provinces establishes a "prior appropriation" licensing scheme whereunder a right to use water for any purpose, except by a riparian owner in respect of domestic use, can only be acquired by a license. The grant of such license vests a right in the grantee who must be compensated in the event of a modification of such right by a subsequent application for a "preferred purpose."⁷³ Accordingly, holders of licenses with respect to water adjacent to or flowing through reserve lands subject to the provincial water regime have a protected and compensable right to the licensed use of the water overruling any claims of the Indian bands, except insofar as domestic uses by the reserves are concerned. Domestic users upon riparian reserve lands are exempted from licensing requirements⁷⁴ and protected from grants of water use to others.⁷⁵ "Domestic" is defined in each jurisdiction to mean household, sanitary and stock watering purposes.⁷⁶ If an Indian band possessed of reserve lands of the category described above desires to use water, and construct works therefore for other than domestic purposes, it must apply for a license under the statute of the appropriate province and be prepared to compensate any license holder affected by the application.

Water Power

At common law, the owner of the soil of a river or lake and of the land on both sides of it had the right, subject to the rights of other riparian owners and to the public rights of navigation and floating, to maintain a dam thereon.⁷⁷ The use of the water must be reasonable. This has been held to allow for the construction of a hydro-electric dam where overflow was not unreasonably affected to the detriment of the lower riparian owner.⁷⁸ The alteration of the rate and quantity of the flow of waters are factors to be considered in determining if a riparian owner is making unreasonable use of the water. The limits imposed upon water use by the common law would suggest that usually statutory authority was required for the construction and operation of dams.

In 1908, the *Dominion Lands Act* was amended to provide power in the Governor in Council to make regulations providing for the development of water power upon Dominion lands "subject to rights which exist or may be

73. *The Water Rights Act*, R.S.S. 1978, c. W-8, s. 15(4); *The Water Rights Act*, R.S.M. 1970, c. W80, s. 12(4); *The Water Resources Act*, R.S.A. 1970, c.388, s.11(6).

74. *The Water Rights Act*, R.S.S. 1978, c. W-8, s. 8(2); *The Water Rights Act*, R.S.M. 1970 c. W80, s.11(2); *The Water Resources Act*, R.S.A. 1970, c.388, s. 5(4).

75. *The Water Rights Act*, R.S.S. 1978, c.W-8, s.16; *The Water Rights Act*, R.S.M. 1970, c. W80, s.13.

76. *The Water Rights Act*, R.S.S. 1978, c. W-8, s. 2(h); *The Water Rights Act*, R.S.M. 1970, c. W80, s. 2(9); *The Water Resources Act*, R.S.A. 1970, c. 338, s. 2(7).

77. *Roy v. Fraser (1903)*, 36 N.B.R. 113 (C.A.) *Caldwell v. McLaren (1884)*, 9 A.C. 392 (H.L.).

78. *Keith v. Corey (1877)*, 17 N.B.R. 400. *Cf. Brown v. Bathurst Electric and Water Power Company, Limited (1907)*, 3 N.B. Eq. R. 543. See *supra* n.44, at 209.

created under the Irrigation Act.”⁷⁹ The *Act* applied to the “lands of the Dominion of Canada in the provinces of Manitoba, Saskatchewan and Alberta.”⁸⁰ In 1919, comprehensive legislation was introduced by the federal Parliament in the form of *The Dominion Water Power Act*.⁸¹ Section 4 of the statute declared that “the property in and the right to the use of all Dominion water-power are hereby declared to be vested in and shall remain in the Crown,” excepting previous Crown grants. “Dominion water-power” was defined as water-power on lands of the Dominion.⁸² Such lands included all Crown lands in Alberta, Manitoba and Saskatchewan. Indian reserve lands were not Crown lands subject to such legislation. To the very limited extent that the treaty or riparian right to use water was not abrogated by the *Irrigation Act*, an Indian band upon a reserve set apart before 1919 might claim to develop the water power. After 1919 and until the statute ceased to apply in the Prairie provinces “lands of the Dominion upon or within which there is water-power . . . and water-powers and waters thereon” could not be “leased or otherwise granted or conveyed.”⁸³ The setting apart of reserve lands after 1919 and before 1930 did not grant the water power in respect thereof.

As indicated in the discussion of ownership of the water-bed, *infra*, Indian bands possessed of reserves which were set apart by treaty entered into prior to July 23, 1894 are entitled to claim the water-bed *ad medium filium aquae* with respect to non-navigable water. Such ownership would, of course, be effective to bar the construction of dams and other works necessary to the production of hydro-electric power. Section 6 of the 1919 *Act* accordingly provided for expropriation of “any land or any interest therein” so required. It should be observed, of course, that water-power upon *non-navigable* waters may not be regarded as practically significant.

The *Dominion Water Power Act* remained in effect in the Provinces until the *Natural Resources Transfer Agreement* transferred “the interest of the Crown in all Crown lands . . . and the interest of the Crown in the water and water-power within the Province under the Irrigation Act and the Dominion Water-Power Act” to the Provinces.⁸⁴ The provincial Water-Power statutes adopted the language of the federal statute almost verbatim. The Saskatchewan statute presently provides:

5. The property in and the right to use all provincial water powers are hereby declared to be vested in and shall remain in the Crown, saving any rights of property in or to the use of such powers which before the first day of April, 1931 had been granted by the Crown in right of Canada.

79. S.C. 1908, c.20, s.35(2).

80. S.C. 1908, c.20, s.2(a).

81. S.C. 1919, c.19.

82. S.C. 1919, c.19, s.2(a).

83. S.C. 1919, c.19, s.6.

84. S.S. 1930, c.87 as am. by S.S. 1938, c.14; Similar provisions may be found in S.M. 1930, c.30 as am. by S.M. 1938, c.27; S.A. 1930, c.21, as am. by S.A. 1938, c.14.

6. Provincial lands:

- (a) upon or within which there is water power;
- (b) required for the protection of any water power;
- (c) required for the purpose of any undertaking;

and the water powers and waters thereon shall not be open to sale, and, except as hereinafter otherwise provided, no interest therein shall be leased or otherwise granted or conveyed by the Crown; and any grant or conveyance hereinafter made of any such lands or any interest therein, except in pursuance of this Act and the regulations, shall not vest in the grantee any exclusive or other property or interest with respect to such lands, or the water powers or waters thereon.

11. If land or any interest therein is required by the Crown for any undertaking or is necessary for creating, protecting or developing any water power, the Lieutenant Governor in Council may direct the minister on behalf of the Crown to acquire by expropriation the title to such land or interest therein as may be required, and thereupon, for that purpose the minister shall have all the powers conferred upon the Minister of Government Services under *The Public Works Act*"

The Manitoba statute has identical provisions.⁸⁶ The Alberta statute relies upon the general vesting and denial of grants of all water to preclude disposition of water power except as under the statute.⁸⁷

The statutes recognize the Indian rights upon reserves set apart prior to 1919 with respect to water power declared to be exempt from vesting as property of the Crown under *The Dominion Water Power Act*. They do not attempt to extinguish the ownership of the water-bed *ad medium filium aquae* with respect to non-navigable waters of Indian bands possessed of reserves set apart by treaty prior to July 23, 1894. The legislation does, however, confer a power of expropriation of lands required for the harnessing of hydro-electric power. Such power is, of course, ineffective with respect to Indian reserve lands. However, section 35 of the *Indian Act*⁸⁸ provides for the application of provincial expropriation authority where the Governor-in-Council consents.

Outstanding Indian treaty reserve land entitlement is expressed by the provincial legislation of each province to be subject to a prohibition of Crown grants of water-power as lands associated therewith.⁸⁹ The public lands legislation of each province also reserves out of every "disposition" of such lands the water power and associated lands.⁹⁰ It is submitted that provincial legislation cannot be applied so as to unilaterally vary the obligation of the Province to set aside Crown lands to fulfill outstanding treaty land entitlement. And, as submitted above, that obligation should extend to treaty and riparian rights, including water-power, incidental to the lands set aside upon agreement with the Provinces. Moreover, it will be argued below that the setting aside of reserve lands under public lands legislation does not constitute a "disposition".

Section 11 of the Alberta and Saskatchewan *Natural Resources Transfer Agreement* and Section 12 of the Manitoba *Agreement* provides:

85. *The Water Power Act*, R.S.S. 1978, c. W-6.

86. *The Water Power Act*, R.S.M. 1970, c. W70.

87. *The Water Resources Act*, R.S.A. 1970, c.388.

88. R.S.C. 1970, c.1-6.

89. R.S.S. 1978, c. W-6, s.6; R.S.M. 1970, c.W-70, s.7(1); R.S.A. 1970, c.388, s.8.

90. R.S.M. 1970, c. C340, s.5. The reservation in the Manitoba legislation is "subject to express provision to the contrary". R.S.S. 1978, c.P-31, s.15. S.A. 1931, c.43, s.6.

The provisions of paragraphs one to six inclusive and of paragraph eight of the agreement made between the Government of the Dominion of Canada and the Government of the Province of Ontario on the 24th day of March, 1924, which said agreement was confirmed by statute of Canada, fourteen and fifteen George the Fifth chapter forty-eight, shall (except so far as they relate to the Bed of Navigable Waters Act) apply to the lands included in such Indian reserves as may hereafter be set aside under the last preceding clause as if the said agreement had been made between the parties hereto, and the provisions of the said paragraphs shall likewise apply to the lands included in the reserves heretofore selected and surveyed except that neither the said lands nor the proceeds of the disposition thereof shall in any circumstances become administrable by or paid to the Province.⁹¹

Paragraph 8 of 1924⁹² *Agreement* provides:

No water-power included in any Indian Reserve, which in its natural condition at the average low stage of water has a greater capacity than five hundred horsepower, shall be disposed of by the Dominion of Canada except with the consent of the Government of the Province of Ontario and in accordance with such special agreement, if any, as may be made with regard thereto and to the division of the purchase money, rental or other consideration given therefor.

Water-power may arise as an incident of reserve land if (i) set apart after July 1, 1896, and before June 6, 1919, pursuant to a treaty entered into prior to July 23, 1894; (ii) set apart after 1930; (iii) set apart prior to 1919 in Southern Manitoba.

Section 11 of the *Agreement*⁹³ provides for provincial sharing with respect to reserves set aside after 1930. With respect to "pre-1930" reserves "neither the said lands nor the proceeds of the disposition thereof shall in any circumstances become administrable by or be paid to the Province." The disposition of Indian water-power is subject to the consent of the Province, but only with respect to reserves set apart after 1930 is the Province entitled to share in any consideration arising therefrom. The provision of the *Natural Resources Transfer Agreement* providing for the terms upon which Indian water power shall be disposed of emphasizes, of course, the inclusion in the treaty obligation of the water power associated with the land set apart pursuant thereto.

Ownership of the Water-Bed

The Common Law

By the common law of England, the bed of non-tidal rivers and streams belongs, in the absence of any evidence to the contrary, by presumption of law, in equal moities to the owner of the riparian lands. Each proprietor owns the bed of the river *ad medium filium aquae* — to the centre thread or channels of the stream. The presumption is not rebutted by land descriptions that utilize banks as boundaries.⁹⁴ The ownership of islands follows ownership of the bed. The English rule was applied to the largest lake in the United Kingdom, Lough Neagh, in *Johnston v. O'Neill*.⁹⁵ The different conditions of Western Canada led the Manitoba and Alberta Courts of Appeal not to apply the English Common Law presumption to navigable

91. *B.N.A. Act 1930*, 20-21 George V, c.26 (U.K.).

92. *S.C. 1924*, c.48.

93. *Supra* n.91.

94. *MacLaren v. A.G. for Quebec* [1914] A.C. 258 (P.C.); reversing (1912), 46 S.C.R. 656.

95. [1911] A.C. 552 (H.L.).

waters,⁹⁶ that is, rivers or lakes. The ungranted beds of navigable waters, accordingly, belong to the Crown in the right of the Province pursuant to the *National Resources Transfer Agreement*.⁹⁷

With respect to *non-navigable* water, including lakes, the presumption *ad medium filum* appears to apply,⁹⁸ and it is most obviously recognized where a lake is wholly comprised within a piece of land.⁹⁹ This was affirmed in the Survey Book issued under *The Dominion Lands Survey Act*¹⁰⁰ part of which was quoted in *Flewelling v. Johnston*:

136. Riparian owners whose lands border upon unnavigable waters are held to be the owners of the bed of such waters in front of their holdings *ad filum aquae*. Their rights in this regard may depend to some extent upon the precise terms of description by which their lands have been conveyed to them. An exception is made by *The Irrigation Act* for the provinces of Saskatchewan and Alberta and for the North West Territories, except the provisional districts of Mackenzie, Franklin and Ungava, section 7 of the Act providing that no grant shall be made by the Crown of any exclusive property or right in the land forming the bed or shore of any lake, river, stream or other body of water. The word shore in this section is presumed to be intended to designate that part of the bed which is uncovered when the water is low.¹⁰¹

Beck J. in *Flewelling v. Johnston* concluded as follows:

The surveys made under *The Dominion Lands Surveys Act* and in accordance with the foregoing instructions are the foundation for the issue of Crown patents. It would seem to be proper to revert to these instructions as an assistance in the construction of patents and as indicating the intention of the Department of the Interior in respect of grants.¹⁰²

Contrary authority is provided by the Supreme Court of Canada decision in *The King v. Fares*¹⁰³ which found an intention to exclude the common law presumption in the *Dominion Lands Act* with respect to surveyed, riparian land purchased at a fixed price per specified acre. There was also, in the words of Locke, J. in *Canadian Exploration Limited v. Rotter*¹⁰⁴, "no authority in anyone to give away lands of the Crown or to sell unsurveyed lands" upon that form of transfer. The decision of the Supreme Court in *Canadian Exploration* appears to have confined the influence of the decision in *Fares* to homesteads acquisition, purchase and railway grants. It would seem that the decision in *Fares* should be so restricted insofar as it wholly failed to consider the instructions prepared under *The Dominion Lands Survey Act* and the significance of the specific provisions of the *Irrigation Act*. In any event, the decision in *Fares* appears inapplicable on its own terms to the setting apart of the Indian reserve lands. Duff, J. observed: "Unsurveyed lands are outside the scope of that section [authorized purchase of lands] and I know of nothing in the statute which would permit a grant of unsurveyed lands except under conditions having

96. *Flewelling v. Johnston* (1921), 59 D.L.R. 419; [1921] 2 W.W.R. 374 (Alta. C.A.) (The Pembina River). In *Re Inverson and Greater Winnipeg Water District* [1921] 1 W.W.R. 621 (Man. C.A.) (The Red River).

97. *A.G. of Canada v. A.G. of Ontario, Quebec and Nova Scotia* [1898] A.C. 700 (P.C.); affirming (sub. nom.) *Re Provincial Fisheries* (1896), 26 S.C.R. 444.

98. *Gordon v. Hall and Hall* (1959), 16 D.L.R. (2d) 379 (Ont. H.C.).

99. *Bristow v. Cormican* (1878), 3 App. Cas. 641 (H.C.), per Blackburn, L.J. at 666.

100. S.C. 1908, c.21.

101. [1921] 2 W.W.R. 374 (Alta C.A.), at 383.

102. *Id.*, at 384.

103. [1932] S.C.R. 78; reversing [1929] Ex. Ct. R. 144.

104. [1961] S.C.R. 15, at 32.

no place here.”¹⁰⁵ Reserves were set apart by a survey of the boundary of the land reserved; they were not, however, surveyed into townships and sections as were the remainder of the Dominion lands and were, in that sense, “unsurveyed.” Upon the setting apart of a reserve the Governor in Council was empowered to withdraw the reserved lands from the operations of the *Dominion Lands Act*.¹⁰⁶ The withdrawal of the reserve lands from the operation of the *Dominion Lands Act* seems to emphasize the inapplicability of the reasoning of the Supreme Court in *Fares*.

The boundaries of Indian reserves are described in Nelson’s surveys by the reference to “banks” of rivers and “shores” of lakes. For example, the northern boundary of Reserve #74 Sakimay in the Qu’Appelle Valley in Saskatchewan is described as “south easterly along the said bank of the said [Qu’Appelle] River to Crooked Lake, thereon southeasterly one hundred and fifty chains, more or less along the southern shores of the said lake.”¹⁰⁷ Such description does not deny the application of the principle of ownership of the water bed *ad medium filium aquae*.

The characteristics of what constitutes “navigable” water were described by McRuer, C.J.H.C. in *Gordon v. Hall*:

In the first place, to be regarded as navigable water, it must have something of the characteristics of a highway, that is, it must afford a means of transportation between terminal points, to which the members of the public have a right to go as distinct from a means of transportation between one private terminus and another. In *A.G. Que. v. Fraser*, (1906), 37 S.C.R. 577, at 597, Girouard J. said: “The test of navigability is its utility for commercial purposes.” This is a concise statement of the test applied in the American Courts.¹⁰⁸

McRuer, C.J.H.C. recited with approval comments of Hook, J. in *Harrison v. Fite*:¹⁰⁹

. . . Mere depth of water without profitable utility, will not render a water course navigable in the legal sense, so as to subject it to public servitude, nor will the fact that it is sufficient for pleasure boating or to enable hunters or fishermen to float their skiffs or canoes. To be navigable a water course must have a useful capacity as a public highway of transportation.¹¹⁰

The Red¹¹¹, Pembina¹¹², Winnipeg¹¹³, Saskatchewan¹¹⁴ and Assiniboine¹¹⁵ Rivers have all been held to be navigable. The Churchill River and Lake Winnipeg are obviously navigable waterways.

Reserves set apart prior to 1894 in Alberta, Saskatchewan and Northern Manitoba, and prior to 1930 in Southern Manitoba, may claim the waterbed underlying non-navigable water *ad medium filium aquae*. For instance, the Peigan Indian Band has laid claim to the dam site of an irrigation dam at Brochet, Alberta on the Old Man River. The Old Man River is

105. [1932] S.C.R. 78, at 87.

106. S.C. 1872, c.23, s.105.

107. Nelson, Descriptions and Plans of Indian Reserves in Manitoba and the North West Territories (1889), available through the Department of Indian Affairs, Ottawa.

108. *Supra* n.98, at 382.

109. (1906), 148 F. 781 (Cir.), at 784.

110. *Supra* n.98, at 383.

111. *In Re Iverson and Greater Winnipeg Water District*, *supra* n.96.

112. *Flewelling v. Johnston*, *supra* n.96.

113. *Keewatin Power v. Town of Kenora* (1907), 13 D.L.R. 237, at 242, reversed on other grounds 16 O.L.R. 184 (Ont. C.A.).

clearly non-navigable. The band is seeking \$500,000 in immediate compensation and \$2 per acre each year for irrigated land in the irrigation district.

Statutory Crown Reservation of the Water-bed

The 1894 *North-west Irrigation Act* barred grants thereafter of lands "in such terms as to vest in the grantee . . . the land forming the bed or shore"¹¹⁶ of any water-body, "except in pursuance of some agreement or undertaking existing at the time of passing of this Act."¹¹⁷ The prohibition upon grants of the water-bed applied to Keewatin, subsequently Northern Manitoba, from 1905.

It is submitted that a "grant . . . made by the Crown" includes the setting apart of lands for the establishment of a reserve by treaty. Judicial consideration of the term "grant" is limited, but such as there is supports this suggestion. In *District Registrar v. Canadian Superior Oil*,¹¹⁸ the Supreme Court of Canada, in interpreting the 1913 *Provincial Lands Act* of Manitoba, concluded that "grant" included any form of transfer from the Crown. The case concerned consideration of whether a particular transaction was subject to the reservation of minerals in "grants from the Crown." Rand, J. declared, in language equally appropriate to the reservation of the water-bed:

It seems, therefore, clear that the objects of *The Provincial Lands Act*, providing as it does for the entire administration of Crown lands and contemplating the bringing of Crown lands under the general statute, would be defeated were it to be limited in its application to lands held and disposed of by the Crown as at common law. The administration of so important a natural resource looked obviously to the entire land law as available for its functioning and such a restriction upon its scope as is now suggested must be rejected.¹¹⁹

It is submitted that the reservation of the water-bed in section 5 of the *Irrigation Act* contemplated the administration of the "entire land law", not merely specific forms of alienation by the Crown. This conclusion is supported by the absence of reference to other forms of alienation by the Crown in the *Irrigation Act*, and by the exception of certain "agreements or undertakings" which in itself suggests a broad construction of the term "grant".

The suggestion that the reserves created pursuant to treaty are granted by the treaty is in conformity with the United States jurisprudence.¹²⁰ As the *Corpus Juris Secundum* declares: "Where a treaty contains a grant or reservation to Indians as a grant in praesenti, and the title vests by operation of the treaty."¹²¹ Therefore, one would conclude that the *Irrigation Act* operated to deny the passing of the river-bed to bands obtaining reserves set apart after 1894 and before 1930 unless set apart pursuant to treaty entered into before 1894.

114. *Clarke v. City of Edmonton*, [1929] 4 D.L.R. 1010 (S.C.C.).

115. *Patton v. Pioneer Navigation and Sand Co.* (1908), 21 M.R. 405 (K.B.).

116. The Dominion Lands Survey instruction quoted in *Flewelling v. Johnston*, *supra* n.96, at 383 comments: "The word shore in this section is presumed to be that part of the bed which is uncovered when the water is low."

117. S.C. 1894, c.30, s.5.

118. [1954] 2 S.C.R. 321.

119. *Id.*, at 346.

120. *E.c.*, *New York Indians v. United States* (1898), 170 U.S. 1, L.Ed. 927.

121. 42 C.J.S. "Indians", para. 29.

The *Natural Resources Transfer Agreements* provided that "the interest of the Crown in all Crown lands . . . shall belong to the Province(s) subject to any trusts existing in respect thereof and to any interest other than that of the Crown."¹²² The Agreements retained under the administration of the Government of Canada "all lands included in Indian reserves within the Province, including those selected and surveyed but not yet confirmed." Alberta, Manitoba and Saskatchewan all enacted legislation designed to maintain the bar on Crown grants of the water-bed. The water rights legislation¹²³ of each province adopted verbatim the provision originally introduced in the *Irrigation Act*. The federal *Dominion Lands Act* contained no similar provision, but the provinces chose to repeat the bar on Crown grants of the water-bed in their public lands legislation¹²⁴ in respect of "every disposition." In each case the reservation of the water-bed is "in the absence of express provision to the contrary."

Both the federal and statutory bar on the Crown grant of the water-bed are expressed to be subject to pre-existing "agreements or undertakings." This "treaty" exception to the bar is effective to exclude all reserves set apart pursuant to a treaty or adhesion signed before 1894. Reserves established prior to 1930 pursuant to Treaties #8 (1899) and #10 (1906) and adhesion to other treaties signed after 1894 appear subject to the Crown reservations of the water-bed. They are likely to be located in the northern parts of the provinces.

It has been stated above that the Provinces cannot unilaterally vary the obligation to set aside treaty reserve land entitlement imposed by the *Natural Resources Transfer Agreements*. It is further submitted that the provincial bars on the grant of the water-bed are ineffective to deny the application of the presumption *ad medium filium aquae* to the setting apart of reserve lands after 1930. Support for such conclusion is offered by the "treaty" exception which in the provincial legislation refers to "agreements or undertakings" existing in 1930. Most claims for reserve land entitlement are pursuant to treaties or adhesions signed prior to 1930.

The barrier presented by the provincial public lands legislation to the grant of the water-bed on the setting apart of reserve lands may readily be overcome by express provision to the contrary. In any event, it is submitted that it is inapplicable insofar as satisfaction of outstanding reserve land entitlement does not constitute a "disposition" within the meaning of the legislation. The setting aside of unoccupied Crown lands by the Province to satisfy reserve land entitlement transfers such lands to the administration of the Federal Government. The land is throughout vested in the Crown. In *Re Saskatchewan Natural Resources*, Newcombe, J. declared:

There is only one Crown, and the lands belonging to the Crown are and remain vested in it, notwithstanding that the administration of them and the exercise of their beneficial use may from time to time, as competently authorized, be regulated upon the advice of different Ministers . . .¹²⁵

122. *Supra* n.91.

123. R.S.S. 1978, c. W-8, s.11; S.A. 1931, c.71, s.7; R.S.M. 1970, c. W80, s.9.

124. S.A. 1931, c.43, s.7; R.S.S. 1978, c. P-31, s.12, s.s. 1931, c.14, s.7; R.S.M. 1970, c.340, s.5.

125. [1931] S.C.R. 263, at 275; aff'd, by [1932] A.C. 28, 40 C.P.C. (P.C.). And see G.V. LaForest, *Natural Resources and Public Property under the Canadian Constitution* (1969) 18-19.

The effect of a transfer of administration between the Province and the Federal Government was described by Rinfret, C.J.C. in *A.G. of Canada v. Higbie*:

When the Crown, in the right of the Province transfers land to the Crown, in the right of the Dominion, it parts with no right. What takes place is merely a change of administrative control . . .¹²⁶

Since the Crown does not "part with any right" upon a transfer of administration of provincial lands to the Federal Government, it is not considered a "disposition" subject to the public lands legislation. It is to be observed that the power of the Lieutenant Governor in Council to "set aside" appears to be distinct from the powers of disposition described elsewhere in the legislation, for example, purchase, homestead grant.

The Government of Saskatchewan has recently attempted to clarify this problem by enacting an amendment to *The Provincial Lands Act* as follows:

The setting aside of areas of land pursuant to clause (1)(e) is deemed not to be a disposition of that land for the purposes of:

- (a) this Act; or
- (b) any other Act that:
 - (i) restricts or prohibits the disposition of provincial lands; or
 - (ii) makes any disposition of provincial lands subject to a reservation in favour of the crown or of any other person or class of persons;

but the property in, the right to and the use of all water and water powers in that land and any other property, interests, rights and privileges that the Lieutenant Governor in Council may specify is reserved to the Crown.¹²⁷

It must be observed that the Saskatchewan amendment is, of course, *ultra vires* insofar as it attempts to vary the obligation to set aside reserve lands imposed by the *Natural Resources Transfer Agreement*. Reserve land entitlement is governed by the limits of that obligation, not by the provincial legislature.

Rights of Indian Bands Arising from Ownership of the Water-Bed

All Indian reserves in Alberta, Manitoba and Saskatchewan may claim the water-bed *ad medium filium aquae* under non-navigable waters, except those outside Southern Manitoba that were set apart between 1894 and 1930 pursuant to a treaty signed after 1894.

LaForest points out that the owner of the water-bed has, in general, the same rights of property and is entitled to use it in the same manner as any other landowner, and may erect, subject to the rights of the landowners and public rights of navigation and floating, anything thereon — wharf, bridge, dam.¹²⁸ Such rights of the owner of the water-bed at common law must be considered to have been severely modified by federal and provincial water rights legislation.

Ownership of the water and the power to issue water rights is vested in the Provinces. Such ownership could not arise at common law. Pursuant to such ownership the Provinces have enacted the water rights legislation

126. [1945] S.C.R. 385, at 404.

127. Bill 78, S.S. 1979-80.

128. *Supra* n.43, at 234.

which prohibits the construction of any work entailing the diversion or use of surface water unless authorized by the legislation. Such a provision is considered a valid exercise of the Province's jurisdiction over its resources, i.e. the water, albeit it necessarily entails a restriction of the right of the Indian band to utilize its property, i.e. the water-bed. At common law, the owner of the water-bed could not erect a work that would unreasonably interfere with the flow of water to the damage of lower riparian owners. A riparian owner at common law might alter the course of water provided it was returned to its natural course without injury to lower riparian owners, but the actual ownership of the Province in the water itself would seem to preclude such action by the Indian owners of the water-bed. The limitations placed upon the uses to which the water-bed might be put by the control of water usage under the provincial water rights legislation provoke consideration of the utility of such ownership. In the absence of an ability to construct dams or other works controlling the water or even clearing the water-bed of water, the bands are not in a good position to demand payment for use of the bed by passage of the Province's water. It may be that the incidents attaching to the water-bed and the rights of the Province over the water are properly compromised by limiting the Provincial right to flow water over the water-bed to the natural flow thereof. Such regime would entitle the Indian band to restrain artificially stimulated or altered flow, and is in accord with the common law restrictions upon the drainage of water. In *Groat v. City of Edmonton*, the Supreme Court held that municipal drainage power did "not authorize interference with the inherent right of a riparian owner to have a stream of water 'come to him in its natural state, in flow, quantity and quality' (*Chasemore v. Richards* (1857), 7 H.L.C. 349, at 382) . . ." ¹²⁹ In *Groat*, Rinfret, C.J.C. distinguished "mere natural drainage through pipes arranged to take care of rainwater or melted snow." ¹³⁰

A further objection to the control of the water-bed that the Provinces purport to exercise under water rights legislation is section 81(f) of the *Indian Act*. Section 81(f) confers upon a band council the power to make by-laws "for the construction and maintenance of water courses." The power was introduced into the *Indian Act* in 1879. ¹³¹ It may be argued that the provisions confer exclusive control upon the Indian band to regulate and authorize construction upon the watercourse owned by the band. Such argument falters, however, in the face of the Provincial ownership of the water granted by the *British North America Act* of 1930. ¹³² Since neither the Province nor the band can have exclusive control, joint administration over the waters and water-bed in which the bands have an interest is required, perhaps upon the basis of the compromise suggested above.

The need for joint administration becomes manifest in any consideration of projects which might be constructed upon water-beds owned by the Indian bands. Such projects could not be undertaken without band council authorization, by virtue of Indian ownership thereof and section 81(f) of

129. [1928] S.C.R. 522, at 532.

130. *Ibid.*

131. S.C. 1879, c.34.

132. *Supra* n.91.

the *Indian Act*. The only exception would be the circumstances of expropriation under section 35 of the *Indian Act* which, however, requires the consent of the Governor in Council. In the event that a water control project was built without consent upon the Indian owned water-bed then, as a fixture, it would become the property of the owner of the bed, as, for example, the dam in the Old Man River on the Peigan reserve, Alberta, and possibly the Crooked Lake Water Control structure on Cowesses, Saskatchewan.

Rights of Fishery

The ownership of the water-bed in non-navigable waters ordinarily entails the exclusive right to fish in the waters flowing over it. This was declared and explained by the Privy Council in *A.G. for British Columbia v. A.G. for Canada*. Viscount Haldane stated:

The general principle is that fisheries are in their nature mere profits of the soil over which the water flows, and that the title to a fishery arises from the right to the solum. A fishery may of course be severed from the solum, and it then becomes a profit à prendre in alieno solo and an incorporeal hereditament. The severance may be effected by grant or by prescription, but it cannot be brought about by custom, for the origin of such a custom would be an unlawful act. But apart from the existence of such severance by grant or prescription the fishing rights go with the property in the solum.¹³³

There is no public right to fish in non-navigable waters.¹³⁴

The manner of fishing with respect to both public and private rights is subject to federal jurisdiction, but a federal statute purporting to authorize a grant of a private fishery to a person in waters where the bed is owned by another was held by the Supreme Court of Canada in *R. v. Robertson*¹³⁵ to be legislation respecting property and civil rights within provincial jurisdiction and, hence, *ultra vires*.

To the extent that the bands own the water-bed the bands also have an exclusive right of fishery. The Federal government has no jurisdiction under the legislative head of "Fisheries" to abrogate the Indian right of fishery whatever might be its power under "Indians and lands reserved for Indians." And the Province may not abrogate the Indian right of fishery, nor prevent its accrual upon setting apart reserve lands in the satisfaction of treaty reserve land entitlement.¹³⁶

An owner of a fishery has a right of action against anyone who pollutes the fishery. In *McKie v. K.V.P. Co. Ltd.*, McRuer, C.J.J.Ct. commented:

As owner of that part of the soil in the bed of the river covered by the grant to him of the water lot, he has property rights distinct from all the other plaintiffs. He is the proprietor of a fishery appendant or appurtenant to the ownership of the soil. He has the right to a free passage for fish in his fishery and he has the right to catch as many fish as by his industry and art he can: *Hamilton v. Marquis of Donegall* (1795), 3 Ridgeway 267; *Barke v. Faulkner* (1898), 79 L.T. 24. But he must not in the exercise of his rights do anything to interfere with the rights of persons above or

133. [1916] A.C. 153, at 167.

134. See *In re Inversion and Greater Winnipeg Water District*, *supra* n.96.

135. (1882), 6 S.C.R. 52.

136. The reservation of the right of fishery upon the disposition of provincial lands in *The Provincial Lands Act*, S.A. 1931, c.43, s.11 would accordingly be ineffective.

below him or riparian owners. The defendant having, by the pollution of the river, interfered with his plaintiff's property rights, is liable in damages if he has suffered any, and to be restrained from further interference with those rights: *Aldred's Case* (1610), 9 Co. Rep. 57b at p.59a; 77 E.R. 816.

The right of action for an injunction is not dependent on proof of actual damage. Where interference is shown to exist, damage is presumed.¹³⁷

An injunction was issued to restrain the pollution of a river by a "Kraft" paper mill which had substantially affected fishing in the river. It should be observed that provincial authorization of enterprises that pollute the water cannot deny an action by the Indian bands in the event of interference with Indian property rights.

Recreation

It is submitted that there is no right in the public to utilize waters flowing over the Indian water-bed for recreation. Thus, the Qu'Appelle Valley waters do not constitute navigable water-ways and there is, accordingly, no public right of navigation. In *Gordon v. Hal and Hall*, McRuer, C.J.H.C. quoted with approval the following passage from *Harrison et al. v. Flite*¹³⁸:

Mere depth of water without profitable utility, will not render a water course navigable in the legal sense, so as to subject it to public servitude, nor will the fact that it is sufficient for pleasure boating . . .¹³⁹

The Province owns the water pursuant to the federal *Irrigation Act*, the *British North America Act 1930* and the *Water Rights Act*. None of these statutes provide for or contemplate recreational use of water; they are all directed to use of the water for the development of land pursuits, for example, sanitation, irrigation, industrial. It is submitted that the Provinces cannot authorize recreational use of waters flowing over the Indian water-bed. Such would represent a violation of the Indian ownership of the bed beyond the power and incidents attaching to Provincial ownership of the water. Although this conclusion must be considered as tentative, as it must be recognized that such diffusion of ownership of the water-bed and the water did not arise at common law, what authority there is supports this conclusion.

Public Rights

Public Rights of Navigation

It is clearly settled that in Western Canada there is a public right to navigate navigable tidal and non-tidal waters. The origin of such a right was suggested by Clement, J. in *Fort George Lumber v. Grand Trunk and Pacific Railway*:

It seems to me — to put it very shortly — that the case is governed by the principle laid down in reference to the binding effect upon the Crown of the inducements held out in the proclamation which followed upon the Treaty of Paris in 1763, and laid down by Lord Mansfield in the celebrated case of *Campbell v. Hall*, Coup. 204. The Crown's invitation to all and sundry to "resort" to the British Colonies in North America carried with it, I think, that without which the bread offered would have proved a stone, namely, the *free use of the waterways as the only available highways*

137. [1948] 3 D.L.R. 201 (Ont. H.C.), at 216; varied (on other grounds) by (sub nom. *K. V. P. Co. v. McVie*) [1949] 4 D.L.R. 497 (S.C.C.).

138. *Supra* n.109.

139. *Supra* n.98, at 383.

for exploration and settlement; and, after settlement, for travel and transportation. And the conduct of the early governors was uniformly along the same line of invitation to "come up and possess the land." [emphasis added]¹⁴⁰

At common law, a right of passage upon the land abutting the water-body accrued incidentally to the right of navigation where necessity or usage so demanded. Such a right of passage was clearly severable from ownership of the shore arising as it did from factors entirely independent thereof, i.e., the public right of navigation. The limits of the right are described in Halsbury:

There is no right of stray or of recreation there, and no right to go across the foreshore for the purpose of getting to or from boats, except by such places only as usage or necessity has appropriated for that purpose.¹⁴¹

The nature of the right is clearly declared: "It is not a right of property but a right to pass and repass and to remain for a reasonable period of time."¹⁴²

The only legislature competent to interfere with navigation is the federal Parliament. The *Navigable Water Protection Act*¹⁴³ provides for the regulation of the construction and removal of works and bridges and removing obstruction from navigable waters.

Public Right of Floating

The Canadian Courts have developed a common law right to float logs and other property upon water capable of carrying such matter.¹⁴⁴ Such waters may not be "navigable". The right must be exercised reasonably with regard to the rights of others; thus, in driving logs it must be shown that all reasonable means were adopted to avoid injury. At the same time, a riparian owner must ensure the right of logging is not denied; thus, if a dam is built sluiceways must be provided at common law.

Federal Modification of Public Right of Navigation and Floating

In 1872, the *Dominion Lands Act* was amended to provide a statutory declaration of the public right of floating. Section 64 declared:

The free use, for the floating of saw-logs or other timber rafts, of all streams and lakes necessary for the descent thereof from Dominion lands, and the right of access to such streams and lakes, and of passing and repassing on or beside the land on either side, and wherever necessary portage roads past any rapids or falls, or connecting such streams or lakes, and over such roads as, owing to natural obstacles, are necessary for taking out timber from Dominion lands, and the right of constructing slides where necessary, shall continue uninterrupted and shall not be affected or obstructed by or in virtue of any sale or grant of such lands.¹⁴⁵

The provision remained in effect¹⁴⁶ until succeeded by Provincial regulation. The 1872 statute established:

(1) Right to float timber on all waters necessary to take timber out;

140. (1915), 24 D.L.R. 527 (B.C.S.C.), at 532.

141. 39 Hals. (3d) para. 788.

142. *Id.*, para 719.

143. R.S.C. 1970, c. N-19.

144. See *supra* n.43, at 192.

145. S.C. 1872, c.23, s.64.

146. S.C. 1883, c.17, s.69. R.S.C. 1886 c.54, s.89. R.S.C. 1906, c.55, s.184. R.S.C. 1927, c.113, s.73.

- (2) Right of access to such waters, passage alongside and wherever else necessary for "such" use; including portages and roads "necessary for taking out timber."

The right to float and access to water guaranteed by the section is clearly confined to that which is necessary for taking out timber. It does not declare a right of navigation nor provide rights of access for such navigation. The rights of access declared would seem inapplicable to Indian reserves insofar as such lands were withdrawn from the operation of the statute by the Governor in Council. The right to float timber upon waters flowing within Indian reserves would not, however, seem affected by the withdrawal of such lands from the *Act*, but this merely serves as a declaration of the position at common law.

Provincial Regulation of Public Rights of Navigation and Floating

The Provincial governments of Manitoba and Saskatchewan, upon the enactment of the *Natural Resources Transfer Agreement*, sought to further the public rights of navigation and floating. Alberta has no such provisions. The legislation passed by Manitoba and Saskatchewan originally provided:

Where provincial lands bordering on a lake, river, stream or other body of water are disposed of by the Crown, . . . there is hereby reserved to the public the right of access to such lake, river, stream or body of water and of passing and re-passing on or beside the land on either side and wherever necessary for the use thereof, and over all existing or necessary portage roads past any rapids or falls or connecting any such lake, river, stream or body of water.¹⁴⁷

It has remained unchanged in Saskatchewan.¹⁴⁸ The present *Crown Lands Act* of Manitoba provides for the reservation out of every "disposition of Crown land" of "a strip of land one and one half claims in width" upon the shores of every body of navigable water, the public right of landing upon every body of navigable water so far as is necessary, and the public right of passage over any portage road.¹⁴⁹

The sections seek to *supplement* the right of navigation, as distinct from merely floating timber, by preserving rights over Provincial lands disposed of which border on water. The provisions are of significance insofar as they may be sought to be relied upon by the Provinces in negotiations with respect to outstanding Indian treaty land entitlement. It has been submitted, *supra*, that such reliance is inappropriate insofar as it represents an unconstitutional attempt to unilaterally vary the obligation imposed upon the Province to set aside Crown lands under the *Natural Resources Transfer Agreement*. Moreover, there is great doubt that the setting aside of reserve lands constitutes a "disposition".

Irrespective of the *ultra vires* nature of the provincial legislation, the public right of navigation will, of course, be exercisable upon navigable water flowing adjacent to or through lands set aside to satisfy Indian treaty land entitlement. Such a right will, of course, include incidental passage "beside the land on either side and wherever necessary for the use thereof,

147. S.S. 1931, c.14, s.7. S.M. 1930, c.32, s.7.

148. R.S.S., 1940, c.37, s.8. R.S.S., 1953, c.45, s.12. R.S.S. 1965, c.48, s.12. R.S.S., 1978, c. P-31, s.12.

149. R.S.M. 1970, c. C340, s.5.

and over all existing or necessary portage roads.”¹⁵⁰ A public right of access will be maintained in accordance with “usage or necessity”, under the common law, on reserve lands.

It may be recalled that Treaties #5 and #7 provided for the reservation of access rights in respect of designated reserve lands. Any suggestion that the foreshore should be retained by the Province upon navigable waters is totally unjustifiable and unnecessary in order to preserve a mere right of access, and totally unnecessary in order to preserve a right of passage incidental to the right of navigation. The Privy Council declared in *City of Montreal v. Harbour Commissioners of Montreal and Attorney General of Canada*:

Their Lordships have had their attention directed to the reservation, inserted in the grant to Tetreault's predecessors in title, in which the grantors, the Company of New France, in 1640, declared that the concession should not cause any prejudice to the freedom of navigation, which is to be common to all the inhabitants of New France, and throughout all the places therein above conceded, and for this purpose that there should be left a royal highway of twenty toises in width all round the Island of Montreal, from the river to the granted lands, and a similar distance in the River St. Lawrence from the brink of the same to the granted lands, the whole for the use of the said navigation and of passage by land. This was a *mere reservation of a right of highway* [emphasis added] . . .¹⁵¹

The provision of Manitoba's *Crown Lands Act* which seeks to retain the foreshore, if applied to outstanding reserve land entitlement, is also an obvious violation of Treaties #1, #2, #5 and #7, insofar as they all specifically provided for reserves to be set aside upon the shores of designated waters. Moreover, it would represent a clear violation of the intent of the treaties in Northern Manitoba to so attempt to deny to a people traditionally dependant on the water reserve land bordering upon it.

Flooding

At common law, a riparian owner is entitled to have the water flow down to his land in its natural manner, and also to have the water leave his land without obstruction. In *Soulick v. City of Sault St. Marie*,¹⁵² the defendant city was held liable for flooding the downstream lands of the plaintiff as a result of straightening of a natural water-course. And flooding of lands upstream as a result of a dam downstream is well recognized as an actionable obstruction of a riparian owner's right of drainage.¹⁵³

Regardless of a riparian owner's rights with respect to the flow of water, liability may arise upon the principle of *Rylands v. Fletcher*,¹⁵⁴ that is he who for his own purposes brings on his land anything likely to do injury if it escapes is liable for all damage that is the natural consequence of its escape. In *Rylands* the defendant was held liable for damage caused by the escape of water from a reservoir on his land. As LaForest comments:

150. See *Fort George Lumber v. Grand Trunk and Pacific Railway*, *supra* n. 140. Clement J. supported a public right of navigation and passage in respect of established water highways and portages.

151. [1926] 1 W.W.R. 398 (P.C.), at 412.

152. [1935] O.W.N. 522 (H.Ct.J.).

153. *Robinson v. Heplett*, [1939] O.W.N. 61 (H.Ct.J.).

154. [1868] L.R. 3 H.L. 330; affirming [1866] L.R. 1 Ex. 265.

Accordingly, if water is penned back by a dam so as to flood the land of another whether that other is a riparian owner or not, the owner of the dam is liable. The same is true if a dam is suddenly opened causing flooding or other damage down stream.¹⁵⁵

In *Kelly v. Canadian Northern Railway Co.*,¹⁵⁶ the defendant was held liable for the damage to the plaintiff's land occasioned by water collected by a dam flooding the land.

Any major project affecting natural water flow requires statutory authority in order to deny the possibility of a suit in the event of flooding. General statutory authority may be provided under the water rights of water power legislation with respect to works designed to utilize water, and under drainage legislation with respect to drainage projects. Provincial expropriation legislation may confer authority to flood lands. The Manitoba *Crown Lands Act* is unusual in reserving the right out of every disposition of crown land to "raise or lower the levels of a body of water adjacent to the land, regardless of the effect upon the land, but subject to the payment of compensation for permanent improvements."¹⁵⁷ Such provincial legislation cannot authorize the flooding of reserve lands which are exclusively under federal jurisdiction.¹⁵⁸ For example, the flooding of Southend Reserve land in North Saskatchewan was unlawful if undertaken pursuant to the Saskatchewan *Water Power Act*.

The Churchill River Diversion Project Agreement, entered into in December, 1977 between Manitoba, the Manitoba Hydro-Electric Board, five Northern Manitoba Indian bands, and Canada, established principles of compensation for the adverse effects of flooding on the Reserves of Cross Lake, Nelson House, Norway House, Split Lake and York Landing. The agreement provided that the Government of Canada was committed to "ensuring that the special rights of Indians, including those arising from Treaty #5, are adequately protected." Manitoba promised compensation in the amount of four acres for every one acre of land flooded, such lands to be selected by the Indian bands from any unencumbered, unoccupied Crown lands not required for public purposes. Areas under timber lease were not to be regarded as encumbered or occupied unless being actively logged. The agreement specifically provided that unless the areas selected were adjacent to any waterway the "boundaries shall be projected to the margin of the water." The Indians were assured the right of navigation and the maintenance of the navigability of the waterways affected by the project, the protection of burial places and cultural artifacts, first priority to all wildlife resources in the region, and equitable compensation for damage to traditional hunting, trapping and fishing.

Federal statutory authority to flood reserve land may arise by explicit federal legislation providing for the flooding of the land in question. Such may be provided in joint Federal and Provincial projects, such as the Lake

155. *Supra* n.43, at 213.

156. [1950] 2 D.L.R. 760 (B.C.C.A.).

157. R.S.M. 1970, c. C340, s. 5(1)(f).

158. *Kanatawat v. James Bay Development Corporation* Unreported Que. S. Ct., Nov. 15, 1973.

of the Woods Control Board which was authorized by identical provincial and federal statutes to regulate the level of the Lake of the Woods with regards to, *inter alia*, Indian reserves. In *Brodie v. King*,¹⁵⁹ the Exchequer Court concluded that the federal statute contemplated and authorized the flooding of private land without any liability arising therefrom. Federal statutory authority to flood may also arise by expropriation under section 35 of the *Indian Act*. Such expropriation requires the consent of the Governor in Council.

Conclusion

Under neither the common law nor Indian traditional law were bodies of water regarded as the subject of ownership, rather mere rights of use might attach to them. The treaties with the Indians of the Prairie Provinces recognized such rights and assured the Indian bands of their right to use such waters for the development of their reserves. In the 1894 *Irrigation Act* the Federal Government broke faith with the treaties and declared the ownership and power of disposition of water rights to reside solely in the Crown. Treaty rights to water use were confiscated. The same statute also sought to deny any entitlement to the water-bed arising thereafter. The furtherance of irrigation and water use policy appears to have been developed entirely without regard for the Indian people or the treaty promises made to them.

Upon the transfer of the natural resources of Alberta, Manitoba and Saskatchewan to the administration of the provinces the abrogation and confiscation of Indian water rights is no longer within the administering government's competence. The provinces are not empowered to deny Indian reserve property interests. The provinces have, however, and continue to deny the water rights of Indian bands on outstanding reserve land entitlement. The provinces cannot vary the obligation imposed upon them to set aside lands and associated water rights to fulfill the treaty obligations of the Government of Canada. The Saskatchewan Government has observed: "this is a legitimate debt which should not be allowed to continue."¹⁶⁰ It is to be hoped that the governments of Alberta, Manitoba and Saskatchewan will meet this debt and in the words of the United States Supreme Court "deal fairly with the Indians"¹⁶¹ in recognizing the treaty right to water use and power.

159. [1946] 4 D.L.R. 161 (Ex. Ct.).

160. See *Indian Lands and Canada's Responsibility — The Saskatchewan Position* (booklet published by The Department of the Environment of the Province of Saskatchewan)

161. *Arizona v. California* (1963), 373 U.S. 546, at 597.