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Looking Through Cloudy Waters — A Historical Analysis of the Legislative Declarations of Crown Water Rights in Alberta

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Abstract

This paper analyses a keystone of the legislative framework for water rights — the legislative declarations of government or Crown rights to water in Alberta. These declarations originated in the first water rights legislation adopted by Parliament in the late 1800s, but they have been changed numerous times, resulting in a dynamic, complex and arguably confusing evolution. Viewed both individually and collectively through their evolutionary history, these rights declarations arguably raise more questions than they answer. Chief among these questions are: What purpose have they served? What non-legislative public or private rights and public duties have they recognized? Are either the declared rights, or the private rights issued from Crown rights, in the nature of "property"? And finally, is there any current legal effect of the widely varying Crown rights declarations over time? If nothing else, the numerous legislative formulations of this declaration over the years indicate that the concept of Crown rights to water is itself murky and, thus, should be clarified as part of any effort to reform the allocation system.

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1.0. Introduction

> It is almost a truism that water has been a major concern in the arid areas of the Canadian West since the earliest days of settlement.[1]

If anything, the observation of water law scholar David Percy carries even more force for the prairie provinces now, than it did when he made it in 1986. This trend is a result of rapidly increasing concerns about climate change impacts on stream flows and recent, multi-year draught conditions, combined with increasing industrial, commercial, and residential demands.[2] The pressures on Alberta's water resources are growing throughout the province but they are arguably the most acute in the South Saskatchewan River Basin (SSRB) which has long had the highest imbalance between the local demand for, and supply of, water.[3]

Despite Alberta's long history of orderly water licensing and recent efforts to fold this licensing system into a holistic watershed management approach, the "major concern" with water management has arguably only continued to grow in recent years. Thus, for example, an Alberta court recently noted, in the context of a southern Alberta-based water dispute, the "belief in many quarters that we are in the midst of a water crisis …."[4] Similar observations have been echoed in other recent publications.[5]

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[1] D.R. Percy, "Water Rights Law and Water Shortages in Western Canada" (1986) 11 Can. Water Res. J. 14.

[2] According to a recent Albert Water Council report, "[t]he rapid pace of social, economic, and environmental change in Alberta has caused an immediate need to safeguard our water sources …." Alberta Water Council, *Water for Life — Recommendations for Renewal* (January 2008) at 9, online: <http://www.albertawatercouncil.ca/Portals/0/pdfs/Renewal_Final_Report.pdf>. See also, e.g. Alberta Water Research Institute (AWRI), *Towards Sustainability: Phase 1 — Ideas and Opportunities for Improving Water Allocation and Management in Alberta* (November 2009) at 5, online: <http://www.waterinstitute.ca/pdf/summary_report_future.pdf> (noting "growing concern" with Alberta's priority system for allocating water rights and "increasing concern" about the "adequacy and priority of water allocations for nature").

[3] See, e.g. Danielle Droitsch & Barry Robinson, *Share the Water*: *Building a Secure Water Future for Alberta* (Canmore: Water Matters Society of Alberta and EcoJustice, 2009) at 9, online: <http://www.water-matters.org/pub/share-the-water>; Michael M. Wenig, "Thinking Like a Watershed" (June/July 2004) 28 LawNow 13. The SSRB includes the Red Deer, Bow, and Oldman River sub-basins, and the urban centres of Calgary, Lethbridge, Red Deer, and Medicine Hat.

[4] *Tsuu T'ina Nation v. Alberta (Minister of the Environment)* (2008), [2009] 2 W.W.R. 735 at 744 (Alta. Q.B.), LoVecchio, J. See also *ibid*. at 768-769 (noting the province's need to address a water "crisis" as partial grounds for accepting its failure to provide First Nations with the full extent of consultation they sought before adopting a water management plan for the SSRB).

[5] See, e.g. Droitsch & Robinson, *supra* note 3 at 25; Tony Maas & Lindsay Telfer, *The Prairie Water Directive — A Collective Call to Action for Water Security in the Prairie Provinces* (Edmonton: Prairie Water Watch, 2009), online: <http://www.prairiewaterwatch.ca/>; D.W. Schindler & W.F. Donahue, "An

Not surprisingly given these growing concerns, the province recently has been receiving advisory reports, and is planning to hold consultations and consider proposals to "revamp" Alberta's long-standing water allocation system.[6] While justified, this initiative will face several substantial hurdles, one of which was noted by Percy prior to the province's adoption of the present *Water Act*, when he commented that "[r]eformers of water law do not start with a clean legal slate. Any reformers must take into account the rights that have vested under the present type of legislation since the end of the nineteenth century."[7]

This paper aims to assist the province in "tak[ing] into account" these vested water rights, by analysing a keystone of the legislative framework for water rights — the legislative declarations of government or Crown rights to water in Alberta. As discussed in part 3 below, these declarations originated in the first water rights legislation adopted by Parliament in the late 1800s, but they have been changed numerous times, resulting in a dynamic, complex and arguably confusing evolution. Thus, the historical analysis of Crown water rights declarations may serve less to explain or clarify this keystone component, than to underscore the murky foundation of public rights from which the private rights have emanated.

The legislative declarations analysed in this paper are relatively short and discrete, but they are best viewed in the context of the broader legal framework for water rights. Hence, part 2 below provides an overview of this broader framework with special attention to the range of, and uncertainties with respect to, different potential categories or sources of water rights. However, two of those categories of water rights — aboriginal rights to water and human rights to water under international law and Canadian constitutional law — will be addressed in forthcoming papers.[8]

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impending water crisis in Canada's western prairie provinces" *Proceedings of the National Academy of Sciences USA* 103 (2006) 7210 at 7213.

[6] "Changes to Alberta's water allocation system coming" *Calgary Herald* (5 March 2009); Government of Alberta, News Release, "Government receives advice from Alberta water experts" (23 November 2009); Minister's Advisory Group, *Recommendations for Improving Alberta's Water Management and Allocation* (August 2009), online: <http://environment.gov.ab.ca/info/library/8239.pdf>; Alberta Water Council, *Recommendations for Improving Alberta's Water Allocation Transfer System* (August 2009), online: <http://www.albertawatercouncil.ca/Portals/0/pdfs/WATSUP_web_FINAL.pdf>; AWRI, *supra* note 2.

[7] Percy, *supra* note 1 at 20.

[8] See Monique Passelac-Ross and Christina Smith, *Defining Aboriginal Rights to Water in Alberta: Do They Still 'Exist'? Are They Prior Rights?*, Occasional Paper (Calgary: Canadian Institute of Resources Law) [forthcoming in 2010].

2.0. A Brief History of Private Water Allocations

Alberta's private water allocation system has been primarily based in legislation, starting with Parliament's adoption of the *North-west Irrigation Act* in 1894.[9] However, to fully consider these water allocations, one must start before this Act was adopted, when water rights were governed by the common law in Canada. Hence, this part starts with a brief comment on common law rights, and then assesses the *Irrigation Act* and two provincial legislative successors to that federal statute.

2.1. Common Law Water Rights

Canadian common law of water was "received," and thus derives from, the common law in England whose own origins date back to early Roman law.[10] A complete explanation of the origination and evolution of this common law development is beyond the scope of this paper.[11] For purposes here, the distinguishing feature of this common law legacy is its ambiguity, particularly, with respect to: the core distinction among private, public, and Crown or government rights to various types of waters;[12] the extent to which Canadian legislators and jurists deemed themselves able and justified in modifying English common law to suit Canadian circumstances;[13] and the extent to which government or

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[9] S.C. 1894, c. 30. The Act's name was later shortened to the *Irrigation Act*, apparently, by the drafters of the 1906 edition of the Revised Statutes. The Act will hereafter be referenced as the "*Irrigation Act*" or simply the "Act".

[10] Speaking of the relevance of, but difficulty in considering, these Roman legal origins, Alberta's highest court stated in a landmark water riparian rights case in 1917:

> "The Roman law forms no rule, binding in itself, upon the subjects of these realms; but in deciding a case upon principle, where no direct authority can be cited from books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it proves to be supported by that law, the fruit of the researches of the most learned men, the collective wisdom of ages and the ground work of the municipal law of most of the countries of Europe."

Makowecki v. Yachimye (1917), 10 Alta. L.R. 366 at 385 (Alta. S.C. (A.D.)), Beck J. (quoting *Acton v. Blundell*, 12 M. & W. 324; 13 L.J. Ex. 289, Tindal, C.J.).

[11] See, e.g. Joshua Getzler, *A History of Water Rights at Common Law* (Oxford: Oxford University Press, 2004) and Tim Bonyhady, *The Law of the Countryside — The Rights of the Public* (Abington, Aust.: Professional Books, 1987).

[12] For a discussion of the different common law rights applicable to different types of waters, see, e.g. *Kapicki et al. v. Andriuk et al.* (1974), [1975] 2 W.W.R. 264 at 271-74 (Alta. Dist. Ct.), Feehan, D.C.J.; *Makowecki*, *supra* note 10 at 376.

[13] As an Alberta court noted, in discussing Canadian reception of English common law relating to the capacity of women to hold public offices, "the Courts of this province are not in every case to be held strictly bound by the decisions of English Courts as to the state of the common law of England in 1870. We

Crown rights to waters are modified or limited by corresponding rights of downstream jurisdictions or jurisdictions sharing lakes or underground aquifers.[14] On top of these uncertainties, there remains uncertainty as to the extent to which Canadian water rights legislation can and has been intended to trump common law water rights and, to the extent any such rights still exist, the extent to which Canadian courts still have authority to modify or even identify those rights.[15] Even the full scope of remaining common law

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are at liberty to take cognizance of the different conditions here, not merely physical conditions, but the general conditions of our public affairs and the general attitude of the community in regard to the particular matter in question." *Rex v. Cyr* (1917), 3 Alta. L.R. 320 at 324 (Alta. S.C. (A.D.)), Stuart, J.; see also, e.g. *Clarke v City of Edmonton*, [1930] S.C.R. 137 at 149, Lamer J. (in dispute regarding common law riparian rights to land 'accreted' from changes in watercourse boundaries, noting federal legislation calling for the reception of English common law in the then-existing Northwest Territories but only as "applicable" — i.e. "suitable to the conditions" in the Territories), and *Makowecki*, *ibid.* at 384-85 ("If there was no ascertainable common law rule or if that rule, being different from the civil law rule, is not applicable to the conditions of this part of Canada, then the law is what reason and justice require …").

[14] Michael M. Wenig, Arlene Kwasniak & Michael S. Quinn, "Water Under the Bridge? The Role of IFN Determinations in Alberta's River Management" in H. Epp, ed., *Water: Science & Politics* — Proceedings of the Alberta Society of Professional Biologists, Annual Conference and Workshop, 25-28 March 2006, Calgary, Alberta at 8; see also generally Steven A. Kennett, *Managing Interjurisdictional Waters in Canada: A Constitutional Analysis* (Calgary: Canadian Institute of Resources Law, 1991).

[15] This last issue is reflected in the continuing discussion among Canadian scholars of the existence, or potential for courts to identify, a common law "public trust" or trust-like duty implicit in government rights to natural resources, including water, and a corresponding public right of use or enjoyment of those resources. For relatively recent examples of this scholarship, see, e.g. Ralph Pentland, *Public Trust Doctrine — Potential in Canadian Water and Environmental Management*, Polis Discussion Paper 09-03 (Victoria: University of Victoria, 2009), online: <http://www.flowforwater.org/documents/public_trust_doctrine.pdf>; Andrew Gage, "Public Rights and the Lost Principle of Statutory Interpretation" (2005) 15 J. Envtl. L. & Prac. 107; John C. Maguire, "Fashioning an Equitable Vision for Public Resource Protection and Development in Canada: The Public Trust Doctrine Revisited and Reconceptualized" (1997) J. Envtl. L. & Pol'y 1; and Barbara von Tigerstrom, "The Public Trust Doctrine in Canada: Potential and Problems" (1997) 7 J. Envtl. L. & Prac. 379. Canadian scholars have long noted the absence of judicial recognition of a common law public trust doctrine in Canada, but this has resulted more from the *absence* of such a judicial affirmation than from the courts' express *denial* of the existence of this common law doctrine. See, e.g. Von Tigerstrom, *ibid.* at 385-388. In fact, recent case law provides some, albeit limited, judicial affirmation of a public trust. Thus, in *British Columbia v. Canadian Forest Products Ltd.*, a majority of the Justices of the Supreme Court of Canada held that Canadian governments could, in their capacity of holders of public rights in natural resources and the environment, invoke common law claims for compensation and injunctive relief for environmental damages. The majority then noted, without deciding, the "novel questions" of whether governments might be liable for any failure to protect the environment, and "the existence or non-existence of enforceable fiduciary duties owed to the public by the Crown" in respect of environmental protection. [2004] 2 S.C.R. 74 (discussed in Stewart A.G. Elgie & Anastasia M. Lintner, "The Supreme Court's Canfor Decision: Losing the Battle but Winning the War for Environmental Damages" (2005) 38 U.B.C. L. Rev. 223). Likewise, in *Prince Edward Island v. Canada*, a Prince Edward Island trial court judge refused to grant a motion to strike a claim, by PEI fishermen, that the federal government breached a public trust in mismanaging Atlantic fisheries. [2005] P.E.I.J. No. 77 (P.E.I. Sup. Ct. Trial Div.), *rev'd*, [2006] 277 D.L.R. (4th) 735 (P.E.I. Sup. Ct.) (holding that federal courts, not PEI

riparian water rights — perhaps the clearest water-related right in common law and most clearly addressed in water rights legislation — remains uncertain.[16]

2.2. Legislative Water Rights Frameworks

Turning to the legislative water rights framework, the *Irrigation Act* essentially started with a general declaration of Crown rights to water (discussed further in part 3 below) and then prohibited the "diver[sion]" or "use" of water "otherwise than under the provisions" of the Act.[17] The *Irrigation Act* provided for the government's grant of Crown rights to divert or use water through a licensing system, whose key characteristics were carried forward through the Alberta Legislature's adoption of the *Water Resources Act* (*WRA*) in 1931 and replacement of that Act with the present *Water Act*, in 1999.[18] Through its evolution under these three statutes, this licensing regime has been notable for its reliance on the "first in time, first in right" principle, also known as the principle of "prior allocation". Under this principle, licensees' rights have been prioritized by the date of their completed licence applications and the rights of senior licensees trump those of all junior licensees on the same river. Thus, in times of shortage, the government could cut off junior licensees until all of the more senior rights had been satisfied.[19] By its nature, the "prior allocation" principle has been aimed at resolving competing human demands when they collectively exceeded the available water supply.[20]

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courts, have jurisdiction to consider public trust claims against the federal government), *application for leave to appeal dismissed*, [2007] S.C.C.A. No. 97. See also, e.g. Lorne Sossin, "Public Fiduciary Obligations, Political Trusts, and the Equitable Duty of Reasonableness in Administrative Law" (2003) 66 Sask. L. Rev. 129 at 132 ("The notion of public officials being 'entrusted' with public authority lies at the very root of our political and legal system.").

[16] See David R. Percy, "Seventy-Five Years of Alberta Water Law: Maturity, Demise & Rebirth" (1996) 35 Alta. L. Rev. 221 at 224; and Alastair R. Lucas, *Security of Title in Canadian Water Rights* (Calgary: Canadian Institute of Resources Law, 1990) at 15.

[17] S.C. 1894, c. 30, s. 4, as amended by S.C. 1895, c. 33, s. 2. See, e.g. Percy, *ibid.*, for a discussion of Parliament's motivations for replacing the purely common law water rights with a legislative framework.

[18] S.A. 1931, c. 71; R.S.A. 2000, c. W-3. Besides enabling water managers to grant water rights through licenses, each of the three water Acts has itself granted rights directly to specified water users. For example, the *Water Act* generally allows owners of 'riparian' lands to divert adjacent waters for agricultural and household uses, subject to various restrictions specified in the Act (ss. 19-23).

[19] S.C. 1898, c. 30, ss. 8 and 19. See, e.g. Wenig, Kwasniak & Quinn, *supra* note 14 at 9. See *Tsuu T'ina Nation*, *supra* note 4 at 743 (noting that the *Water Act* "continues the long established practice in Alberta of a licensing priority system. The concept of first in time, first in right, has been in place for over 100 years.") and 749 (same).

[20] Wenig, Kwasniak & Quinn, *ibid.* at 9.

Another key characteristic of this historical licensing regime is its grant of considerable discretion to water managers — through both *ad hoc* decision-making and the adoption of generic regulations — in: setting licence application requirements; deciding whether to grant licences; and setting licence terms and conditions including licence durations.[21]

While sharing these key characteristics, the three Acts vary in numerous other characteristics. For example, the *Water Act* includes numerous water management planning and environmental provisions that were lacking in the *WRA* and, thus, that purport to bring Alberta's water management more in line with contemporary, environmentally-oriented resource management approaches.[22] The *Water Act* also modernized the *WRA*'s licensing system in several other respects by, for example, allowing water managers to authorize trades of water licenses under trading systems incorporated in provincially-approved water management plans.[23]

Besides the variations among the three Alberta water licensing Acts, each of the Acts has itself been amended — the *WRA* numerous times — so there is some variation of legislative licensing provisions *within* each of the three legislative regimes. As a result of these numerous changes within and among water licensing statutes, one might say that the legislative framework for water licensing in Alberta has essentially been constantly evolving over its' roughly one hundred-and-fifteen year history. If 'constantly evolving' is an over-statement, the framework has at least been changed in one way or another numerous times.

This legislative moving target, combined with the sheer length of time a licensing framework has been in effect, makes it difficult to fulfill Percy's call for an "account[ing]" of all licence-based water rights, for several reasons.[24] First, these two factors combined have likely resulted in a wide variation of licence conditions among the thousands of licenses issued to date, even among all licenses issued for diversions from the same river or watershed.[25] For example, all licences issued under the *Water Act* are

[21] *Irrigation Act*, S.C. 1894, c. 30, ss. 6-8, and 45; *Water Resources Act*, S.A. 1931, c. 71, ss. 11(2), 31(3), and 65(1)(b).

[22] Wenig, Kwasniak & Quinn, *supra* note 14 at 11**;** *Tsuu T'ina Nation*, *supra* note 4 at 748 (noting that the *Water Act* was the Legislature's "attempt to modernize water law" in Alberta).

[23] See Wenig, Kwasniak & Quinn, *ibid.* at 16-17. For a detailed discussion of the Act's framework for trading water licenses, see Nigel Bankes, "The Legal Framework for Acquiring Water Entitlements from Existing Users" (2006) 44 Alta. L. Rev. 323.

[24] See Lucas, *supra* note 16 at 83 (noting that the "transition" from the federal to the provincial licensing statutes introduced "complexity and uncertainty" to water rights).

[25] See Minister's Advisory Group, *supra* note 6 at 8 (noting that water licences "include terms and conditions that have varied considerably over the decades").

required to have expiration conditions,[26] which are absent from all or most licences issued under either the two prior Acts.[27] Second, most of the non-expiring, pre-*Water Act* licenses have been carried forward through at least one of the two major legislative regime changes (some of the licences date back to the late 1800s and, thus, have endured two legislative regime changes) through 'grandparenting' provisions of the *WRA* and *Water Act*. Yet, these legislative grandparenting provisions are themselves hardly clear as to: whether a grandparented licence is generally "subject to" the predecessor statute as it existed when the licence was issued or as amended; and, the extent to which water managers can exercise new authority under the *Water Act* in managing the licensed allocation.[28]

Finally, in addition to the problems arising from the legislative moving target, many of the licence conditions may be difficult to interpret even in light of the legislation in force at the time they were issued, and licences with older priorities may stem from non-licence tenure instruments that are of uncertain validity.[29]

* * * * *

The notion of a legislative water licence system connotes a more organized, orderly system of allocating water rights than a common law rights-based system. However, the thumbnail sketch above suggests several uncertainties or ambiguities in the licence system that frustrates attempts to take full account of vested water rights. The next part shows the difficulty legislators have experienced just in expressing core public or Crown rights to water. Given this difficulty, it is no surprise the licence regime built on this core has been problematic.

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[26] R.S.C. 2000, c. W-3, s. 51(5) and *Water (Ministerial) Regulation*, Alta. Reg. 205, 98, s. 12.

[27] E.g. Percy, *supra* note 16 at 223 and 226.

[28] In its last version before it was amended, the *WRA* stated that licensees could continue to exercise their licence rights in accordance with their licence terms *and* the *WRA* and accompanying regulations "so far as" those laws were not "inconsistent" with the "terms on which" the licences were granted. R.S.A. 1980, s. 10(1). The *Water Act* states similarly that licences pre-dating that Act are considered "deemed" licences and the holders of those licences can continue to exercise their licence rights in accordance with their licence terms *and* the *Water Act*, but that the former prevail over the latter if there is any "insisten[cy]" between them. R.S.C. 2000, c. W-3, ss. 18(1) and (2).

[29] As to unclear licence terms, see Lucas, *supra* note 16 at 63-71 and 96-97 (discussing terms that appear to conflict with the legislative prior allocation principle). As to uncertain pre-licence instruments, see *ibid*. at 82-87. See also Minister's Advisory Group, *supra* note 6 at 8 (noting that the terms and conditions of Alberta water licences "are sometimes lengthy and complex and of varying degrees of legality").

3.0. Legislative Declarations of Crown Rights

Section 4 of the original version of the *Irrigation Act* provided the two-pronged template of core legal provisions that have carried through to the present. The first prong is a declaration of Crown rights to water; the second prong is a prohibition on the use or diversion of water except pursuant to a licence or other instrument granted by the Crown. However, this template has remained constant only in its most general sense, because the exact wording has changed several times, as discussed below.

In the original *Irrigation Act*, the first prong of the template was the declaration that, "[u]ntil the contrary is proved," the "right" to the "use of all water at any time … shall, for the purposes of this Act, in every case be deemed to be vested in the Crown".[30] This assertion of Crown right was then followed by a second statement: "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 … body of water, otherwise than under the provisions of this Act."

At first blush, these two provisions seem like a sensible starting point for a legislative water allocation regime, but they raise numerous questions on closer inspection. Many of these questions remain — albeit in somewhat modified form — in the context of present water legislation.

The first question is why Parliament's declaration of the Crown right to water, in the first statement in section 4, was really necessary. Did the Crown lack that legal right before Parliament adopted the statement? If it did lack that right, could Parliament lawfully acquire the right for the Crown simply through its inclusion of the statement in the *Irrigation Act*? If the statement was simply declaring a Crown right that already existed in law, then was it redundant? Was it intended simply for symbolic purposes?

Still other questions relate to the nature of the Crown "right" declared in the first statement of section 4. Was it in the nature of, or equivalent to, a "property" right?[31] Did it impliedly include a trust, or trust-like or stewardship duty to manage water resources on behalf of Canadians?[32] And is the statement's declaration of the Crown's exclusive

[30] S.C. 1894, c. 30, s. 4. This provision was specifically limited to waters "in any river, stream, watercourse, lake, creek, ravine, cañon, lagoon, swamp, marsh or other body of water". *Ibid*. Parliament later added "spring[s]" to this list of water bodies. S.C. 1908, c. 38, s. 2.

[31] In s. 8, Parliament stated that water "the property in which is vested in the Crown," may be "acquired" under the Act. This statement suggests that the Crown "right" declared in s. 4 was intended to be in the nature of a "property" right. The statement in s. 8 begs the question, however, whether the right that is "acquired" is also in the nature of a property right.

[32] See Susan G. Lawson, *Water as Property — Does it Belong To Us All?* (LL.M. Thesis, University of Calgary, 2009) at 74 [unpublished] (concluding that Alberta has a "common property interest" in water rather than a "private property interest").

"right to the *use*" of water intended to include the "diversion" of water, notwithstanding that both of those two terms are listed in the second statement? In other words, is the term "use" limited to instream uses?

Any attempt to answer these questions likely requires analysis of then-existing law of sovereignty, which analysis is beyond the scope of this paper. However, a partial answer is that the phrase "[u]ntil the contrary is proved" at least served to express Parliament's recognition that some other legal rights to water may have existed at that time and that Parliament generally did not intend the *Irrigation Act* to extinguish those pre-existing rights.[33] This apparent intent still begs several questions: What other legal rights might have existed? Were they simply rights purported to have been granted through agreements or other written instruments issued by the government before Parliament adopted the *Irrigation Act*? Or did Parliament adopt this clause to indicate its intent that the Act was generally not meant to trump any then-existing common law or international legal rights? How might any such rights be "proved"? And, how could any such pre-existing rights be so strong that Parliament seemed to deem it necessary to place them on a par with Crown rights?[34]

Given these uncertainties, it is not surprising that the *Irrigation Act* was scarcely one year old before Parliament adopted amendments revising the Act's ambiguous original Crown rights declaration. As relevant here, these changes included Parliament's declaration that the Crown's "right to use" water was accompanied by Crown "property in" water.[35] This addition addressed the issue of whom if anyone held the property right in water, but its drafting raises the questions of whether Parliament viewed the concepts of "property in" water as somehow different than the "right to use" water.[36] The new drafting also raises the question of which of those concepts Parliament considered to apply to or subsume a Crown grant of a right to "divert" water, which grant has been a common feature of water licences to the present. These questions arguably have more than academic significance in that they underlie practical and serious questions as to

[33] This conclusion holds only as a general matter because the Act itself expressly extinguished the ability of riparian owners to acquire rights to the "permanent diversion" or "exclusive use" of water through any means other than those rights-granting instruments allowed under the Act. S.C. 1894, c. 30, s. 6. In another section, the Act required persons with pre-existing water rights "of a class similar to those which may be acquired" under the Act to apply for and obtain a grant issued under the Act for those same rights. *Ibid*., s. 7.

[34] The phrase — "save in the exercise of any legal right existing at the time of such diversion" — in the next provision of s. 4, serves a similar function of recognizing at least the potential of pre-existing rights, but raises similar questions as those raised by the exception in the first statement.

[35] The new declaration thus referred to the "property in and the right to the use" of water as vested in the Crown. S.C. 1985, c. 33, s. 2.

[36] For brevity, references below to "Crown rights" are intended to include both the concepts of Crown "property in" water and the Crown's "right to use" water, unless otherwise noted.

whether diversion rights in existing water licences are tantamount to "property" rights and hence what, if any, powers the province has to revoke or modify these diversion rights.[37]

In addition to expressly referencing Crown "property" in water, the 1895 amendments deleted the clause "[u]ntil the contrary is proved" at the outset of the declaration. This deletion was not intended to universalize Crown rights to water, because Parliament added later that the Crown rights declared in that provision were:

> 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 ….[38]

What did Parliament intend to accomplish with this much wordier substitute for the Act's original exception to the declaration of Crown rights? In theory, the "inconsisten[cy]" phrase narrowed the exception to the declaration of Crown rights. For example, one might imagine that Crown rights to divert water could be exercised up to some level of diversion without impinging on non-Crown rights to instream water uses. Thus, the revised exception clarified that the existence of these pre-existing, non-Crown rights did not automatically negate the assertion of Crown rights to divert. However, while one can imagine theoretical overlaps of Crown and non-Crown rights, Parliament's addition of the "consistency" phrase still leaves unanswered the question of what pre-existing, non-Crown rights Parliament had in mind in the first instance.

Parliament's addition of the reference to a "public right or a right common to the public" is significant, if nothing else, in indicating Parliament's view that such a public right existed at the time, or at least might subsequently be judicially recognized. However, the phrase does not explain the origin or scope of any such public right. Parliament's wording of this phrase, treating public rights as essentially an exception to the exception from Crown rights, also begs the question of whether Parliament considered these public rights to be subsumed under the concept of "Crown" rights (including "property") or whether they constituted a *third* category of water rights. If the former, did Parliament consider these public rights to provide a restraint or limitation on the government's authority in exercising Crown rights, or did Parliament view these public rights as essentially an outdated and no longer legally significant concept?

Parliament's tinkering with its declaration of Crown rights, and the numerous questions these amendments raised, set a pattern for the evolution of the core water rights provisions in subsequent legislation.

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[37] See Lucas, *supra* note 16 at 22-23 and 92-93.

[38] S.C. 1985, c. 33, s. 2. The 1895 enactment added that its revisions to s. 4 were to be "read and construed" as if they had "originally formed" part of the original Act. *Ibid*.

Parliament established the Province of Alberta through its adoption in 1905 of the *Alberta Act*,[39] but retained federal water rights through section 21 of that statute, which provided that all Crown interests in "lands" and, and Crown interests in "waters within the province" under the *Irrigation Act* "shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada …."[40] However, in the 1930s, Parliament transferred public lands and natural resources, including water (except on remaining federal lands), to Alberta (as well as to Manitoba and Saskatchewan). This transfer occurred through a transfer of "land" in the 1929 *Natural Resources Transfer Agreement* (*NRTA*), and a supplemental agreement which clarified that water was intended to have been included in the original agreement.[41]

The *NRTA* is thus the link from federal to provincial water rights declarations. The key provision is section 1 of the *NRTA*, which states that the transfer of federal interests in land (and water) was "subject to any trusts existing in respect" of those resources, as well as to "any interest other than that of the Crown in" those resources. As with the *Irrigation Act*'s declaration of Crown rights, these "subject to" clauses hinted at the existence of non-Crown rights (of trust beneficiaries, in the case of the "trusts") but without making clear what those interests were or who held them.[42] Notwithstanding these ambiguities, these *NRTA* clauses arguably indicate at least that whatever non-Crown rights were recognized under the *Irrigation Act* were not extinguished through the transfer of federal water rights to the Province. As with the *Irrigation Act*, however, the *NRTA* clauses failed to clarify whether the public or common rights mentioned in that Act were a subset of Crown rights, and thus were passed on to Alberta, or were independent of those rights, and thus an external constraint on or limitation to the scope of Alberta's newly inherited rights.

Shortly after the original *NRTA* took effect, the Alberta Legislature passed the *Water Resources Act* (*WRA*) which declared that the federal *Irrigation Act* "cease[d] to be in

[39] 4-5 Ed. VII, c. 3 (reprinted in R.S.C. 1985, App. II, No. 20).

[40] The federal *Irrigation Act* remained in force in Alberta, pursuant to the *Administration Of Natural Resoruces (Temporary) Act*. S.A. 1930, c. 22 (referenced in the *WRA*, S.A. 1931, c. 71, s. 70).

[41] These agreements were approved by Parliament in the *British North America Act, 1930* (U.K.), 21 Geo. 5, c. 26, and the *Natural resources Transfer (Amendment) Act 1938*, S.C. 1938, c. 36 (discussed in Percy/1977 at 146).

[42] These provisions mirrored a "subject to" provision transferring ownership of natural resources to the eastern provinces, in s. 109 of the *Constitution Act, 1867*. That "subject to" clause has been construed to affirm various aboriginal rights as constraints on provinces' natural resource ownership. See *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at 1117 (provincial ownership subject to Aboriginal title); and *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 at 539-540 (provincial ownership subject to Crown duty to consult arising from unsettled Aboriginal rights and title).

force" in Alberta.[43] While this declaration was generally a valid description of reality following the *NRTA*, the occurrence of the declaration in a provincial statue is somewhat curious as provincial legislatures generally lack the constitutional authority to legislatively invalidate federal statutes.[44]

Of more importance here, the *WRA* generally copied the *Irrigation Act*'s two-pronged template with respect to the declaration and subsequent disposition of Crown water rights. The original *WRA* began this drafting approach with a declaration that "[a]ll the waters in any … body of water whatsoever which is the property of the Province shall be vested in the Province".[45] This declaration differed from the *Irrigation Act* declaration, in part, by referring only to "property" and not also to Crown "rights to use" water, but without clarifying whether the latter were considered to be subsumed under the former. Perhaps more importantly, the *WRA* declaration differed from that in the *Irrigation Act* by declaring, not that the Province had a property right in *all* water in the province — i.e. that no other private or public water rights remained, but that, *to the extent any such provincial property rights existed*, those rights were "vested" in the province. As written, this declaration appears to be a tautology, because any "property" would seem, by definition (or at least unless otherwise stated), to be "vested" in the property owner. Moreover, the declaration by itself was singularly unhelpful in clarifying the scope of waters to which the Legislature considered the province had property or other legal rights.

Following this modest declaration, the *WRA* then stated the principle that "no person shall have any right of property therein" or "shall have any right to divert and use the same" except pursuant to a license granted under the *WRA*.[46] The terms "therein" and "the same" appear to refer only to the undefined scope of waters to which the province had a vested property interest, so this provision did not purport to suggest that the *only* possible non-government water rights are those granted by licence under the *WRA*.

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[43] S.A. 1931, c. 71, s. 70. Notwithstanding the transfer, Parliament did not repeal the *Irrigation Act* until 1950. See *Territorial Lands Act*, S.C. 1950, c. 22, s. 26. The *Irrigation Act* doesn't appear to have been amended since 1923, likely attesting to its disuse after the transfer agreements.

[44] In fact, this declaration was not even a completely accurate description of reality because the *WRA* included several provisions purporting to grandparent those previously issued rights. So the *Irrigation Act* lived on through grandparented water tenures. This legacy of federal grants was significant, because it included grants of water rights to nine of Alberta's thirteen Irrigation Districts. (This data is gleaned from the irrigation district water licenses with priority dates preceding the Legislature's enactment of the *WRA*.) Those thirteen districts collectively hold rights to roughly 75% of all water allocated in the SSRB. Bankes, *supra* note 23 at 327. The federal Act lived on in the additional sense that the *WRA* declaration was expressly subject to several provisions that essentially adopted federal water management regulations under the *Irrigation Act* pending the province's development of its own regulations under the *WRA*. S.A. 1931, c. 71, ss. 48, 63, and 71.

[45] S.A. 1931, c. 71, s. 5(1).

[46] *Ibid.*

Also of note, the provision's distinct references to rights both "of property" in water, and "to divert and use" water, might suggest that the latter were not themselves considered "property" rights. If this interpretation is correct, the thousands of *WRA* licenses issued by the province granting rights to divert and use water might not be considered to constitute legal "property" rights.[47]

This legislative principle was accompanied by several exceptions, including those for: diversion or use rights granted, or validly applied for, under the *Irrigation Act*. Read in context of the prior reference to those waters vested in the Province, this exception purports to refer only to rights granted under the *Irrigation Act* with respect to those provincially vested waters. Thus, it does not purport to extinguish *all* other possible private, or non-governmental public, water rights.

In addition, while the exception seems limited to water rights specially granted or sought under the *Irrigation Act*, another provision prohibited the un-licensed "diver[sion] or use" of provincially vested water, subject to an exception for diversions or use pursuant to the "exercise of a legal right" existing "at the time of such diversion or use".[48] By referring to essentially *any* "legal right," rather than those affirmatively granted under the *Irrigation Act*, this provision appears to recognize the existence, or at least the possibility of the existence, of non-legislatively-granted private or public common rights. Put another way, the provision indicates the Legislature's intent not to extinguish those rights.[49]

The Legislature removed this exception in 1971.[50] However, it is difficult to discern whether the Legislature meant this amendment to finally extinguish any then-existing non-legislatively-granted "legal right[s]".[51]

As with Parliament's 1895 correction to the *Irrigation Act*'s original Crown rights declaration, in 1939 the Alberta Legislature adopted an amendment purporting to correct the seeming tautology in the *WRA*'s Crown rights declaration. As relevant here, this amendment contained the arguably non-tautological proposition that the "property in any water" located in the Province is "vested in the Province."[52] While removing the

[47] See Lucas, *supra* note 16 at 22-32 for a discussion of provincial water licenses' lack of other indicia of "property" rights.

[48] S.A. 1931, c. 71, s. 6.

[49] The original *WRA* also included an exception for the rights of riparian owners to use enough water as may be required for "domestic purposes". *Ibid.*, ss. 5(2).

[50] S.A. 1971, c. 113, s. 4 (codified in R.S.A. 1980, s. 5).

[51] See Gage, *supra* note 15 at 124 (concluding, from an analysis of Canadian decisions, that legislation must be 'express' and 'unequivocal', demonstrating a clear and unambiguous intention to restrict or extinguish public rights before such rights will be extinguished").

[52] S.A. 1939, c. 11, s. 3.

tautology, the Legislature muddied the waters by adding that the new declaration applied only to those waters to which the Province's "legislative authority" "extends" "and which is not [already] vested in the Province by virtue of the" 1929 *NRTA* (and 1938 amendment).

The first of these two limitations seems logically backwards or circular because the geographic scope of provinces' legislative authority is itself tied to the scope of waters to which the provinces have proprietary interests. The second of these two limitations is confusing in several respects: How could the Province legally claim property rights in waters *other than* those covered by the *NRTA*? What is the scope of any such non-*NRTA* waters? Why wouldn't the province also declare provincial property rights in waters granted to the province by the *NRTA*? And finally, absent a declaration of property rights with respect to those *NRTA* waters, did the province then lack authority to issue licences and grant other tenures with respect to those *NRTA* waters?

Notwithstanding these questions, this *WRA* declaration remained unchanged for roughly forty years, except that the provision's reference to the "Province" was changed to the "Crown" (thereafter defined as "Her Majesty the Queen in right of Alberta"). This change alone might raise questions about the nature of the right covered by the declaration, except that the change was apparently made, not by the Legislature, but by a drafter of the 1980 version of the Revised Statutes of Alberta.[53] Thus, it is likely inappropriate to ascribe any *legislative* intent to the change, not that any such intent would have been readily discernible had the Legislature made the change itself.[54]

In 1981, the Legislature finally removed these two bizarre limitations to the Crown rights declaration, by replacing the declaration with a new one stating more simply that the "property in and the right to the diversion and use of all water in the Province is hereby vested in Her Majesty in right of Alberta."[55]

The new declaration was eminently more simple and logical than the prior, long-standing version, but the new declaration raised its own questions. If the old version had more than hortatory significance, and was not simply a product of misguided, nonsensical drafting, then what was the legal significance of the change to the new version? Could the Legislature legally change the scope of provincial property rights covered under the old declaration with its adoption of a simpler sounding, broader declaration of provincial rights? On the other hand, if the original rights declaration was just hortatory or symbolic, then did the updated version lack any legal significance as well? Did the Legislature really intend to claim "property" rights with respect to *all* water located in Alberta,

[53] *Cf.* R.S.A. 1980, c. W-5, ss. 1(d) and 3, with R.S.A. 1970, c. 388, s. 5(1).

[54] For a discussion of the symbolic significance of references to "Crown" resources, see Michael M. Wenig, "Who Really Owns Alberta's Natural Resources?" (Dec. 2003/Jan. 2004) 28 LawNow 39.

[55] S.A. 1981, c. 40, s. 3.

including water flowing through federal lands and water in river basins or aquifers shared with either other provinces, the Northwest Territories, or the United States? And finally, did the Legislature consider the "right to the diversion and use" of water something less than a "property" right, such that the province retained the "property" interest in water even after it granted a licence allowing the diversion or use of that water?[56]

Adopted in 1996 and in force in 1999, the *Water Act* officially repealed the *WRA* and contains its own Crown rights declaration, thus, providing the latest installment in the tortuous legislative evolution of those declarations. As relevant here, the *Water Act*'s declaration mimics that in the post-1981 *WRA*, by stating that the "property in and the right to the diversion and use of all water in the Province is vested in Her Majesty in right of Alberta".[57]

However, the *Water Act* breaks new ground by adding that this declaration is "except as provided for in the regulations." What did the Legislature mean by this exception? Simply that Environment regulations could spell out the allowable conditions of water licences or other rights granting instruments, or that these regulations could by themselves make sweeping changes to the fundamental property and related rights to Alberta water, as declared in section 3 of the Act? Subsection 169(2)(ccc) gives the Environment Minister power to adopt regulations "governing property in and rights with respect to diversion and use of water in Alberta". Thus, this section appears to refer to the regulations referenced in the exception to the declaration of provincial rights in section 3. However, the terms of subsection 169(2)(ccc) are so broad that they shed little if any light on what the Legislature had in mind by inserting the exception in the section 3 Crown rights declaration.

Perhaps not surprisingly given this ambiguity, to date Alberta Environment has not adopted any regulations under this section. Nor do any of the four sets of existing *Water Act* regulations refer expressly to "property" rights in water.[58]

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[56] Several court decisions could be read as supporting this view, although they are hardly clear on the subject. See *Stott, et al. v. Butterwick* (1998), 231 Alta. R. 234 at 236-37 (Alta. Q.B.), Laycock, M. (referring to the *WRA*'s Crown rights declaration in rejecting plaintiffs' claim that they have title to the disputed ground water, notwithstanding the plaintiffs' right to withdraw such water for domestic purposes); and *Schneider v. Town of Olds* (1969), 8 D.L.R. 680 at 681 (Alta. S.C. (T.D.)), Milvain, C.J.T.D. (referring to the *WRA*'s Crown rights declaration in noting that the disputed ground water "belongs to the Province").

[57] R.S.A. 2000, c. W-3, s. 3(2).

[58] *Bow, Oldman and South Saskatchewan River Basin Water Allocation Order*, Alta. Reg. 171/2007; *Oldman River Basin Water Allocation Order*, Alta Reg. 319/2003 (noted as being adopted by the Environment Minister under s. 35 of the *Water Act*); *Water (Offences and Penalties) Regulation*, Alta. Reg. 193/98; and *Water (Ministerial) Regulation*, Alta. Reg. 205/98.

4.0. Conclusions

Alberta has good reason to review its present water allocation system. While the province has tinkered around the system's edges, the system's core water licence-based features have remained essentially unchanged for over a hundred years, notwithstanding a growing demand/supply imbalance, increasing environmental concerns and recent efforts to address environmental a human needs through a more holistic, watershed-based management approach. In reviewing the present allocation system, Alberta must consider what if any steps can be taken to remove the uncertainties in the licence-based allocation system and more general system of vested water rights.

The starting point for this effort is Alberta's legislative Crown rights declarations. Viewed both individually and collectively through their evolutionary history, these rights declarations arguably raise more questions than they answer. Chief among these questions are: What purpose have they served? What non-legislative public or private rights and public duties have they recognized? Are either the declared rights, or the private rights issued from Crown rights, in the nature of "property"? And finally, is there any current legal effect of the widely varying Crown rights declarations over time?

If nothing else, the numerous legislative formulations of this declaration over the years indicate that the concept of Crown rights to water is itself murky and, thus, should be clarified as part of any effort to reform the allocation system.

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