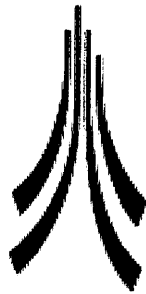


John Robert Pearson LLB. LLM. LLM.



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*'Indians, Ungulates, and Unconventional Oil: The protection of
culturally significant environmental features through multi-
jurisdictional human rights law.'*

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Acknowledgements

Throughout the researching and writing of my thesis I have been fortunate enough to have the assistance, advice and support of a plethora of individuals. Firstly, and most pertinently given the nature of the work I must thank my supervisor James Summers. Through numerous revisions of an almost completed text, meetings with a habit of wandering off track (into interesting discussions I might add) and the birth of a child for each of us, he has retained both his patience and faith in me to complete.

Beyond the traditional student-supervisor dynamic, I have had the good fortune to work with a number of friendly and supportive staff at Lancaster. Naming and thanking them all would involve writing another thesis altogether (something of a catchphrase for this project!). However, the sage words of David Milman at some difficult moments, and the wisdom of James Sweeney since his arrival at the School are worthy of note. Also I must pay tribute to the entirely un-related conversations about comics, bikes, training regimes, running, films, television and computer games with Angus MacCulloch, Agata Fijalkowski, Mark Butler and Bela Chaterjee which made the whole process bearable.

Thanks in this regard must also be extended to my examiners. Whilst they are employed to undertake such roles where appropriate, I am eminently aware that opting to examine my work specifically is a matter of their own discretion. Thus I must thank Damien Short and Sophia Kopela for their time in considering my work and for the guidance they will undoubtedly offer for my future career.

Outside of academics, the cogs which make any academic department go round must be thanked, the administrative staff. Eileen Jones in particular must be thanked as the font of all knowledge regarding postgraduate matters and for always being willing to help. The other administrative staff, though in no way obliged to do so have constantly provided guidance,

laughs and chocolate (even the Turkish delight ones) throughout, so my thanks must also be extended to Wendy, Lilloo, Sarah, Karen and Angela.

Whilst academic staff have become friends and been supportive throughout the process, there is an inimitable connection to those in your own position. Thus I must thank my fellow PhD students for sharing the up and downs of the process. I am certain that I have made lifelong friends, created in-jokes that will last a life time and even found a unicorn. So to Alex, Rodrigo, Sana, Jamie, the Siobhans, Sam, Sigrun, Ernest and all those with whom I have shared this experience my warmest thanks and the best of luck with your own futures.

Finally I would like to thank those outside of academia, who whilst not helping with the completing of the piece itself have ensured I could do so. My parents have supported my academic career from the outset, and I undoubtedly owe them more than I could ever hope to repay and so can offer only my thanks and admiration for all they have done. Rowena has put up with me, supported, guided and loved me through what is a difficult process. Added to this she has brought our daughter Amelia into the world during the course of my writing of this thesis, thus providing greater inspiration to persevere than I would have ever previously thought possible.

To you all I owe my thanks for providing the basis for a career, for supporting me through an arduous process, and for providing the smiles, laughs and memories I know I will never forget.

Abstract

The thesis considers the expansive interpretation of established human rights law from the provincial, domestic, regional and international legal spheres to protect environmental features crucial to the continued existence of indigenous cultures. Specifically the research will assess whether a practicable basis for a litigious action on these grounds might be constructed and applied. This is achieved through the use of the case study of the extraction of the 'tar sands' of Alberta, Canada.

The tar or oil sands are a source of so-called unconventional oil, which has become a commercially viable source of the resource following rises in market price over recent decades. Debate surrounds the environmental impacts of the extraction and refinement processes however and in particular its affects upon inimitable ecosystems in the regions exploited. The indigenous populace of the province are inextricably reliant upon said ecosystems for the expression of their culture and maintenance of their traditional practices. The thesis will answer the question as to whether the interpretation of domestic Canadian, regional and international human rights law offers the potential for a justiciable legal action seeking the cession or restriction of tar sands extraction in order to protect culturally significant and inimitable environments.

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<i>Poma Poma v Peru</i> Communication No. 1457/2006 U.N. Doc. CCPR/C/95/D/1457/2006	86, 197, 205, 210, 211, 212, 213, 215, 219, 239, 243, 244, 246, 254, 258, 262, 286, 296, 301
<i>Inter-American Court of Human Rights Cases and Commission Reports</i>	
<i>Ache Indians v. Paraguay</i> IACHR Case 1802, OEA/Ser.L/V/II.43, doc. 21, corr. 1 (1977)	157
<i>Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs.</i> IACHR Series C No 185 (2008)	141, 146, 213, 248, 262
<i>Communities of the Maya People (Sipakepense and Mam) of the Sipacapa and San Miguel Ixtahuacán Municipalities in the Department of San Marcos, Guatemala</i> IACHR PM 260-07 (2010)	152, 164

<p><i>Grand Chief Michael Mitchell v. Canada</i>, Case 790/01, Report No. 74/03, Inter-Am. C.H.R., OEA/Ser.L/V/II.118 Doc. 70 rev. 2 at 160 (2003).</p>	277
<p><i>Hul'qumi'num Treaty Group v Canada</i> Report No 105/09 Petition 592-07 Admissibility (30th October 2009) 17</p>	155
<p><i>Mayagna (Sumo) Awas Tingni Community v Nicaragua</i> Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001)</p>	146, 254, 299
<p><i>Maya Indigenous Communities of the Toledo District</i> Case IACHR 12.053, Report No. 40/04 (Merits) (2004)</p>	151, 164, 250
<p><i>Mercedes Julia Huenteao Beroiza et al. v. Chile</i> IACHR, Report n. 30/04, Petition 4617/02, Friendly Settlement (11 Mar. 2004)</p>	165
<p><i>Sawhoyamaxa Indigenous Community v Paraguay</i> Case 0322/2001, Report No. 12/03, Inter-Am. C.H.R., OEA/Ser.L/V/II.118 Doc. 70 rev. 2 at 378 (2003)</p>	137
<p><i>Xakmok Kasek Indigenous Community v Paraguay</i> Case 0326/01, Report No. 11/03, Inter-Am. C.H.R., OEA/Ser./L/V/II.118 Doc. 70 rev. 2 en 390 (2003).</p>	137

<p><i>Yakye Axa Indigenous Community v Paraguay</i> Case 12.313, Report No. 2/02, Inter-Am. C.H.R., Doc. 5 rev. 1 (2002).</p>	<p>9, 137, 152, 154, 217</p>
<p><i>Yanomami Case</i>, Case 7615, Inter-Am. C.H.R. Res. No. 12/85, OEA/Ser.L/V/II.66, doc. 10, rev. 1, 24 (1985)</p>	<p>135, 136, 143, 200</p>
<p><i>International Court of Justice Cases</i></p>	
<p><i>Nuclear Tests Case (Australia v. France)</i> I.C.J. Reports 1974</p>	<p>256</p>

Chapter 1

Introduction and Methodology

1.1 Introduction

When asked the states which possess the largest oil reserves, or the state which meets the majority of the crude oil demand of the United States of America (U.S.) , the overwhelming preponderance of suggestions from the average member of the public would be states in the Middle East, or for those more aware of contemporary human rights issues Nigeria. When told that Canada sits atop the second largest confirmed oil reserves by barrel¹ (only Saudi Arabia possesses more), and supplies the largest proportion of the crude oil demands of the U.S. of any State (including the United States itself), the continuous procession of shocked expressions would be almost as impressive as the figures which confirm these statements. The import of crude oil and petroleum products into the U.S. has steadily increased over the last two decades, imports from the world's largest oil reserves in Saudi Arabia have however fallen slightly, likely as a result of political tension in the Middle East. Those from Mexico, the third largest provider of oil to the world's largest consumer have increased by approximately twenty five per cent since 1993.

Canada by contrast has increased its exports of oil and petroleum products to the U.S. by over fifty per cent over the same period.² The influence of Canada in so called, 'Petropolitics'³ since its discovery of vast deposits of 'unconventional crude'⁴ beneath the

¹ The reserves of Venezuela although thought to be larger than those of both Canada and possibly the largest of any state have not been officially confirmed.

² Refer to Annex 1. All figures taken from the U.S. Energy Information Administration website, at: <<http://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=MTTIMUSCA1&f=M>> Accessed 20th July 2014.

³ Phrase coined by renowned author and journalist in; Friedman, T. 'The First Law of Petropolitics' *Foreign Policy* (Washington, May/June 2006) <http://www.ituassu.com.br/oil_fp2.pdf> Accessed 20th January 2011

⁴ Defined by the National Energy Board of Canada as 'Crude oil, which at a particular point in time, cannot be technically and economically produced through a well using normal production practices and without altering the natural viscous state of the oil,' in Canada's Oil Sands: Opportunities and Challenges to 2015 National Energy Board of Canada (Calgary, June 2006) <<http://www.neb.gc.ca/clf-nsi/rnrgynfntn/nrgyrprt/lsnd/pprntnsndchllngs20152006/pprntnsndchllngs20152006-eng.pdf>> Accessed 15th February 2011

province of Alberta⁵ has increased exponentially, making it a major player on the world energy stage as the non-renewable nature of fossil fuels becomes ever more apparent. Prior to the late 1970s the maximum level of oil exported to the U.S. by Canada within a year had only once in history exceeded one million barrels.⁶ Today that figure is exceeded twice in a single day,⁷ and annually Canada exports almost half as much oil to the U.S. as all of the Organisation of Petroleum Exporting Countries (OPEC) member states combined. Only recently, however, has a discovery made nearly three centuries ago⁸ truly altered the political and economic future of the North American neighbour of one of the most influential states in human history, catapulting it onto the world stage and to a standing the likes of which it has never before found itself in.

The 'slow-motion stampede of sorts in Alberta'⁹ triggered by the discovery in the province of so called 'tar sands'¹⁰ and processes capable of accessing its economic potential, has however had significant adverse environmental effects as well as granting a source of considerable prosperity for the province and Canada as a whole. This less well publicised damage, of various forms, caused by the tar sands projects has been felt by the population of Alberta generally. However, no social group has felt the environmental impact more than the indigenous people of the province whose very way of life, in terms of their culture and sustenance is threatened by the ever accelerating development of the projects. As Short states, 'when indigenous lands are used by extractive industries the inherent corporate preference for externalising environmental costs can lead to physical, as well as cultural destruction. The tar

⁵ Although deposits extend into Saskatchewan, the overwhelming majority of deposits are within the borders of Alberta.

⁶ Alberta Energy Resources Conservation Board, *Annual Oil and Gas Statistics*, Calgary, 1979.

⁷ Refer to Annex 1. All figures taken from the U.S. Energy Information Administration website, at: <http://www.eia.gov/dnav/pet/pet_move_impcus_a2_nus_ep00_im0_mbb1_m.htm> Accessed 20th January 2011.

⁸ Sweeney, A. *Black Bonanza: Canada's Oil Sands and the Race to Secure North America's Energy Future* (John Wiley and Sons, Toronto, 2010)

⁹ Marshall, E. 'OPEC Prices Make Heavy Oil Look Profitable' (1979) 204 Science, New Series 4399 at 1287

¹⁰ This terminology and that of oil sands is addressed in the later Section 2.5.

sands project is a prime example of this.’¹¹ A legal challenge has been mounted by these peoples against both the province of Alberta and the Canadian government on the basis of breaches of their rights imbued under historic treaties between them and the Crown. The notion of a breach of human rights is however not considered within this litigious action, although media and activist groups’ speculation of such a breach has surrounded the case.¹²

The notion that human rights law offers protection by extension to the environment owing to the reliance we have upon it is well established in both academic literature and case law. Whilst case precedents will be discussed at length later in the thesis, the philosophical reasoning for the protection of the environment under the auspices of human rights is worthy of note. This justification will also serve to highlight the relevance of this field of law to the particular context of the tar sands industry in Alberta and the impacts it allegedly has upon the indigenous populace of the province. Whilst one of the central tenets of human rights law is the protection of the individual from abuses of power by the state, and this is undoubtedly of some relevance to the focus of the piece, it is in the connection of the individual to their environment that the rationalisation of assessing the tar sands industry through human rights jurisprudence can be found.

Anderson perhaps describes the connection between human rights and the environment best by stating that they both, ‘touch upon all spheres of human activity.’¹³ Immediate connections here can also be established between the basis for human rights in

¹¹ Short, D. ‘Cultural Genocide and Indigenous Peoples: A Sociological Approach’ (2010) 14 (6) *The International Journal of Human Rights* 833, 844

¹² See for example the work of Amnesty International and the Rainforest Action Network: <<http://www.amnesty.ca/our-work/issues/indigenous-peoples/the-lubicon-cree-ongoing-human-rights-violations>> Accessed 30th July 2014 and <<http://www.ran.org/royal-bank-canada-steps-away-tar-sands-support-first-nation-rights-0>> Accessed 30th July 2014

¹³ Anderson, M.R. *Human Rights Approaches to Environmental Protection: An Overview* in Boyle, A. and Anderson, M.R. (eds.) *Human Rights Approaches to Environmental Protection* (Clarendon Press, Oxford, 1996)

‘inherent dignity...of all members of the human family,’¹⁴ and the need of all humans of ‘an environment of a quality that permits a life of dignity and well-being.’¹⁵ Similarly Nickel’s suggestion of a ‘minimally good life’¹⁶ as a focus for human rights would fit with this inextricable connection between human dignity and a basic environmental standard which supported this. As such the contention here is that the impact of the tar sands industry on the indigenous populace is so great as to potentially impact upon their inherent human dignity. Specifically these breaches of fundamental rights are suggested as arising from harm to environmental features of particular cultural significance.

Whilst the proximity of industrial projects to residential or culturally significant areas is by no means a new issue, and a relationship which can in some case be harmonious, the potential and actual impacts of the tar sands industry on the indigenous peoples of Alberta are particularly severe. These impacts will be discussed in at length later in the piece, but a number of academics have suggested that cumulatively these impacts constitute a ‘slow industrial genocide’¹⁷ of these peoples. Whilst it might be suggested that the language of genocide is extreme, the testimony of those facing the impacts to be discussed would suggest it may be apt. Caribou, a source of food and traditional materials to be discussed at length in the thesis are particularly susceptible to these adverse effects and in the opinion of the peoples who utilise them in this manner, ‘The extinction of caribou would mean the extinction of our people.’¹⁸ Although this rhetoric might seem somewhat hyperbolic, those campaigning against the projects feel their hand has been forced. ‘When the government fails

¹⁴ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III) Preamble.

¹⁵ Stockholm Declaration of the United Nations Conference on the Human Environment, 16 June 1972, U.N. Doc. A/CONF.48/14/Rev.1 at 3 (1973)

¹⁶ Nickel, J. ‘*Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights*’ (University of California Press, Oakland, 1987) 51

¹⁷ Huseman, J. and Short, D. ‘A Slow Industrial Genocide: Tar Sands and the Indigenous Peoples of Northern Alberta’ (2012) 16(1) *International Journal of Human Rights* 216

¹⁸ Pembina Institute *Canadian Aboriginal Concerns with Oil Sands: A compilation of key issues, resolutions and legal activities* <<https://www.pembina.org/reports/briefingnoteofntoursep10.pdf>> Accessed February 20th 2015

to engage with First Nations about our concerns, and fails to respect our rights, these things have nowhere to go but the courts.’¹⁹The thesis does not intend to consider whether the harms constitute genocide as is suggested by Husemann and Short,²⁰ but instead to assess whether the severing of the connection between the environment and the indigenous peoples who rely upon it could constitute a breach of established human rights provisions to which the Canadian and hence Albertan governments are subject.

The tar sands extraction projects of Alberta present a case study in which this connection between inimitable environmental features and culture can be explored. In particular this context allows for the consideration of whether the inhibition or destruction of cultural connections to such irreplaceable features might give rise to breaches of human rights law. Innumerable industrial projects across the world present potential harms to environments which bear great significance to identifiable and distinguishable cultural groups, however a number of factors make this instance of environmental damage to such features acutely useful for the purposes of the analysis to be undertaken in the thesis.

Firstly the range and severity of the harms to the features of cultural significance to the indigenous populace is considerable. The industrial extraction of the tar sands presents threats to traditional food sources, materials for clothing and building, and an array of other practices of significance peculiar to the groups inhabiting the regions affected. These impacts are arguably so severe as to threaten the very existence of the groups themselves. Pat Marcel, an indigenous elder even suggested in a report on the health of the Athabasca river in proximity to extraction operations, ‘We’re talking about the survival of the Athabasca river,

¹⁹ Ibid.

²⁰ Huseman, J. and Short, D. (n17)

but more than that this is about the survival of our people.’²¹ The strength of this connection between this ecosystem and the continuation of a culture ensures that the claims of human rights breaches could not be assuaged out of hand by the contention that the economic benefits of exploiting this resource far outweighed any harm caused in doing so.

Similarly the status of Canada as a developed nation reduces the strength of contentions concerning the need to exploit natural resources to access wealth and utilities necessary to improve the standard of living of citizens. In spite of this, the suggestions of the necessity of the extraction of the tar sands as a resource to ensure energy security for Canada and indeed North America as a whole remain undiluted. Indeed a report submitted to the International Monetary Fund suggested that a boost to gross domestic product was likely were oil sands extraction to continue at present rates, though highlighted the inherent risks in such a rapid expansion also.²² As such whilst not avoided in their entirety the suggestions of the absolute necessity of extraction which might be prevalent in similar debates in other states are undeniably weakened by the level of development of Canada.

The legal system of Canada and in particular the approach of its judiciary to the interpretation and application of human rights jurisprudence to be discussed in greater detail in the thesis²³ also affords a unique opportunity to consider liberal approaches to the application of human rights law in a sympathetic arena. As a result, international, regional and domestic human rights legislation are all available avenues for discussion of the suggestions of the thesis that severe damage to culturally significant environments could

²¹ Pembina Institute *Government Protects Oilsands Industry, Fails to Protect Athabasca River* <<http://www.pembina.org/media-release/1384>> Accessed February 20th 2015

²² Bayoumi, T and Muhleisen, M *Energy, the Exchange Rate and the Economy: Macroeconomic Benefits of Canada's Oil Sands Production* <<https://www.imf.org/external/pubs/ft/wp/2006/wp0670.pdf>> Accessed February 20th 2015

²³ See in particular Chapter 3 in this regard.

breach rights enshrined in these jurisdictions. Added to this is the inherent recognition of the significance and need for protection of these regions within the Canadian legal system.²⁴ Vast swathes of the land under which the tar sands resource is located are afforded constitutional protection owing to their historic occupation by the indigenous peoples by a series of treaties with the Canadian government signed in the late eighteenth and early twentieth centuries.²⁵ These treaties confer rights over the land to the indigenous peoples who bear inextricable cultural connections to it. As such there is an established legal basis on which to build the suggestion that the land in question holds unique significance to said peoples which could, if inhibited or removed entirely, could constitute breaches of established human rights provisions. Thus established aspects of the Canadian legal system support the contentions of the thesis in a manner unique to the case study providing an established recognition of the significance of the land in question but falling short of establishing individual rights to utilise the land in a particular culturally significant manner.

Whilst Canada remains the only nation with a large scale industry based around extracting tar sands, refining the raw material and selling the product on the market as synthetic crude oil, a number of other nations sit atop significant, and in the case of Venezuela larger, reserves of the resource. As such the discussion surrounding the impacts of the processes involved in the industry and the human rights implications thereof has relevance to emerging industries globally. The relevance of this discussion is however not limited to other instances of extraction of material akin to that considered here. The tar sands

²⁴ This is clearly established in the The Constitution Act, 1867 (U.K.), 30 & 31 Victoria, c. 3. at section 35 but also in a number of seminal precedents such as *Corbiere v. Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203, *R v Van der Peet* [1996] 2 S.C.R. 507 and *Haida Nation v BC* [2004] 3 S.C.R. 511, [2004] S.C.C. 73.

²⁵ The Constitution Act, 1867 (U.K.), 30 & 31 Victoria, c. 3. S.35

are amongst a growing number of resources termed by some as ‘extreme energy’,²⁶ or ‘unconventional oil and gas.’²⁷ These are resources which are only economically and socially viable only by virtue of global reliance on the so called fossil fuels and the realisation that reserves of more easily accessed resources are declining. The human rights implications of this broad group of resources are potentially considerable, particular to them, and far beyond that which could be addressed in this thesis. Academic discourse outside the natural and physical sciences surrounding them is in its infancy. Legal discourse is no exception to this, and as such the distinct impacts and considerations of this group of previously unutilised sources of energy warrants academic investigation beyond the existing literature surrounding conventional resources. The consideration of the issues raised in a setting as conducive to logical interpretation of established human rights instruments as Canada will, it is hoped, facilitate discourse in states with sovereign resources of a similar nature and where their exploitation might similarly impact upon land of acute significance to minorities and particularly minority cultures.

More specifically this thesis aims to examine the rights which might be used as a basis for a case against the licensing of tar sands projects arising from the environmental damage caused by them. This will be constructed around suggested breaches of the human rights of the indigenous peoples of Alberta. In order to provide some relevancy to their own specific culture, the rights purported by the piece to have been breached will be linked to fundamental expressions of it as represented in those rights enshrined within the historic treaties and declarations made prior to the start of the twentieth century. The reasoning for this methodology in relation to each adverse impact and a more detailed analysis of the various

²⁶ Extreme Energy Initiative *What is extreme energy?* < <http://extremeenergy.org/about/what-is-extreme-energy-2/> > Accessed February 20th 2015

²⁷ The distinction between unconventional and conventional oil should be noted as being potentially misleading. Scientifically this is a distinction concerned with the density of the oil by comparison to water

components surrounding the central theme will be discussed in more detail at various points in the work. Firstly in this introduction the methodology for the work as a whole will be outlined. Following this a chapter has been dedicated to background information necessary which serves to provide a brief overview of the main proponents in the dispute concerning the tar sands as well as a basic understanding of the impacts the extraction thereof is suggested as having upon the ecosystems of Alberta. Following this, more specific detail will be provided within later chapters where it is necessary to elaborate upon the basic background provided herein.

1.2 Methodology

The methodological approach to the piece will be largely empirical, in that it will outline an approach to challenging the licensing of tar sands projects in theory already available to the indigenous peoples within the province of Alberta. This is as such a claim could be made for human rights breaches under the existing federal legislative and judicial frameworks of Canada or the provincial mechanisms of Alberta. The normative aspect of the research will be formed by the proposition that interpretations of the applicability of accepted human rights provisions within the domestic jurisdiction of Canada could give rise to a basis for a legal challenge to the tar sands projects founded on human rights law from various levels of enforcement.

The premise is therefore that the legal provisions to be discussed are *lex lata*,²⁸ but that interpretation of that law and its application to the damage caused by the tar sands is *lege*

²⁸ The law as it stands.

ferenda.²⁹ Note should be made that the thesis does not intend to contest that there exists or should exist a broad right to the environment, or narrow protection of specific aspects thereof. Instead the proposition is that the damage caused by the tar sands projects to specific environmental features which the indigenous peoples of Alberta inhabit, rely upon to express their culture and have inimitable rights over, is so severe that it constitutes a breach of established human rights provisions when applied using culturally relative judicial interpretation.

Care will also be taken to avoid contentious political and social issues which might bring the work into disrepute or leave it open to criticism on the basis of unsubstantiated arguments. In this regard a specific example would be the intense debate surrounding the issue of climate change. Where such issues are at risk of being touched upon by the piece a clear statement will be made to separate it from any contentious debates and unsupported statements of personal opinion on any such issues will be avoided. The purpose of this methodological approach is to highlight the lack of recognition for human rights law as recourse to bring an end to, seek compensation for and reparation of, the damage caused by the tar sands projects in the province of Alberta.

Methodology will also therefore guide the structure of the piece in that the logical approach to the development of the aforementioned argument will be to consider the human rights provisions of each level of enforcement, national, regional (multinational) and international separately in relation to the interpretation of the existing domestic provisions pertinent to the subject matter. In essence the broad rights which might give rise to a basis for a legal challenge against the damage caused, through judicial interpretation, will be identified

²⁹ The law as it should be.

and the relevant human rights provisions at each level of enforcement then assessed as to their applicability and utility in relation to the case study of the indigenous peoples of Alberta and the effects the tar sands projects are having upon them.

Thus a clear structure resulting from this methodology is established. This is first to analyse the effects of the tar sands projects and their scope, and select the rights relevant to that subject matter. Following this a consideration of those broad rights at each level of enforcement will be made. To conclude, an assessment will be made in each case of their potential utility in relation to the creation of a basis for a viable legal challenge, or part thereof. The core aim of the piece in this regard is to construct a legal basis for contesting the licensing of tar sands projects by the Canadian government, which despite being based in theory could be practically applied. Such an application would ideally have a relative potential for success in securing, as a minimum, the restriction of the tar sands projects and their licensing in the province of Alberta so as to limit the damage being done to the indigenous peoples of the province and the inimitable environment on which they rely to perpetuate their culture.

Qualitative research methods will evidently form the majority of those utilised within the thesis, with analysis of the potential application and interpretation of existing legal provisions being based upon such methods. However, a significant amount of quantitative data is available concerning the effects of the tar sands projects, especially in relation to their alleged environmental and human health impacts. Thus utilising this data to support qualitatively based propositions could not feasibly be avoided. Note should be made that manipulation of such data will not be required, and conclusions drawn from it will be factual in nature, avoiding the necessity to interpret said data and hence justify those interpretations.

To avoid the plethora of published and documented quantitative data available would be remiss as its potential to support qualitative arguments solely through its quotation in relation to statements is vast.

Thus although the methods utilised in the research and the subsequent conclusions will be purely qualitative, the propositions put forward would be weakened should the superfluity of quantitative data widely published and recognised not be utilised in a supportive evidential role. All data utilised will be fully referenced to ensure that no requirement for justification of quantitative methods is required. The credibility of any data will be questioned at all stages, endeavouring constantly to ensure that any contested data is not drawn upon, or is highlighted as being so. Also where use of such data is beneficial, or necessary, opposing views or published challenges to the veracity of said data will also be highlighted.

During the course of the research a number of reports, articles, studies and other publications will be utilised to illustrate statements or to support arguments made within the piece. However, as is the case with developments of the size and commercial importance of those in relation to the tar sands, parties who stand to benefit from the continuation or expansion of them will seek to publish material improving the likelihood of their being able to do so. Thus many publications are funded by the very bodies whose work may well depend upon a favourable portrayal in that same piece. In relation to the research at hand, the sources of funding for publications utilised, where provided or if unknown, whose veracity and impartiality could be brought into question as a result of said funding will be stated. Otherwise the piece in question will be excluded from use within the thesis. These measures aim to ensure the impartiality and the utility of the legal arguments presented in the work, in

order that they could be used in the formulation of a case against the current policy applied in the licensing of tar sands developments in Alberta, Canada.

A brief note on the precautionary principle found in environmental law and established as a core principle of field in the Rio Declaration³⁰ is necessary at this point. The thesis cannot discuss the precautionary principle and its implications in relation to the case study within the constraints made upon it. As such although the principle will be mentioned briefly at points within the text, it should generally be regarded as referring merely to a requirement to take reasonable measures to mitigate or eliminate foreseeable harms which could severely affect the health of individuals. Such an approach reflects a commitment to both environmental impacts assessments and precaution more generally in the licensing of industrial projects which provincial and federal authorities alike in Canada have espoused. The reasoning for this approach is twofold. Firstly the piece is concerned with the application of human rights law to the impacts upon the indigenous populace of Alberta arising from the tar sands extraction industry. The precautionary principle, whilst considered in some seminal cases³¹ in this field is not an established principle of human rights law. Secondly the principle suggests precaution on the part of governing authorities with regards to impacts of which there is an existing knowledge, or a reasonable foreseeability. As will be discussed however, some of the impacts of the tar sands industry are as yet unascertained to an extent which would demand precaution under the principle. Also such precaution would likely constitute only heightened monitoring of potential impacts, and as such offer little protection of indigenous peoples and culture.

³⁰ Rio Declaration on Environment and Development (1992), UN Doc. A/CONF.151/26 (vol. I) / 31 ILM 874

³¹ See for example: *Tatar v. Romania* [2009] ECHR, Application no. 67021/01 and *Yakye Axa Indigenous Community v Paraguay* Case 12.313, Report No. 2/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 387 (2002)

In this regard some consideration of the concept of Human Rights Impact Assessments is necessary. The ‘phenomenon of undertaking human rights impact assessments’³² has grown in prevalence in recent years and can take two broad forms, ex ante (before the activity being assessed), and ex post (after the activity being assessed). de Beco also highlights that divisions of ‘positive and negative, intended, and unintended and direct and indirect impact’³³ can also be made. Such distinctions would undoubtedly be of value to the discourse surrounding the human rights impacts of the tar sands extraction projects particularly in relation to direct and indirect impacts. Indeed this distinction is a crucial aspect of some of the conclusions drawn by the thesis as will be highlighted.

The methodology of the thesis is however aimed at assessing whether a breach could be suggested as having occurred at all on the basis of the harm to culturally significant environmental features rather than that assessed by human rights impact assessments, the potential risk of doing so or the extent to which they have been breached. The nature of human rights impact assessments is in itself diverse. As Harrison, an avid proponent of the concept, concedes, ‘we will never be able to define a uniform process for all HRIAs...[t]he appropriate model will depend on the nature of what is being assessed.’³⁴ They are broadly defined as, ‘measuring the impact of policies, programmes, projects and interventions on human rights,’³⁵ and as such are constrained by the ‘difficulties in gaining access to relevant data and the challenge of attributing policy change to the HRIA.’³⁶

³² Harrison, J. ‘*Human Rights Measurement: Reflections on the Current Practice and Future Potential of Human Rights Impact Assessment*’ (2011) *Journal of Human Rights Practice* 3(2) 162, 163

³³ de Beco, G. ‘*Human Rights Impact Assessments*’ (2009) 27 *Netherlands Human Rights Quarterly* 139, 143

³⁴ Harrison, J. ‘*Human Rights Measurement: Reflections on the Current Practice and Future Potential of Human Rights Impact Assessment*’ (2011) *Journal of Human Rights Practice* 3(2) 162, 165

³⁵ Human Rights Impact Resource Centre, *An Introduction to Human Rights Impact Assessment* <<http://www.humanrightsimpact.org/hria-guide/overview>> Accessed February 20th 2015

³⁶ Bakker, S. Van Den Berg, M. Duzenli, D. and Radstaake, M. ‘*Human Right Impact Assessment in Practice: The Case of the Health Rights of Women Assessment Instrument (HeRWAI)*’ (2009) 1(3) *Journal of Human Rights Practice* 436, 451

These issues in particular preclude the application of the Human Rights Impact Assessment methodology to the case study of the thesis. Human rights impact assessments undeniably bear considerable relevance to extractive industries in particular as they allow for the incorporation of scientific data into assessments of potential breaches of said rights. However, in relation to industrial activities of considerable economic value, the need for evidence of significant strength to dissuade both government support and corporate fervour to extract, and indeed to suggest an unjust regulatory process is well documented and recognised by jurisprudence in this area.³⁷ As will be discussed throughout the thesis, contentions as to the veracity of data regarding the impacts of the tar sands industry generally and in relation the indigenous populace specifically is both lacking and, where available, highly contentious. Thus the validity of any proposed impact assessment would undoubtedly be contested on these grounds irrespective of the proposed outcome.

Of greater importance however is the fact that the thesis proposes a novel application of existing provisions, and as such one which might be deemed as misguided in the conclusions drawn. As such to suggest that the impact upon rights which have not been widely recognised as being potentially breached in the manner proposed could be assessed using Harrison's methodology³⁸ would be remiss. Essentially, that which is not known cannot be measured. Thus, it is hoped that the thesis might instead act as a precursor to such analysis by providing a basis for potential breaches from which an assessment of their extent could be

³⁷ In this regard see the case of *Hatton v United Kingdom* (2002) 34 EHRR 1. Here the overall social and economic value of night flights to and from London's Heathrow airport was deemed as outweighing the minor environmental impacts of the noise they produced. This process is often referred to as the margin of appreciation or the fair balance test. See in this regard: De Hert, P. *A Human Rights Perspective on Privacy and Data Protection Impact Assessments* in Wright, d and de Hert, P *Privacy Impact Assessment* (Springer, London, 2012) 32-77

³⁸ Harrison, J. 'Human Rights Measurement: Reflections on the Current Practice and Future Potential of Human Rights Impact Assessment' (2011) *Journal of Human Rights Practice* 3(2) 162

made. The relevance of the human rights impact assessment methodology to the effects of the tar sands industry on the indigenous populace as a result of environmental damage is therefore not entirely absent. Instead it is merely premature where the rights which might be assessed as having been breached remain unidentified. As such the concept will not be included in the discourse of the thesis but might provide an avenue for expansion upon the conclusions drawn herein.

1.3 Structure of the Work

The work will be divided into three main sections, each dealing with potentially applicable rights originating from the Canadian domestic legal system, regional human rights mechanisms and finally international legal instruments in this field. These will be further segregated into rights protecting the individual from physical and psychological harm and those which condemn the suppression of the ability of individuals to conduct themselves in a manner they see fit. In the context of the thesis this will primarily concern the ability of individuals to live in a manner conducive to their cultural beliefs. The influence of the European regional human rights system and the Declaration on the Rights of Indigenous Peoples³⁹ will be the only exception to this basic structure and will be discussed *in totum*⁴⁰ within the chapters concerning the regional mechanisms and the international instruments respectively.

Following this introductory chapter of the piece, the background information necessary to understand the context of the piece which support the legal arguments made herein will be provided. The processes involved in tar sands extraction, along with a brief history of the development of the industry will begin this chapter. The specific environmental

³⁹ United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295) HR/PUB/13/2 (DRIP)

⁴⁰ In full.

impacts of the tar sands extraction projects which provide the basis for the proposed action constructed within the piece will then be outlined. This will be segregated into the three main impacts considered by the piece, water consumption, tailings ponds⁴¹ and those felt by the boreal woodland caribou. Finally this chapter will connect these two areas by providing a brief background to the indigenous populace of Alberta, and in particular the regions impacted upon most intensely by the tar sands operations therein.

The third chapter of the piece will begin the analysis of human rights instruments to which the Albertan and federal Canadian governments, and organs thereof are subject in relation the licensing of the extraction of tar sands. The first of three chapters in this regard it will focus on the domestic instruments pertinent to the piece. Within this it will outline the particular rights which are suggested as having been breached by the current approach to licensing or the operations approved thereby. Both federal and provincial legislation will be considered and the ramifications of the constitutional arrangements of Canada will be outlined where appropriate also. The aim of this section will be to highlight those rights of potential utility to the aim of the piece, whilst also affording a basis on which to interpret rights from the other two broad jurisdictions to be considered by the piece which are not all able to be upheld directly in the Canadian domestic legal system.

The following two chapters will focus upon the two other jurisdictions considered by the piece, those of the regional and international human rights mechanisms with connections to Canada. These connections will be both interpretative and enforceable in nature, and the particular applicability of each instrument discussed to Canada, and Alberta, will be outlined where appropriate. The chapter focused on regional mechanisms will consider the Inter-

⁴¹ This term is explained in full in heading 2.33 concerning Tailings Ponds.

American and European regional systems, both of which have had some bearing on judicial decisions within the domestic Canadian courts. Introducing this chapter will be a detailed justification for the segregation of the discussion of regional and international instruments within the piece. Following this, the nature of Canadian relations with the Inter-American system will be highlighted as a particular concern in relation to the piece, as strained interaction influences the applicability of provisions from this jurisdiction in relation to the aim of the piece.

The last substantive chapter of the work will consider the international human rights instruments of note in relation to the extraction of the tar sands and the environmental impacts thereof. As well as the widely applicable texts affording rights to all citizens of ratified parties, the piece will also discuss the interpretative value of non-binding instruments from this legal sphere with particular relevance to indigenous peoples. This will allow for not only culturally relative interpretations of binding rights to be suggested, but interpretations with specific applicability to the often culturally idiosyncratic context of indigenous peoples. The potential utilisation of non-binding mechanisms within this sphere, particularly those under the auspices of the United Nations, will also be discussed. Whilst not strictly binding or enforceable in themselves the interpretative and political benefits they afford in relation to the aim of the piece.

The last chapter of the work will be reserved for concluding remarks. The conclusion of the piece will highlight the human rights provisions which offer the basis for a litigious action opposing the current approach to licensing and regulating the tar sands industry with the greatest possibility of success. Beyond the rights themselves, the most apt forum for such challenge will be suggested. This will be based upon an analysis of the strengths and

weaknesses of the mechanisms available in each jurisdiction in relation to Canada specifically. However, arguably the most important consideration in this regard will be the likelihood of a favourable outcome for the suggested action within each of the fora. The distinction between the proposed interpretative approach to opposing the knowing damage of culturally significant environmental features and protection afforded to the environment under the auspices of human rights law internationally to date will also be stressed to demonstrate what the piece offers to wider academic debate in this regard.

Chapter 2

Historical and Scientific Context

2.1 Historical Context of Tar Sands Expansion

Despite knowledge of the mineral rich nature of the sands of the Athabasca river basin and their abundance being relatively common, it was not until the 23rd of April 1929 that a method of effectively processing the bituminous sand was patented and the true potential of the previously unattainable bitumen became apparent. Karl Adolf Clark, an Ontario born chemist, is regarded as the grandfather of tar sands development for his discovery of, ‘a process for separating and treating bituminous sands and like material into its bituminous and other constituents.’⁴² The process is now known as the hot water recovery process, and despite refinement and a massive increase in scale to industrial levels, remains the most commonly used production method in the modern tar sands extraction operations outside the utilisation of alternative methods to extract from deep reservoirs.⁴³

Despite this discovery a further thirty eight years would pass until the first tar sands extraction plant, akin to those now prevalent in the Athabasca oil sands fields, began to operate.⁴⁴ This was largely due to the considerable cost of extraction of bitumen from the tar sands, and then its upgrading to the more highly demanded synthetic crude oil. The opening of a relatively small, by current standards at least,⁴⁵ project for extraction of crude oil from the tar sands by the Great Canadian Oil Sands company outside Fort McMurray, Alberta, on 30th September 1967 marked the beginning of insatiable contemporary development of what

⁴²Canadian Intellectual Property Office *Patent CA 289058: Bituminous Sand Processing* (Issued 1929) <http://brevets-patents.ic.gc.ca/opic-cipo/cpd/eng/patent/289058/page/289058_20031129_description.pdf> Accessed 15th February 2011 Accessed 30th July 2014.

⁴³ A pocket of tar sands beneath the ground, which has been mapped using imaging techniques, and as such has an ascertainable crude oil output.

⁴⁴ Attempts were made to extract bitumen from the tar sands on an industrial scale prior to this, but all proved to be impracticable prior Clark’s discovery.

⁴⁵ A limit was placed initially on the volume of synthetic crude oil allowed to be produced by the plant at 31,500 b/d, which shortly prior to opening was revised to 45,000 b/d. Today plants average production values of around 300,000 b/d.

is now described as one of the 'most destructive projects on earth.'⁴⁶ Just over a decade passed until a conglomerate of investors, forming Suncor Energy Incorporated (Suncor) began production at their plant in 1978 with daily production outputs doubling those of the Great Canadian Oil Sands plant, but still falling far short of modern standards, producing a mere 100,000 barrels per day (b/d).⁴⁷ The next two decades would mark rapid and unhindered growth in tar sands extraction and refining towards the levels we see today, with the average modern plant producing three times the amount the Suncor plant was capable of at maximum output.

A number of factors caused the enormous swell in interest, and crucially investment, from oil and engineering companies, professional investors, funds and banks, and indeed the governments of both Alberta and Canada. The two most obvious of these were the basic economic factors of supply and demand. Demand crucially rose exponentially from Canada's closest neighbour, the U.S. Between the opening of production of the two inaugural projects aforementioned, US oil imports more than tripled,⁴⁸ and have almost doubled again between 1978 and today. This surge in demand was coupled with the delicate and highly politicised supply of crude oil from states forming OPEC, and emphasised by the oil embargo imposed by the organisation in 1973 as a result of continued American backing of Israel. These factors provoked the massive increase in both financial investment and research and development into the potential of the tar sands in terms of crude oil production, the benefits of which are being reaped today.

⁴⁶ A phrase now in wide usage when referring to the tar sands projects, coined by the environmental campaign group Environmental Defence in its report '*Canada's Toxic Tar Sands Report by Environmental Defence*': <http://environmentaldefence.ca/sites/default/files/report_files/TarSands_TheReport.pdf> Accessed 15th February 2011

⁴⁷ b/d : barrels per day.

⁴⁸ See total import figures in the table published by the US Energy Information Administration, taken from: <<http://www.eia.doe.gov/aer/txt/ptb0504.html>> Accessed 15th February 2011 (*Full table at Annex 2*).

Debate surrounding the tar sands extraction projects does not focus solely upon the environmental and economic arguments however. A unique perspective and standpoint on the issue is possibly the most hotly contested aspect of the arguments engulfing the practice. Those in favour of the tar sands developments contest that the utilisation of the resources possessed by a State such as Canada where human rights are guaranteed, is preferable to the continued reliance upon that sourced from States where this is not necessarily the case. Even where the financial and environmental costs of the resource far outweigh that from such a State it is argued that the moral case for the more expensive, in this case Canadian, oil should result in its extraction and use. In relation to the Canadian tar sands, the synthetic crude oil their refinement produces has been labelled as being such 'Ethical Oil' by those seeking its development, continued extraction, and expansion in its marketing.

One of the most high profile and outspoken proponents of this side of the debate is Ezra Levant, who argues, 'Every drop of oil from Alberta is one less drop from some fascist theocracy, or some brutal warlord; one less cent into the treasuries of Russia's secret police and al-Qaeda's murderers.'⁴⁹ This standpoint has however, caused ire at an international level, with those States accused of producing 'unethical oil,' speaking out about the accusation in the Canadian media.⁵⁰ The ethicality of tar sands oil alone, regardless of the oil industry as a whole, could however produce a thesis of considerable length, and as such this debate will be side-lined within the research, however to fail to provide context to the wider arguments surrounding the issues focused upon by the piece would be remiss.

⁴⁹ Levant, E. *Ethical Oil: The Case for Canada's Oil Sands* (McClelland and Stewart, Toronto, 2010) 233-4

⁵⁰ McCarthy, S. "'Ethical oil' and sparks war of words between Ottawa, Saudis.' *The Globe and Mail* (2011) <<http://www.theglobeandmail.com/news/politics/ethical-oil-ad-sparks-war-of-words-between-ottawa-saudis/article4256682/>> Accessed 30th July 2014

2.2 Tar Sands Extraction and Processing

Despite highly volatile oil prices throughout the latter half of the 20th century,⁵¹ expansion was tempered until the OPEC oil embargo of the U.S. in 1973. This was owing to the high cost of both extraction and refinement or ‘upgrading’ of the bitumen so readily available in the north east of Alberta.⁵² The natural state of the tar sands unlike conventional crude oil is solid, not the easily utilised liquid or ‘light’ crude to which the world has become accustomed. Also the tar sands are not pure bitumen immediately ready to be refined, unlike ‘conventional crude’ whose state allows for both easy transportation and relative purity upon extraction facilitating almost immediate use, or at least quick and cheap refinement into a highly lucrative end product. As such extraction of the raw material to be processed into crude oil sold by the barrel and listed on stock markets the world over is a challenge in itself.

Two broad approaches to extraction are available to companies who have had projects approved, and these are dependent upon the depth at which the reservoirs of tar sands are situated. Shallow reservoirs are easily strip mined from the earth, with material covering the reservoir excavated and removed to expose the raw material which is then dug from the ground and transported to refineries. The alternative is so called, ‘in situ’ extraction, which relies upon an element of refinement within the reservoir itself. In this method the high viscosity of the tar sands prevents its extraction from significant depth in its natural form. The solution is, in the simplest of terms, the application of extreme heat and pressure to the reservoir. Two forms of ‘in situ’ extraction are utilised by companies currently operating in the tar sands fields of Alberta, steam assisted gravity drainage (SAGD) and cyclic steam

⁵¹ WRTG Economics *Crude Oil Prices* (2011) <http://www.wtrg.com/oil_graphs/oilprice1947.gif> Accessed 30th July 2014 (*Full table at Annex 3*).

⁵² Clarke, T. *Tar Sands Showdown* (James Lorimer and Company Ltd. Publishing, Ontario, 2008) 35-36

stimulation (CSS).⁵³ Note should be made that SAGD is by far the more commonly used method in the Athabasca region tar sands, and its effects will therefore be focused upon within the thesis⁵⁴.

Steam assisted gravity drainage essentially involves heating and pressurising the highly viscous raw tar sands beneath the ground in order that it can be pumped from the earth directly. This involves the drilling of two wells into a ‘reservoir’ of tar sands beneath the ground. The first is used to directly inject highly pressurised water and other chemicals into the reservoir. This results in a change in consistency of the tar sands within the reservoir to a less viscous state and allows the mixture to be pumped out of the second well drilled and sent for refinement into synthetic crude oil via pipelines (a method of transportation made possible by this new state).⁵⁵ Favoured by the industry as the visual damage caused as a result of extraction is far less than open pit extraction, ‘in-situ’ extraction still accounts for a fraction of the total of synthetic crude oil output of the projects in Alberta, though this will inevitably increase. Estimates place only around 10% of the confirmed tar sands deposits of Canada at a depth capable of open pit mining, and as such the future of extraction undoubtedly lies in these methods, even if current production levels attributed to them do not reflect this reality.

Although these approaches mitigate some of the more obvious effects of open pit extraction, they still entail many of the considerable ramifications of open pit mining. The processing of the final saleable product of crude oil from the tar sand mixture extracted,

⁵³ A process called VAPEX is also being experimented with by oil companies operating in the tar sands, though this is highly similar to SAGD, but utilises solvents instead of water.

⁵⁴ The two processes are not exclusively used by oil companies, and in some cases are rotated to achieve the highest yields, but SAGD is by far the most widespread and commonly utilised extraction method for deep reservoir tar sands in the Athabasca projects.

⁵⁵ A basic illustrative diagram of the SAGD process is included at Annex 4.

although in liquid form and thus more easily transported to the surface and to refineries, retains the very same refining difficulties and adverse effects once the raw material emerges above ground. The post extraction process is exactly the same but with one less link as the heating occurs below the surface instead of in a refinery above the ground, and as such the adverse effects of these stages are retained.

In basic terms the SAGD process benefits only the oil companies as smaller leases are required for the land, as they are based upon the area of the surface utilised. The area impacted upon directly is reduced massively as deviated wells⁵⁶ can be used and as such multiple reservoirs can be accessed from one drilling rig. The SAGD approach is preferred therefore from a public relations standpoint as it does not require the highly visible and emotive damage to the surface demanded by open pit extraction. The details of the specific effects of the two main processes utilised in the Athabasca region on various aspects of both the environment and the indigenous cultures of Alberta will be discussed in greater depth in relation to the proposed human rights violations they give rise to later in the piece.

2.3 The Environmental Impacts of Tar Sands Extraction

The thesis will consider three main impacts of the tar sands, all of which have significant repercussions for the environment on which the First Nations of Alberta rely. In particular impacts to the boreal forest ecosystem will be considered as it is within this type of environment that the bulk of current extraction operations are being undertaken. In this context the focus will be upon the impacts of water extraction from naturally occurring sources, tailings ponds, and the impacts to boreal woodland caribou. The three are somewhat

⁵⁶ Deviated wells are those wells which do not follow a vertical path, and instead travel at an angle other than perpendicular to the surface to access resources which are not located directly below a well site.

interconnected for example the impacts of tailings ponds will affect caribou as well as the indigenous populace, as would a significant reduction in the presence of water in the regions exploited. However the specific effects to them necessitate discussion owing to their significance as a species still hunted in a traditional manner by a proportion of the indigenous populace of north east Alberta. Whilst other smaller mammalian species are also hunted, the sub-species of caribou to be discussed migrate only within a particular latitudinal band which runs across the north of the province. As such impacts to them are both acute and likely irreversible owing to their existing status as 'at risk,'⁵⁷ increasing the severity of resultant impacts upon First Nations also.

2.31 Water Consumption

Water has long been a contested issue between the indigenous peoples of Canada and the federal and provincial institutions. Indeed some of their earliest interactions concerned the use of water on traditional lands both in Alberta and throughout the Western half of Canada, as colonialism spread from its origins on the Eastern seaboard. The debate over the use of water largely surrounded the irrigation of the southern half of Alberta, topographically dominated by arid plains, to allow for the land to be farmed. The northern half of Alberta was largely disregarded in these negotiations owing to its vastly differing topography of dense forest and mountains. However, the rights to water it was decided were enjoyed by the indigenous populous during this period of the late 19th and early 20th century. This mentality shaped the basic laws regarding water use present in Alberta as a whole to the present day, both within the numbered treaties establishing reserve lands and provincial legislation, and as such warrants discussion.

⁵⁷ Species At Risk Act 1985 S.C. 2002 c.29

The focus of colonial authorities governing Alberta was the establishment of a culture of farming to both sustain the local population and promote and support trade routes. This was especially true of the lower half of Alberta, which consists of far more easily traversed terrain, thus providing efficient trade links with the Western seaboard through the neighbouring province of British Columbia. Forcing the Western European ideal of a farming economy upon the indigenous population was however fraught with difficulties, both cultural and physical. Poor weather conditions, reluctance to forego traditional practices and methods on the part of the Indians, and disagreements regarding the best methods to attribute the land and rights thereto all hampered the development process. These setbacks were however, in part responsible for the basic principles underlying the water use laws present today in Alberta and can be seen as having influenced the negotiations and formation of the numbered treaties concerned with the regions of Alberta on which the thesis is focused. Such effects are far more palpable in the text of Treaty 6 as its geographical scope covers a mixture of both boreal forest and arid plains. In the case of Treaty 8 however, the purview of which is based almost solely on boreal regions the comments on the negotiations between the Crown and the First Nations presented by the Crown representatives in appendices as opposed to the treaty itself bear the hallmarks of these influences though to a lesser extent.

The primary issue which has driven the direction of the water use policy and legislation in Alberta since its creation is that of, who in basic terms possesses rights over the water coursing through and beneath province. Essentially the debate concerned the application of riparian rights or the doctrine of prior appropriation to the regulation of the use of water in the province. Riparian rights consider water to be a shared resource, and whilst the land owner on or through whose land water is settled or flows, 'were entitled to receive

the flow of water to their property substantially undiminished in quantity and unimpaired in quality,⁵⁸ the central tenet remains that, ‘Riparianism was grounded firmly in the principle of shared use of water as a common resource.’⁵⁹ Prior appropriation by contrast granted rights to water, ‘based on the first in time to put the water to beneficial use’.⁶⁰ Under the western Canadian system, rights to take and use would be authorised by way of a licensing scheme. ‘Prior to granting such licenses the Dominion first vested in the Crown the property in water and thereby the right to grant licenses to it.’⁶¹ The colonial promotion of the irrigation of large tracts of land for the purposes of farming and the imposition of western agricultural methods including ranching favoured, and indeed required, the implementation of the prior appropriation doctrine. This was a marked step away from the riparian rights doctrine of English common law at the time, and an inheritance of successful policy south of the border in the neighbouring states of the USA with similar climates and topographies.

Separation from the common law principles of the English legal system to which colonial administrators were accustomed was largely a result of the sharing of experience, information and successes with the authorities over the border in the USA and the realisation that the similar climate and topography provided more relevant guidance than the English position. The completion of the progression towards this basis for water rights came in 1894 with the enactment of the North West Irrigation Act,⁶² which resulted in the abolition of the riparian rights structure which had formed the basis of water rights until this time. The position with regard to the indigenous peoples subject to the Act by virtue of dwelling within the geographical scope of its application was not clarified as the Act did not mention the

⁵⁸ Lucas, A. *Security of Title in Canadian Water Rights* (Canadian Institute of Resources Law, Calgary, 1990) 6.

⁵⁹ Smith, C.M. and Passelac-Ross, M.M. *Defining Aboriginal Rights to Water in Alberta*. (Canadian Institute of Resources Law, Calgary, 1990) 4

⁶⁰ *ibid.* 4

⁶¹ *ibid.* 34

⁶² North West Irrigation Act 1894 c.30

rights of indigenous peoples with regard to water, merely asserting, ‘property in and the right to the use of all the water at any time in any stream.....be deemed to be vested in the Crown,’⁶³ though it did also stipulate that this was, ‘save in the exercise of any legal right existing at the time.’⁶⁴

In relation to the thesis this provision creates some confusion as the provisions of Treaty 6 were negotiated prior to the passing of the Act, whereas Treaty 8 was concluded some four years later. Similarly the provisions of the Act do not cover all of the territories reserved under Treaty 8. The position of the Canadian courts in this regard, whilst not specific to rights to water, has been to uphold rights to practices and actions reserved under the numbered treaties, such as the right to fish, thereby not challenging the supremacy of federal and provincial authorities to control the use of water within their territory generally. This approach has for the most part been adopted since the enactment of the North West Irrigation Act⁶⁵ and in relation to subsequent acts concerning the attribution of water rights in the province into the modern era. Thus, whilst the position with regards to the water rights of the indigenous peoples of Alberta remains somewhat unclear, the acknowledgement of the immense significance of the resource can be traced almost to the very commencement of relations between those peoples and those authorities which would evolve to form the modern provincial and federal governments. Indeed whilst rights to the removal of water remain rights to practices reliant upon certain flow levels being maintained are clear and incontrovertible, as illustrated by the recognition of fishing in the historic treaties discussed in the piece.

⁶³ *ibid.* s.2

⁶⁴ *ibid.* s.2

⁶⁵ *ibid.*

2.32 Boreal Woodland Caribou

Ongoing development of tar sands projects has far-reaching effects that might at first be apparent to the casual observer or interested party engaged in the media coverage surrounding the projects. Physical damage to the boreal forest, water systems and geographical features are worryingly obvious, with some insisting such damage can be seen from space,⁶⁶ and as such lend themselves to the kind of startling and headline grabbing campaigns desired by those opposing the extraction of the tar sands for oil. However, one of the most crucial links to the specific region and ecosystems of Alberta for the Indians is not the forest itself, but that which it in turn supports.

The Indians of Alberta, and indeed Canada as a whole, are not famed loggers, and nor are they reliant solely upon fish as their source of sustenance, although the effects on this aspect of their culture are discussed in a later chapter. In the northern areas of the province, dominated by the boreal forest ecosystem which is home to the three oil sands fields in the province with which the thesis is concerned,⁶⁷ caribou provide nourishment, clothing, and even building materials as well as cultural enrichment to the Indians. In the more southern areas, where plains ecosystems border the tar sands fields, similar benefits are attained from the hunting of bison. A note should be made that, whilst in some regions bison are still hunted in a traditional fashion by the indigenous peoples populating the ecosystems where they are prevalent, the frequency of both this practice, as opposed to an approach akin to farming, and of the peoples which undertake such practice and have been affected by the tar

⁶⁶ National Geographic, *Satellite Views of Canada's Oil Sands Over Time* (2011) <<http://news.nationalgeographic.com/news/energy/2011/12/pictures/111222-canada-oil-sands-satellite-images/>> Accessed 30th July 2014

⁶⁷ The Athabasca, Peace River and Cold Lake oil sands fields are displayed in Annex 5. Alberta Geological Survey, *Alberta Oil Sands* (2013) <http://www.ags.gov.ab.ca/energy/oilsands/alberta_oil_sands.html> Accessed 30th July 2014.

sands developments is minimal. As such, whilst the affects to bison will be mentioned in the research, the primary focus will remain upon caribou with bison being discussed in relation to the reclamation of tailings ponds and strip mine sites, where bison have been introduced to populate such land, with disputed success. Factors affecting these species, especially that of the caribou, indirectly affect the Indians of Alberta equally as dramatically, threatening not only their source of food but their very way of life.

The effects of the tar sands development on caribou especially has been widely researched and publicised by animal welfare, conservation organisations and academic institutions alike, but the effect that their decline in turn has upon the indigenous peoples of the province is often barely considered, if at all, despite the two being inextricably linked. This chapter of the work intends to establish that this link is so strong that the very existence of some of the Indians of Alberta is threatened as a result of the damage to the fauna and flora of the boreal forest, and consequentially that the human rights of those indigenous people affected are breached. The discussion will conclude with a suggestion as to the best basis for a case to be brought against the governmental authorities permitting the tar sands developments based upon the aforementioned suggested human rights breaches.

The right of the Indians of Alberta, ‘to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered,’⁶⁸ is protected in both Treaty 6 and Treaty 8, and represents recognition of both their traditional and cultural practices, but also their need for sustenance within the Canadian domestic legal system and by the executive of the state. The ‘Commissioners for Treaty No. 8’ highlighted the significance of the hunting and trapping practices of the Indians subject to that treaty, stating that, ‘There was expressed

⁶⁸ Treaty 8 <<http://www.ainc-inac.gc.ca/al/hts/tgu/pubs/t8/trty8-eng.asp>> Accessed 15th February 2011. Treaty 6 available at <<http://www.ainc-inac.gc.ca/al/hts/tgu/pubs/t6/trty6-eng.asp>> Accessed 15th February 2011.

at every point the fear that the making of the treaty would be followed by the curtailment of the hunting and fishing privileges,⁶⁹ and following the negotiations and signatures noted;

‘(a) disinclination to adopt agriculture as a means of livelihood.....for the more congenial occupations of hunting and fishing are still open, and agriculture is not only arduous to those untrained to it, but in many districts it as yet remains untried.’⁷⁰

This expertise in hunting and trapping, as has already been highlighted, was exploited by the European settlers who used indigenous people both as guides and intermediaries in the development of the fur trade.

In the modern era, where fur is no longer in demand and food is more readily available in a developed state such as Canada, respect for and understanding of more traditional sources of food and other resources is less forthcoming. As a result the indirect impact on the indigenous peoples of Alberta of the effects on wildlife of the tar sands projects is not immediately considered as once it might have been. Arguments against the extraction of tar sands for the production of synthetic crude oil relating to the affects to caribou, are therefore constructed almost exclusively on their numerical prevalence and not also the wider ramifications of their decline.⁷¹ This fact is also represented in the legislation of Canada itself, which recognises the boreal woodland caribou as a ‘species at risk’ under the provisions of the Species At Risk Act 1985,⁷² and provides specific measures for the protection of listed

⁶⁹ *ibid.*

⁷⁰ *ibid.*

⁷¹ Wasser, S.K, Kleim, J.L, Taper, M.L, and Lele, S.R. ‘The influences of wolf predation, habitat loss, and human activity on caribou and moose in the Alberta oil sands’ (2011) 9(10) *Frontiers in Ecology and the Environment* 546

⁷² Species At Risk Act 1985 S.C. 2002 c.29

species, whereas the Canada Wildlife Act 1985⁷³ protects the lands for the purpose of, ‘the protection of any species of wildlife in danger of extinction.’⁷⁴ In neither piece of legislation however are the effects of wildlife extirpation on humans considered.

The two main influences of tar sands development on the caribou inhabiting Alberta and the reserves protected by the numbered treaties are the loss of habitat, and ‘linear features’ resulting from the exploration and extraction of the tar sands, and the transportation of the refined product, synthetic crude oil. The destruction of the boreal forest habitat of the caribou, specifically woodland caribou,⁷⁵ culturally significant to the majority of the nations encompassed by the thesis is primarily as a result of deforestation to allow open pit mining of the bitumen, sand and mineral mixture forming the tar sands. However, the clearing of smaller areas of forest to allow the construction of drilling platforms for in-situ extraction, the construction of roads and pipelines, and the creation of tailings ponds also devastates this ecosystem.⁷⁶ As Dyer highlighted over a decade ago, ‘industrial development and its associated infrastructure of roads, wells, and seismic lines seriously reduce availability of habitat for woodland caribou,’ and, ‘Assessments that take into account only the physical disturbance associated with industrial development may greatly underestimate the cumulative impact of development on caribou.’⁷⁷

The effects on the caribou of this loss of habitat are numerous and all equally devastating to their numbers and thus ability to support the traditional hunting of the Indians

⁷³ Canada Wildlife Act R.S.C. 1985 c W-9

⁷⁴ Canada Wildlife Act R.S.C. 1985 c W-9 s.8

⁷⁵ As identified by a research study undertaken by the University of Alberta. Oberg, P. Rohner, C and Schmiegelow, F.K.A. *Responses of the Mountain Caribou to Linear Features in a West-Central Landscape* (2000) <http://www.ualberta.ca/~fschmie/Caribou/pdfs/Caribou_Responses%20to%20Lines.pdf> Accessed 30th July 2014

⁷⁶ Note should be made that the majority of tailings material is stored in former pit mines, reducing the immediate physical impact of these features to some extent. The ability of such ponds to return to a state akin to the native ecosystem is another source of considerable debate and will be discussed later in the piece.

⁷⁷ Dyer, S.J, O’Neill, J.P, Wasel, S.M. and Boutin, S. ‘Avoidance of Industrial Development by Woodland Caribou’ [2001] 65 (3) *The Journal of Wildlife Management* 531, 538

inhabiting the oil sands fields themselves or areas bordering their development projects and infrastructures. 'Unlike other caribou ecotypes, boreal woodland caribou (*Rangifer tarandus* caribou) in northern Alberta, show considerable overlap between their summer and winter ranges, suggesting strong range fidelity to particular locations. This overlap is believed to occur because the peatland complexes that caribou use provide refuge against predation as well as access to their primary winter forage, lichens.⁷⁸ The woodland caribou inhabiting the boreal forest of Alberta prefer the, 'undisturbed old growth boreal forest'⁷⁹ as opposed to, 'young forest and shrub-rich habitats,'⁸⁰ left behind after the old growth is disturbed or destroyed as a result of tar sands development.

Despite the organic material and species of plants which return not being harmful to the caribou in themselves and as such provide a source of sustenance for them, they are nervous and timid creatures preferring the seclusion and cover that the denser established growth provides. Although caribou will eat this alternative plant material, their main source of sustenance throughout the harsh winters of northern Alberta, where the vast majority of foliage dies back or is buried beneath a carpet of snow, is lichen. This takes a greater length of time to become established than other indigenous flora and as such is more abundant in areas of old growth, thus making such areas preferable to the native woodland boreal caribou. This in turn results in decreasing the variance in their seasonal migration ranges in comparison with other similar ungulates, and even other sub-species of caribou as studies into the boreal woodland caribou have highlighted.⁸¹ Caribou obtain lichen throughout the winter

⁷⁸ Tracz, B.V, LaMontagne, J.M, Bayne, E.M. and Boutin, S. (2010) 'Annual and monthly range fidelity of female boreal woodland caribou in response to petroleum development' 30 (1) *Rangifer* 31, 31

⁷⁹The Cooperative *Save the Caribou: Stop the Tar Sands*. (2010) ,2 < <http://www.co-operative.coop/upload/ToxicFuels/docs/caribou-report.pdf> > Accessed 13th December 2011. Accessed 13th December 2011

⁸⁰ *ibid.* 6

⁸¹ Tracz, B.V, LaMontagne, J.M, Bayne, E.M. and Boutin, S. (2010) 'Annual and monthly range fidelity of female boreal woodland caribou in response to petroleum development' 30 (1) *Rangifer* 31, 31

by digging craters in the snow to unearth patches of this essential source of sustenance which is only found in quantities large enough to support an animal the size of woodland boreal caribou in certain areas with a specific topography, as such any disruption to this habitat is amplified in its effect on those reliant upon it.

The less dense young forest is the habitat of the more populous deer species of the boreal forest as well as rodent life and as a result is also home to the top predator in this unique ecosystem, the wolf. As Schneider, Hauer, Adamowicz and Boutin state, 'Caribou have persisted in Alberta for millennia despite the presence of wolves, which suggests that the current unsustainable rate of wolf predation is not the norm and that caribou-wolf dynamics have been modified in some fundamental way over the past few decades.'⁸² A number of ramifications of the loss of territory and increased predation by wolves have been proposed, firstly it has been argued that, by reducing the size and quantity of the preferred habitat of the caribou, their numbers are increased in the less dense young forest exposing them more frequently to the predators which prefer to hunt there, and consequently reducing their numbers. The second effect proposed is that increases in the density of the primary prey of the wolf, white tailed deer and moose as a result of the habitat loss caused by the tar sands developments, have resulted in increased density also of wolves in restricted habitat, again increasing the likelihood of encounter between wolves and boreal woodland caribou. Thirdly it is argued that the increased interaction with caribou over the years during which tar sands development has occurred will have increased the efficiency of wolves in hunting this previously less common source of sustenance.

⁸² Schneider, R.R, Hauer, G, Adamowicz, W.L. and Boutin, S. (2010) 'Triage for conserving populations of threatened species: The case of woodland caribou in Alberta' 143(7) *Biological Conservation* 1603, 1604

These might seem *prima facie* to be an insignificant set of effects, in that the caribou was a natural source of prey for wolves prior to the tar sands developments changing the topography of the area. However when considered in light of low numbers of woodland caribou in Alberta, and indeed Canada, as a whole in relation to historic values, one of the few facts on which all studies agree,⁸³ is the considerable effect of the increased likelihood of their interaction (where previously deer would be the prey of choice for wolves in the ecosystem), increased predation efficiency and wolf density in the habitat, become far more apparent.

A conservative estimate of 175 to 275 woodland caribou remain in the territory of the Beaver Lake Cree First Nation, which covers an area of around 40,000 km² accounting for approximately 9% of the total boreal forest of Canada. These figures have been challenged by a recent study which suggests higher numbers of around 330 caribou within a largely overlapping study area, having identified from scat a minimum of 208 unique caribou in the region⁸⁴. The research of Wasser which reports the larger numbers of caribou than had previously been thought to exist in the north eastern region was however funded and given logistical support by Statoil Canada Limited, and as such has been subject to some criticism. The method used to attain these figures has however been lauded as far more accurate than the previous methods used to ascertain an estimate as to boreal woodland caribou numbers in that region of Alberta.

Wasser study utilised DNA sampling from caribou scat to identify an exact number of individual caribou, and also provide insight into the effects on nutrition felt in areas bordering

⁸³ Despite differing in the highlighted indications as to severity and thus suggested urgency of reaction, such studies have all highlighted concerns with similar results.

⁸⁴ Wasser, S.K, Kleim, J.L, Taper, M.L, and Lele, S.R. 'The influences of wolf predation, habitat loss, and human activity on caribou and moose in the Alberta oil sands' (2011) 9(10) *Frontiers in Ecology and the Environment* 546

tar sands developments. Previous studies had been based upon unreliable visual studies, made very difficult by the topography of the boreal woodland, and using which distinguishing accurate numbers of individual caribou is arguably impossible. In spite of the larger number suggested by study of Wasser, in the results of the study the researchers argue that the increase is not significant enough to allay fears regarding the survival of boreal woodland caribou in the areas influenced by the tar sands developments, and instead issue a warning;

‘These results do not suggest that caribou populations are free from risk in the Alberta oil sands nor do they imply that management action is unwarranted. They do, however, indicate that more time is available than previously thought for managers to arrive at the best solutions to facilitate caribou recovery in this region.’⁸⁵

Although the figures suggested by both reports for numbers in the regions where tar sands developments are at their most intense, they represent a small percentage of the total caribou population of Canada and indeed Alberta, and as such a number of factors must be taken into account.

Firstly the woodland caribou is the largest sub-species of caribou making it uniquely suited to supporting the traditional hunting of the First Nations people. Also being relatively nomadic creatures, with very specific habitat and dietary preferences, boreal woodland caribou are notoriously difficult to observe and track, let alone hunt for sustenance, thus any effect on their habitat will result in an amplified effect on those reliant upon them. Secondly the First Nations peoples only have limited rights to hunt the caribou, with restrictions placed on areas where hunting is allowed and quantity dependent upon the province in question, thus changes in either caribou numbers or their migratory ranges would have severe effects on the indigenous peoples reliant upon them, especially as hunting is performed on foot and using

⁸⁵ *ibid.* 6

traditional methods. Only individuals recognised as aboriginal peoples or ‘Indians’ under the Indian Act 1985⁸⁶ may hunt the boreal woodland caribou, otherwise they are subject to the same regulations as all other Canadians, for whom hunting of woodland caribou is banned in Alberta, owing to their status as a ‘species at risk’⁸⁷. Thus in spite of conflicting studies relating to the specific numbers of caribou and the precise consequences of reducing the habitat in which they prefer to dwell, the research is largely in agreement that the impacts of the tar sands have an amplified effect beyond that which might initially be envisaged.

A very specific effect on the caribou and their habitat, although not always destroying it to the visually dramatic extent that wholesale deforestation does, is the imposition of so called ‘linear features’ upon the landscape by the development of the tar sands projects. Linear features take two main forms, pipelines constructed to transport either heated tar sands or the refined synthetic crude oil, and ‘seismic lines.’ These are lines created by seismographic surveys undertaken to assess the location, size and thus potential yield of subterranean oil sands reservoirs, utilising an approach known as reflection seismology. This process involves sending powerful vibrations down into the earth and measuring the reflected vibrations, or the speed these waves travel through the various levels (or strata) in order to identify the type, size and location of the materials composing the earth beneath. Such vibrations are most commonly generated using one of two methods, either by an explosive shot or charge⁸⁸ or a seismic vibration source.

Both methods involve significant disruption to the boreal forest environment which the woodland caribou inhabit. Explosive shots clearly induce not only the initial physical shock of the blast and the unavoidable noise generated, but also the physical damage caused

⁸⁶ Indian Act R.S.C.1985, c 1-5

⁸⁷ Under the provisions of Species At Risk Act 1985 S.C. 2002 c.29

⁸⁸ Usually composed of dynamite, encased in a dense material where the earth is loose.

by said explosion, and although the blast is contained beneath the surface and apparent disruption appears minimal, the subterranean impacts are felt by flora and fauna alike as root beds and subterranean animals are either disturbed or destroyed. By contrast the seismic vibration source does not cause the immediate and obvious physical damage that the explosive source causes, but has a more prolonged effect, and can require larger secondary disruption dependant on the specific vibration source utilised. The source is most commonly a vehicle mounted weight⁸⁹ dropped at regular intervals along a chosen course, though there is increasing use of seismic vibrators which send continuous signals into the earth to provide a more accurate and detailed seismic survey, and again this is most often mounted on a vehicle.⁹⁰ Like the explosive source of the necessary vibrations to conduct the surveys, the noise produced by this method does not constitute a sufficient infringement of noise pollution regulations in the province relating to human inhabitants, but undoubtedly influences the movement and feeding patterns and grounds, of all fauna in the immediate vicinity, including the already shy woodland caribou.

The instantaneous effects of the vibration sources required to conduct these surveys are not however the only effects felt in the boreal forest of Alberta, and the wildlife dependent upon it. The regular pattern of the surveys conducted to ensure maximum coverage in the seismic results produced is etched on the landscape.⁹¹ Seismic lines mark the areas disturbed by the survey techniques, and present physical barriers to a number of inhabitants of the boreal forest. As well as causing further small scale deforestation by destroying the root structures of the established trees and other flora, thus killing them and leaving the clear

⁸⁹ Colloquially termed a 'thumper' in the seismography industry.

⁹⁰ These seismic vibrators are often termed 'Vibroseis' after the patent of the same name originally granted to oil company Conoco, which has since lapsed.

⁹¹ 'Seismic lines' are clearly visible in the pictures at Annex 6. The images form part of: The Cooperative *Save the Caribou: Stop the Tar Sands*. (2010), 6. < <http://www.co-operative.coop/upload/ToxicFuels/docs/caribou-report.pdf> > Accessed 13th December 2011. Accessed 13th December 2011.

lines of barren earth running for miles and carving up the forest, the open patches created have similar effects to the deforestation undertaken to allow open pit extraction of tar sands. Such pits as has been discussed have been shown to limit caribou movement, increasing their population density in the remaining established old growth boreal forest, or forcing them to inhabit new growth, where their preferred sustenance is less abundant. In both cases this exposes them to a greatly increased likelihood of interaction with natural predators beyond that which their numbers can sustain and the same results occur due to linear features.

The vastly increased number of roads in the regions where tar sands are being developed imposes similar effects to the seismic lines which facilitate them. As well as adding the effects felt as a result of the lines, such as habitat and food source loss, roads also present their own inimitable problems, that of increased caribou mortality as a result of collisions with vehicles, an effect felt also by other animals on which the indigenous peoples of the province do not rely so heavily. The caribou, accustomed to minimal human and motor vehicle contact, are unaware of the dangers the roads present when cautiously, and hence slowly ambling across them. This is often at narrow points in the road or near bends and corners where the trees lining the road afford them larger amounts of cover, whilst also reducing the likelihood of a motorist being able to see them in time to prevent an often fatal collision.

The recent study of Wasser suggested that the effect of linear features varied, stating that the results obtained implied, 'that caribou are not experiencing functional habitat loss from linear features alone. Caribou did avoid areas near primary roads, indicating that habitat

loss may have more to do with human use than with the linear features themselves.⁹² The conclusions of the study therefore recommend a restriction on the use of linear features in order to minimise their impact however, recognising that the cession of all tar sands developments is unlikely some prudence is needed in relation to these recommendations as despite using highly accurate and lauded techniques, as mentioned above, the study was logistically supported and funded by one of the largest tar sands developers. Thus, although there is some debate as to the extent, it is not only the extraction process itself which presents a considerable threat to the existence of the creatures so inextricably linked to the culture of the indigenous peoples of the province, but the vast infrastructure which supports this rapid and prosperous, yet incredibly harmful development.

Added to the damage wrought by the seismic lines and roads, and another example of the secondary effects wrought by the supporting infrastructure, is that caused by an alternative linear feature, pipelines. Used to transport either unrefined but heated tar sands extracted via steam assisted gravity drainage from the well to the refinery, or refined synthetic crude oil from the aforementioned refineries to commercial distributors, the pipelines latticing Alberta as a result of the tar sands development are a major source of controversy within the province and beyond its borders and outside of Canada itself. The focus of the thesis is on the effects specific to the province of Alberta and the indigenous peoples there, but to fail to mention the furore surrounding the proposed pipeline to transport tar sands oil deep into the US would be remiss.⁹³ As well as the effects caused by the seismic lines and roads resulting from the exploration for potential tar sands extraction sites, and assessments of the economic and practical viability of confirmed subterranean reservoirs, the

⁹² Wasser, S.K, Kleim, J.L, Taper, M.L, and Lele, S.R. 'The influences of wolf predation, habitat loss, and human activity on caribou and moose in the Alberta oil sands' (2011) 9(10) *Frontiers in Ecology and the Environment* 546, 550

⁹³ Concerns have been raised as to the safety, and economic and social impacts of the pipeline.

pipelines, essential to the continued extraction, refinement and ultimately, sale of synthetic crude oil derived from the tar sands, impose a unique form of damage to the wildlife on which the indigenous people rely.

Whereas the seismic lines, roads and direct deforestation to extract tar sands by strip mining cause loss of habitat, increased population density, scarcity of preferred food and habitat for caribou, and higher exposure to predators, the pipelines also create a tangible physical barrier for the animals. Intentional and direct deforestation and that as a result of seismic mapping and road construction impose merely an open area over which animals, such as caribou are unwilling to cross, but still capable of doing so, and whilst causing serious effects in itself, pales in comparison to a barrier running through habitat which in some cases cannot be crossed for miles. The height at which pipelines are suspended above the ground ranges dependent on the terrain, but the height rarely exceeds 0.8 metres above the ground,⁹⁴ whilst the average caribou stands at 1.2m at the shoulder,⁹⁵ and an animal which weighs over 300lbs⁹⁶ is neither particularly adept at passing through small spaces nor built for large increases in distance travelled per day to source sustenance. The effects of pipelines include reduced food sources and habitat, and increased exposure to predators like the seismic lines, roads and direct deforestation but these are amplified by the non-permeable nature of the barrier they represent.

To an extent caribou will become accustomed to the seismic lines and roads through their territory, as they can be passed, albeit with considerable reluctance, but pipelines cannot

⁹⁴ The Cooperative *Save the Caribou: Stop the Tar Sands*. (2010), 8 <<http://www.co-operative.coop/upload/ToxicFuels/docs/caribou-report.pdf>> Accessed 13th December 2011. Accessed 13th December 2011

⁹⁵ Transport Canada, *Wildlife Control Manual: Deer and other Ungulates* (2011) <<http://www.tc.gc.ca/eng/civilaviation/publications/tp11500-sectioni-sectioni2-1774.htm>> Accessed 18th April 2011

⁹⁶ *ibid*. This is a low female weight, males may reach 700lbs.

conceivably be adapted to in their current form. The continued expansion of tar sands extraction operations, and, 'new developments will similarly create a 'spiders web' of pipelines carving up the forest over a huge area and will effectively destroy that forest as caribou habitat.'⁹⁷ Thus as a potentially damaging influence on movement and feeding patterns in the caribou of the province, and consequentially on reproduction and the continuation of the woodland caribou sub-species in the region of the tar sands developments, the pipelines are arguably the most harmful of the seismic lines owing to their unique effects on the ecosystem.

2.33 Tailings Ponds

The visible scarring caused by open pit or surface mining of the tar sands, and the bare patches carved from surveys and the construction of pipelines and well sites for the alternative method of attainment, in-situ extraction, are all well documented visual impacts of the extraction processes. Equally, if not more stunning in terms of visual impact however are the 'tailings ponds,' vast lakes of the by-products of the extraction and refinement of the tar sands raw material. The physical size and colour of the ponds has provided ironically beautiful images, vast in scale and range of colours, of what is in fact a considerably harmful result of the processes outlined.⁹⁸ The term ponds has become widely used parlance for these means of storing by-products across extraction industries and is by no means reserved to the extraction of oil alone.⁹⁹ Indeed the term is used widely to represent the bodies in which left

⁹⁷ The Cooperative *Save the Caribou: Stop the Tar Sands*. (2010), 8. < <http://www.co-operative.coop/upload/ToxicFuels/docs/caribou-report.pdf> > Accessed 13th December 2011. Accessed 13th December 2011

⁹⁸ Images provided at Annex 7

⁹⁹ See for example: Beeston, M.P. van Elteren, J.T. Slejkovec, Z. and Glass, H.J. 'Migration of arsenic from old tailings ponds- A case study on the King Edward Mine, Cornwall UK.' (2008) 108(1) *Environmental Research* 28

over materials are stored after the extraction and refinement processes of any material which was contained within an ore or other complex mixture of materials.

These misleadingly named ‘ponds’ are controversial for a variety of reasons, firstly their scale, consuming considerable areas of natural ecosystems, primarily boreal forest, to store these products. Secondly the potential and actual risk posed by leakage from these ponds into the surrounding terrain, and of the greatest concern, the water table. Thirdly the danger of the ponds to wildlife, especially native bird species reliant upon bodies of water, is well documented.¹⁰⁰ Finally a great deal of heated debate surrounds the notion of reclamation, the return of the land used to its original state, or as close thereto as is possible. All three of these factors impact negatively upon the indigenous peoples of the region of the north east of Alberta where tar sands industrial projects are at their most prevalent. As such all three can also be argued to form the basis for a case against the licensing of such projects brought about upon the contention that the impacts are severe enough to breach established human rights principles. Before these arguments can be presented however, some elaboration upon the nature of the tailings, the effects they are suggested to have, and the debates surrounding them is required.

As the Canadian Association of Petroleum Producers admits on its own website, as, ‘just 20 per cent of oil sands deposit can ever be produced by mining, the tailings ponds created are large and impact the landscape.’¹⁰¹ The remaining 80 per cent of the extracted raw material is therefore the basis for the contents of the tailings ponds, along with the copious volumes of water utilised to refine the original raw material into bitumen able to be

¹⁰⁰ Timoney, K.P. and Ronconi, R.A. ‘Annual Bird Mortality in the Bitumen Tailings Ponds in North Eastern Alberta, Canada’ (2010) 122(3) *The Wilson Journal of Ornithology* 569. Images are also provided in Annex 8.

¹⁰¹ Canadian Association of Petroleum Producers (CAPP), *Tailings Ponds* (2013)

<<http://www.capp.ca/environmentCommunity/land/Pages/TailingsPonds.aspx>> Accessed 13th July 2014.

fractionally distilled into saleable crude oil derivatives. Indeed research into the water consumption of various methods of energy production in the USA revealed that, ‘On average, 1.5 bbl of MFT [mature fine tailings]¹⁰² is generated per bbl of bitumen produced.’¹⁰³

Mature fine tailings are the most concerning aspect of the tailings ponds as it is this mixture of by-products which takes the greatest length of time to solidify and become conducive to reclamation. Unassisted the ‘settling’ as it is termed of this layer in the tailings ponds is suggested to take up 40 years, and even the most optimistic estimates for reclamation using technological advancements place this figure at over 5 years. Seemingly innocuous, the paste like mixture of the mature fine tailings is the source of almost all of the impacts listed above attributed to tailings. Should the mixture take less time to settle, land use, impacts to wildlife, leakage and the period taken to return the land utilised to its original state, or as close thereto as is possible, would all be significantly reduced. For these reasons almost all of the major companies involved in the extraction of tar sands have devoted resources to reducing the length of this settling period, both for public relations, legal and cost reasons.

The time taken for these ponds to settle to a degree facilitating reuse is not the only concern arising from the tailings however, their chemical makeup is also a source of considerable debate and criticism. Chief amongst the chemical components causing concern is naphtha, and the potential formation of naphthenic acids and their seepage into the natural water table, potentially harming species reliant upon it. Concerns have also been raised however in relation to alkyl-substituted polyaromatic hydrocarbons, known to cause deformities in fauna and even death in birds, and to the impact of methanogenic bacteria,

¹⁰² Mature fine tailings is the term given to the mixture of water, clay and other by-products of the refinement process which is found between the sand which quickly sinks to the base of the ponds, and the water which rises to the surface.

¹⁰³ Argonne National Laboratory, Energy Systems Division, *Consumptive Water Use in the Production of Ethanol and Petroleum Gasoline* (2009) <<http://www.osti.gov/scitech/biblio/947085>> Accessed July 30th 2014

which produce methane and alter the concentration of other harmful substances in the tailings mixture. In spite of the acknowledgement of these impacts, the focus of the piece will be upon the reclamation and land use, and the effects of seepage from these ponds, with consideration of chemical impacts being largely dedicated to those resulting from the naphtha and naphthenic acid content of the mature fine tailings. In this regard a note should be made that the impact of the tailings ponds which has received arguably the most media coverage is the death of birds having landed on the ponds.

Various species of aquatic birds, land upon the surface of the pond and gather the excess bitumen on their feathers which has not been successfully removed by the refinement process. The weight of the bitumen and effect upon the aerodynamic efficiency of the wings as a result of sticking the feathers together prevents the birds from being able to take off again. As a result of both the excess weight added by the bitumen and exhaustion, the birds drown. Public and industry awareness of this issue was highlighted by the publication of a number of images of birds either on the ponds in north eastern Alberta, or shortly after having been removed from them,¹⁰⁴ being published by individuals and non-governmental organisations, and later by mainstream media outlets.¹⁰⁵ In response tar sands mining companies have invested heavily in measures to deter birds from landing on or near the ponds, the use of scarecrows and air cannons being the most popular methods adopted. Whilst the death of native bird species is undeniably tragic and abhorrent, beyond the broad connection to nature that the First Nations peoples have, their ability to continue to exist in terms of

¹⁰⁴ Images are provided in Annex 9.

¹⁰⁵ See for example: Brooymans, H. and Farrell, J. 'Syncrude faces scrutiny after ducks land on toxic pond' *The National Post* (2008) <<http://www.nationalpost.com/news/story.html?id=482931>> Accessed June 28th 2010.

Tait, C. 'Syncrude triples number of dead ducks in tailings pond' *The Financial Post* (2009) <<http://www.financialpost.com/story.html?id=1448397>> Accessed 20th June 2010.

Henton, D. 'Dead ducks in a tailings pond – how it happened' *The Edmonton Journal* (2010) <<http://www.edmontonjournal.com/business/Dead+ducks+happened/3177628/story.html>> Accessed 25th June 2010.

sustaining themselves and expressing their culture in the manner to which they are accustomed, a key factor in the piece, would not be impacted upon.

In a similar manner to the seismic lines caused by the survey process, pipelines, wells and open pit mines the ponds disturb considerably the migratory patterns of boreal woodland caribou, their predators, and their preferred food source, lichen which grows largely in established boreal forest. The ponds themselves occupy large areas of land, estimates at their surface area being measured in the hundreds of square kilometres,¹⁰⁶ and are created by the felling of considerable area of that ecosystem, whether created from exhausted open pit mines,¹⁰⁷ or constructed. The considerable length of time between the deposit of tailings and its availability for attempted reuse after reclamation, ranging from 5 up to 40 years, effectively removes their surface area from the ecosystem for that time period, impacting upon all trophic levels reliant upon it.

Such impacts are not however restricted to the surface area of the ponds, bare land intimidates fauna used to the cover afforded by the thick vegetation of the boreal forest such as caribou and similar prey animals and their shared predators, increasing the likelihood of predation beyond that which would be expected in an unhindered ecosystem. Added to this the increased human and industrial presence and disturbance which accompanies the establishment of such a tailing pond would further exacerbate this deterrent effect on non-aerial fauna. As tailings ponds have to be reclaimed as soon as possible, and indeed it benefits companies to do so, if only in terms of public relations, they have an interest in maintaining a presence to achieve this aim. For example, surface water from the ponds which can be

¹⁰⁶ Alberta Government, *Oil Sands Environmental Management: Quick Facts* (2013) <http://www.oilsands.alberta.ca/FactSheets/Quick_Facts_FSht_85x11_Nov_2013_Online.pdf> Accessed 30th July 2014

¹⁰⁷ Where possible companies fill former open pit mines, from which all accessible tar sands raw material has been extracted, with tailings to avoid further consumption of land which has not already been damaged.

recycled continuously being removed and utilised elsewhere in the refinement process, results in the constant presence of a workforce and requisite machinery, communications routes and causes considerable noise pollution. Thus as well as the physical deterrent of the presence of the ponds themselves, and associated facilities and personnel, the noise created by their actions would act as a deterrent with a far wider scope, the range of the hearing of native species being greater than that of their eyesight.

The length of time which the tailings remain liquid in form, coupled with the vast quantity of the material has posed considerable issues with regards to containment for the companies exploiting the natural resources of bitumen contained within the tar sands. Even the most conservative and positive of government papers admit, ‘Leakage from tailings ponds into the surface waters may have occurred.’¹⁰⁸ As a result the governmental authorities have aligned themselves with extraction and refinement companies, ‘to develop dry tailings technologies that will significantly change the impact of tailings ponds on the local environment.’¹⁰⁹ They, ‘have also undertaken isotopic fingerprinting research to distinguish between natural and anthropogenic contaminants in groundwater in the vicinity of tailings ponds.’¹¹⁰ In spite of this and, ‘containment dykes and groundwater monitoring facilities in order to capture and recycle run off,’¹¹¹ the Government of Canada aims only, ‘to minimize seepage,’¹¹² tacitly acknowledging that absolute elimination of this harmful process is not achievable. Although acknowledged at a federal level therefore, if somewhat indirectly, the provincial authorities are less forthcoming with regards to any such recognition.

¹⁰⁸ Alberta Environmental Monitoring Panel, *A World Class Environmental Monitoring, Evaluation and Reporting System for Alberta The Report of the Alberta Environmental Monitoring Panel* (2011), 76. <<http://environment.gov.ab.ca/info/library/8381.pdf>>. Accessed July 30th 2014.

¹⁰⁹ Alberta Government, *Lower Athabasca Regional Plan 2012-2022*. Approved August 22nd 2012. Page 2. <<https://www.landuse.alberta.ca/Documents/LARP%20Lower%20Athabasca%20Regional%20Plan%202012-2022%20-%20Approved%20-%202012-08.pdf>> Accessed 30th July 2014. (LARP)

¹¹⁰ *ibid.*

¹¹¹ Government of Canada: Department of Natural Resources, *Oil Sands: A strategic resource for Canada, North America and the world market: Tailings Ponds* (Natural Resources Canada, Ottawa, 2011) 1

¹¹² *ibid.*

The Lower Athabasca Regional Plan published by the provincial Government of Alberta, which, ‘sets the stage for robust growth, vibrant communities and a healthy environment within the region over the next 50 years,’¹¹³ failed to mention leakage from the tailings ponds, concerning itself solely with their volume and the reduction thereof. This was especially indicative of a lack of consideration for the potential for this to occur given that the framework suggests a, ‘Surface Water Quality Management Framework for the Lower Athabasca River,’¹¹⁴ detailing, ‘Limits and Triggers,’¹¹⁵ to facilitate its operation. The plan, when implemented at the national level in March 2011, indicated a greater willingness to consider the potential impacts and possibility of seepage from the ponds, dedicating an entire chapter to, ‘Surface and Groundwater Water Quality Monitoring,’¹¹⁶ setting objectives to answer a number of questions, including, ‘Is there groundwater seepage from tailings ponds and/or other oil sands industrial operations entering the surface water system?’¹¹⁷ Thus there is evidently a degree of disagreement between the provincial and federal authorities as to the extent of such seepage, and whether it is deemed worthy of consideration as part of framework designed to monitor and limit any adverse impacts of industrial developments upon water quality in Alberta.

Despite the differing approaches of the governmental authorities debate has raged in relation to leakage from the tailings ponds and accusations made that its true extent is not being revealed. The issue here is that whilst the Environmental Protection and Enhancement Act,¹¹⁸ along with the specific licensing agreements issued to extraction companies in the

¹¹³ LARP (n109)

¹¹⁴ *ibid.* 51

¹¹⁵ *ibid.* 51

¹¹⁶ Environment Canada: Lower Athabasca Water Quality Monitoring Plan Phase 1, 22 March 2011 at Page 28

¹¹⁷ *ibid.* 28

¹¹⁸ Environmental Protection and Enhancement Act, RSA 2000, c E-12,

province, require the provision of detailed reports on the leakage of tailings pond contents into groundwater and surface water bodies, ‘very few published data are available on the dynamics of groundwater flow and the fate of process water contaminants in the impoundment structure; therefore these processes remain largely unknown.’¹¹⁹ Whilst the seepage rates can vary from project to project dependent upon the material in which the tailings are contained, proximity to groundwater and surface water bodies, and gradient variations amongst other factors, Environmental Defence¹²⁰ estimated that some 11million litres per day¹²¹ of tailings ponds contents (referred to as oil sands process affected waters or OSPW in a number of reports) leaked from that containment.

Although this figure was disputed as inaccurate to an extent by the Royal Society of Canada owing to the fact that they fail to take into account measures to mitigate leaks once they have occurred by companies,¹²² they concede that this is largely as the reports legally required of companies are not made publicly available. As such, considering the precautionary principle espoused throughout environmental law, and factoring in the lack of publication of figures to the contrary by interested parties in industry and the government, this startling estimate represents one of the few indications as to the extent of seepage from tailings ponds and the disregard with which it is treated.

Whilst the volume of seepage is a highly prominent environmental concern, the content of said seepage is arguably a greater source of apprehension for the indigenous

¹¹⁹Royal Society of Canada. *Expert Panel Report on the Environmental and Health Impacts of Canada’s Oil Sands Industry* (December 2010), 122 <<http://rsc-src.com/sites/default/files/pdf/RSC%20Oil%20Sands%20Panel%20Main%20Report%20Oct%202012.pdf>> Accessed 30th July 2014 (EPR)

¹²⁰ A Canadian NGO focused on improving environmental and human health.

¹²¹ Environmental Defence, *11 Million Litres a Day: The Tar Sand’s Leaking Legacy* (2008) <<http://environmentaldefence.ca/reports/11-million-litres-day-tar-sands-leaking-legacy>> Accessed 30th July 2014

¹²² EPR (n119) 124

peoples of the regions exploited. Given that 70 to 80% by weight of tailings material is water,¹²³ and a large proportion of this is reused at other stages within the refinement and extraction processes, it is the other by products which pose the greatest potential for environmental damage, and chief amongst these are naphthenic acids. These acids, 'are of particular concern because of their apparent toxicity to aquatic organisms.'¹²⁴ This 'toxicity' has been found to take a number of forms, impacting adversely upon reproductive capacity, fin and scale structural integrity, and inducing tumours in some cases.¹²⁵

Tailings produced in the last decade contain less than 2% of the naphthenic acids found in tailings released up to 1998.¹²⁶ However, it is the tailings contained within the vast ponds produced between the 1980s and late 1990s, which will potentially take 40 years to fully settle ready for reclamation and contain the highest levels of these acids and which are suggested to leak most profusely, as along with leaps in efficiency with regards reducing the levels of naphthenic acids in tailings, so to have advancements been made in containment methods for them. Studies have shown older tailings ponds to contain double the concentration of such acids required to have, 'completely inhibited spawning',¹²⁷ in some indigenous aquatic species. One of the primary dangers in relation to naphthenic acids is the lack of knowledge regarding them. The Royal Society of Canada report on the Environmental and Health Impacts of Canada's Oil Sands Industry observes;

'There is no absolute, all-inclusive scientific definition of NA (naphthenic acids) because they were first named to describe a broad, complex and uncharacterized class of water-soluble

¹²³ EPR (n119) 121

¹²⁴ *ibid.* 126.

¹²⁵ *ibid.* 120-130.

¹²⁶ *ibid.* 125.

¹²⁷ Kavanagh, R.J. Frank, R.A. Oakes, K.D. Servos, M.R. YOug, R.F. Fedorak, P.M. MacKinnon, M.D. Solomon, K.R. Dixon, G. and Van Der Kraak, G. 'Fathead minnow (*Pimephales promelas*) reproduction is impaired in aged oil sands process-affected waters' (2011) 101(1) *Aquatic Toxicology* 214

acids found in petroleum which were initially most noteworthy because they caused corrosion in refineries and were subsequently found to be a source of fish toxicity.’¹²⁸

Definitions have since been proposed and numerous studies initiated into the varying impacts of this group of acids, though knowledge of how to, ‘separate, then characterise individual NA’¹²⁹ is far from complete, or indeed a desirable level. The rate and level at which these acids are produced and stored, the volume of seepage from ponds is falling as technological advances, and media and social pressures increase. However, the well documented incidences of adverse effects on aquatic ecosystems in the region would indicate that as the Royal Society of Canada states the, ‘release of untreated OSPW to the local aquatic ecosystem is not acceptable,’¹³⁰ in any volume, and yet it persists.

Studies into the impacts of the oil sand production water (OSPW) upon amphibians native to the boreal forest ecosystem of north east Alberta have indicated that similar affects to those seen in fish species inhabiting the water courses of the region are felt by this order of fauna. Specimens kept in OSPW showed, ‘significantly reduced growth and prolonged developmental time,’¹³¹ when compared to control subjects kept in uncontaminated surroundings. Given that growth and development, like reproductive capacity are controlled to a large extent by hormone regulation, the likelihood is that capability to actually reproduce as well as raise young effectively would also be dramatically curbed. In depth assessments as to the impact of naphthenic acids further up food chains within the ecosystems of the region have not been conducted, but the scientific evidence in other highly similar instances would

¹²⁸ EPR (n119) 126

¹²⁹ *ibid.* 126

¹³⁰ *ibid.* 130

¹³¹ *ibid.* 130

indicate a bioaccumulation model would develop, resulting in significantly greater impacts upon the species occupying the higher trophic levels of said ecosystems. Similarly assessments as to the penetration of such acids into fauna reliant upon the water courses and aquifers into which seepage is shown to be occurring have also not yet been completed. Thus the impact to species reliant upon them such as caribou, and in turn wolves, and First Nations peoples cannot be quantified, though the, 'bioaccumulation of toxic substances within the food web,'¹³² and, 'aboriginal use,'¹³³ are highlighted as key issues surrounding tailings ponds by an independent consultancy body¹³⁴ contributing to the report of the Royal Society of Canada.

As such whilst the evidence regarding the impact is weaker than that relating to species dwelling within aquatic ecosystems, the likelihood of impacts to the wider ecosystem reliant upon the water being contaminated is undeniable, and evidence of bioaccumulation in similar situations would suggest potentially equally as severe, if not more so. To disregard the potential for such impacts would therefore be remiss, but suggestions with regard to the aim of the piece, the construction of a case against tar sands extraction projects based in human rights law, will take into account this factor in the context of evidentiary burdens.

A final note in relation to the tailing ponds should be taken that the effects of land usage having already been discussed in the chapter relating to impacts to wildlife, predominantly the boreal woodland caribou, and the impacts of the consumption of land by the tailings ponds, outside of their harmful chemical nature, are in no way different. The same impacts to flora and fauna are caused by the use of land for tailings ponds as for well sites for in-situ extraction, refinement plants, open pit mines and seismic survey damage. As such the

¹³² *ibid.* 131

¹³³ *ibid.* 131

¹³⁴ Clearwater Environmental Consultants. < <http://www.clearwater-environmental.com/>>

discussion will focus on the legal implications of the impacts resulting from specific negative affects arising from the harmful makeup of the tailings material and their leakage into the ecosystems of the regions exploited to access and refine the tar sands.

2.4 The Indigenous Peoples in the Province of Alberta, Canada

In the cruellest sense, it was ironically the very indigenous peoples who introduced the tar sands and their potential to European colonial traders, whose way of life is now most threatened by the massive scale of extraction to which they are subject. The earliest examples of interaction with the indigenous peoples of Canada, although this will have been predominantly on the east coast, can be seen in late fifteenth century. The beginnings of the modern relationship between the indigenous peoples of Alberta and European colonial traders occurred in the late seventeenth with examples of prolonged and sustained trade, and even co-habitation of regions being recorded by the early eighteenth century. Evidence of the existence of human population in the province however, dates back as far as 13,000 years,¹³⁵ their direct ancestors to around 8000 BC¹³⁶ and their utilisation of the unique ecosystem currently prevalent in the province for sustenance, trade, and as an integral aspect of their culture is evidenced as early as 500 BC.¹³⁷

The late eighteenth century brought the encouragement of indigenous peoples to integrate with the European settlers and to adopt their culture. This marked the beginning of a common legal jurisdiction for the indigenous and colonial peoples with the Royal

¹³⁵ Ives, J. '13001 Years Ago' in Cavanaugh, C.A, Payne, M, and Wetherell, D.G. (eds.) *Alberta Formed, Alberta Transformed, Volume 1* (University of Alberta Press, Edmonton, 2006) at 7-8

¹³⁶ See in this regard: <<http://alberta.ca/history.cfm>> Accessed 30th July 2014

¹³⁷ See in particular the discussion of the settling of the dominant indigenous cultures of Alberta which occurred as a result of the encroachment of boreal forest into regions previously dominated by a plains ecosystem and the opting to utilise more permanent domiciles:

<<http://www.historymuseum.ca/cmc/exhibitions/archo/hnpc/npvol29e.shtml>> Accessed 30th July 2014

Proclamation of 1763.¹³⁸ Calloway elucidates the text is exalted as giving rights to the indigenous peoples of Canada, whilst also criticised for preserving the power of the European settlers and the Crown.¹³⁹ The latter half of the nineteenth century and early twentieth, hailed the arrival of specific legislative approaches to governing the indigenous people of Canada, and to enforced integration with Western European culture. These included provisions in relation to common education, and the identification and classification of the indigenous peoples of Canada to prevent the abuse of rights afforded to them by those not recognised as beneficiaries of said rights by law.¹⁴⁰

Most significantly in relation to the rights afforded to the indigenous peoples in the province of Alberta, the last three decades of the nineteenth century brought the negotiation and acquiescence to the so-called ‘numbered treaties’ between them and the Crown. In relation to the tar sands projects in the Athabasca and Cold Lake fields, and therefore the thesis, the most noteworthy of these are Treaties Six and Eight. The treaties outlined the agreement between the Crown and indigenous groups with regards to a geographical area and rights associated with that reserve land. Treaties 6 and 8 are of the greatest concern with regards to the thesis as they outline the reserve lands, and rights attached thereto, which coincide with the northern half of Alberta where the tar sands industry is at its most intense. The treaties were negotiated by representatives of the Queen on behalf of the Canadian government following the realisation of the need to determine legal rights of the indigenous populace following the Royal Proclamation of 1763,¹⁴¹ though their true purpose is somewhat

¹³⁸ Royal Proclamation of 1763 R.S.C. 1985, App. II, No. 1,

¹³⁹ Calloway, C.G. *The Scratch of a Pen: 1763 and the Transformation of North America (Pivotal Moments in American History)* (OUP USA, New York, 2007)

¹⁴⁰ Indian Act R.S., 1985, c.I-5 (having replaced the heavily amended Indian Act 1876). The Act demanded the registration of bands of Indians, and under it those who were neither Indians, or descended from them, and those who did not live within reserves as defined by the Act, were not entitled to Native rights afforded under the Royal Proclamation of 1673.

¹⁴¹ Royal Proclamation of 1763 R.S.C. 1985, App. II, No. 1

debated. Chronologically the cause was undoubtedly the construction of a railway across Canada to facilitate the movement of goods from west to east.¹⁴² Some see them however as a means of clarifying title over the land whilst maintaining peaceful co-existence, others a natural resource grab and some a method of bringing a particular lifestyle and means of subsistence.¹⁴³

Their methodology is quite simple, reserved land was set aside for signatory nations upon agreement to ‘cede, release and surrender’ all other claims to title over land in Canada. This was achieved through the provision of both annuities and equipment as well as offers of assistance with transferring means of securing food from traditional practices to arable farming in conformity with European societies. Neither the prevalent ecosystem nor the cultural beliefs of the indigenous populace however fit with this reality. In practice all of these aims were likely considered by the negotiators, as all promoted the railroad and allowed for the establishment of outposts along its route. Reserve sizes were based upon population of the nation or nations with which a treaty was being signed, though this neglected to account for those groups who opted not to sign the treaties.

The texts are now considerably outdated and not reflective of the current relations between the federal government and indigenous peoples. The legal relationship between the two has evolved over the century since the last of their number was signed with constitutional documents and precedent alike moulding the often fractious relationship between settler and aboriginal. They do however retain considerable legal significance, still determining the geographic limits of reserves and giving rise to often idiosyncratic obligations upon the state.

¹⁴² Penikett, T. *Reconciliation: First Nations Treaty Making in British Columbia* (Douglas and McIntyre, Vancouver, 2006) 62-63

¹⁴³ Calliou, B. *1899 and the Political Economy of Canada's North-West: Treaty 8 as a Compact to Share and Peacefully Co-Exist* in Cavanaugh, Payne, Wetherell. (n135) 303-304

The most famous of these being the ‘medicine chest clause,’ a provision of Treaty 6 which necessitated the agent for reserves established by the treaty to keep a medicine chest for the basic needs of Indians dwelling therein. This has since been held to necessitate the maintenance of basic medical services free of charge for Indians who live on reserve and are a member of Bands which signed the original treaty, much to the disgruntlement of the provincial governments it affects. The treaties overall are often viewed negatively, indeed a Royal Commission report described the relationships they formed as being ‘mired in ignorance, mistrust and prejudice.’¹⁴⁴ The specific legal obligations it imposes upon the federal and provincial governments are debated to this day. However, the establishment of a basic fiduciary relationship¹⁴⁵ in relation to reserve lands and the demand that they be maintained fit for the purpose for which they were initially reserved, the continuation of traditional practices, is assured.¹⁴⁶

For the purposes of the piece, the treaties relevant to the area in which tar sands industrial activity is at its heights can be said simply to ensure constitutionally protected rights to hunt, trap and fish on reserved lands. These texts therefore identify culturally specific links to particular environmental features and in turn impose domestically enforceable legal duties on the state. The connections underpin the legal challenge against tar sands licensing, based in human rights law, outlined in the methodology for the piece. The provisions of these treaties and the requirements placed upon an individual to be registered as an ‘Indian,’ for the purposes of Canadian domestic law, and consequently as a member of one

¹⁴⁴ Aboriginal Affairs and Northern Development Canada, *Report of the Royal Commission on Aboriginal Peoples* (Supply and Services Canada, Ottawa, 1996) 38

¹⁴⁵ Webb, J. and Stevenson, M.G. *Just another stakeholder? First Nations and Sustainable Forest Managements in Canada's Boreal Forest* in Burton, P.J. Messier, C. Smith, D.W. and Adamowicz, W.L. *Towards Sustainable Management of the Boreal Forest* (National Research Council of Canada, Ottawa, 2003) 73

¹⁴⁶ *R. v. Isaac* (1975) 13 N.S.R. (2d) 460, 9 A.P.R. 460 (N.S.C.A.)

of the 'Bands' party to the them to be able to enforce them, will similarly be discussed in later chapters.

2.5 Terminology

A note should be made that in light of the legal definition of the indigenous peoples which are the subject of this research being, 'Indians' in Canadian domestic law under the Indian Act 1876 (and later 1951),¹⁴⁷ this terminology shall be utilised throughout the research in reference to the indigenous peoples of Alberta, especially in relation to Canadian domestic law. Specific reference however will be made to the concept of indigenous peoples in later chapters as the international legal provisions concerning them utilise this classification. As such throughout the two should be thought of for the most part as synonyms of one another and as encompassing the same subject matter in relation to the arguments put forward. This is namely that of the indigenous people of the province of Alberta, Canada, who are able to enforce the rights provided by the historic treaties pertinent to that territory.

Similarly the term, 'aboriginals' is commonly used within the Canadian media, soft law provisions, political documents, and writings on the history of the subjects of this work, and as such should also be considered to be synonymous with the aforementioned terms. The thesis will not discuss indigenous peoples classified as 'Inuits,' or 'Metis' within Canada as they are not capable of enforcing the rights provided under the 'numbered treaties' of the late nineteenth century to which the research is inextricably linked. Also in the case of the 'Inuit'

¹⁴⁷ Indian Act 1876 (repealed by Indian Act R.S., 1985, c.1-5)

peoples, their numbers in the province of Alberta are miniscule,¹⁴⁸ as their traditional lands are in the far North of Canada.

A brief comment regarding the collective term for the Indian peoples of Alberta and Canada generally is also worthy of inclusion. The term 'First Nation' is one of the most commonly used collective noun for the description of Indian groups, identified by the numbered treaties, and certainly the most appropriate to encompass the various groups which the research will consider. In reference to indistinct groups though, the term 'nation' is the most widely used in literature concerning these subjects and as such will also be used in this research. 'Cree' is often used as a suffix to the title of a group to denote what could otherwise be described as a nation, this is however a reference to the specific tribal ancestry of that group being the 'Cree Indians.' In the case of this research for example, one of the most active groups in protesting against the damage inflicted by the tar sands in the province of Alberta, is the Beaver Lake Cree, or in full the Beaver Lake Cree First Nation. To refer to them as a 'nation,' in spite of more widespread use of the term 'cree' as a collective noun in reference to them in many publications, is not incorrect. Thus in order to avoid confusion, the most appropriate term for them for the purpose of the research where referring in general to a collective groups of Indians is, and will be 'nation,' although where referring to them specifically their full title will be utilised.

The present day descendants of the Indians of Alberta first encountered in the early eighteenth century by European settlers, now form 5.8% of the population of Alberta, or just over 97,000 in terms of number. This is a relatively small proportion in relation to the 16.1%

¹⁴⁸ Only numbering 1,610, as compared to the 97,295 Indians, and 85,495 Metis people recorded in the 2006 census. Statistics Canada *2006 Canadian Census*(2006)
<<http://www12.statcan.ca/census-recensement/2006/dp-pd/hlt/97-558/pages/page.cfm?Lang=E&Geo=PR&Code=01&Table=1&Data=Count&Sex=1&Age=1&StartRec=1&Sort=2&Display=Page>> Accessed 30th July 2014 (*Full Table at Annex 9*).

of Canada's overall population recognised as 'aboriginal.'¹⁴⁹ Note should be made, however, that the percentage of Canada's population represented by indigenous people is skewed somewhat by proportionally high percentages of the populations of the provinces of the Northwest Territories, Nunavut and Yukon being 'aboriginal.' Alberta's figure is around the average in comparison to the other provinces bordering the U.S. at the colloquially termed '49th parallel.'¹⁵⁰

As is the case throughout Canada, the Indians of Alberta vary widely, with some integrating heavily with modern Western culture where reserves border, or are indeed within the limits of developed cities. The Stony Plain Reserve #135¹⁵¹ for example is contained within the provincial capital of Edmonton and is inhabited by the Enoch Cree. By contrast other groups maintain more traditional lifestyles and ties to the historical culture of the Native Americans from whom they are descended, sharing a common ancestry with many American Indian tribes in the U.S. These more traditional groups are those most at risk from the adverse effects of the prosperous tar sands development and the ever increasing pace with which it occurs. Those groups to be discussed in the thesis are predominantly located within the plains and boreal forest ecosystems of Alberta, which encompass the tar sands. The bulk of the discussion will however focus on impacts to the boreal forest ecosystem as it is this which is both more difficult to reclaim post-extraction and which is most heavily impacted upon by it.

The history of the indigenous peoples of Canada as a whole is a source of great debate as little evidence is available predating the earliest records provided by European settlers and traders of their existence and culture. As Payne, Wetherill and Cavanaugh state, 'Knowledge

¹⁴⁹ *ibid.*

¹⁵⁰ The colloquial term for the American-Canadian border, so called as the actual border line follows the 49 degree line of latitude to within a few hundred metres along its length.

¹⁵¹ A registered reserve under the Indian Act 1985 and thus also home to a recognised Band.

of this first period is often uncertain, fragmentary and circumstantial, which makes clearer identification of its historical evolution difficult.’¹⁵² Thus making statements on their development prior to this is somewhat difficult. Notable however is the consistency of a subsistence lifestyle amongst all the nations encountered by the aforementioned settlers. The indigenous peoples are repeatedly commented upon as being masters of their natural environment and surviving solely on that which they could attain from that environment, relative to its components in a particular geographical location. As Collins and Murtha comment, ‘members of Aboriginal communities engage in subsistence and/or commercial resource activities such as hunting, fishing, and trapping, which place them in a direct relationship of dependence on land and resources.’¹⁵³

For example those nations whose lands were by rivers were great boat-builders and fishermen. Those living close to or within boreal forests were considered master hunters of caribou, and those inhabiting plains had developed great skills in relation to the hunting and butchery of bison as a source of sustenance and numerous materials integral to their lifestyle and culture. The arrival of European settlers throughout the seventeenth century and into the eighteenth altered this to some extent as nations of First Nation Indians sought to exploit the benefits the settlers brought, involving themselves heavily in hunting for the fur trade. Evidence also suggests provision of guides and diplomats to help find new areas to exploit and to negotiate arrangements with other nations.¹⁵⁴ This rush to profit from these arrivals

¹⁵² Cavanaugh, C.A, Payne, M, and Wetherell, D.G *Looking Back on Alberta History : Reflections in a Rear-View Mirror* in Cavanaugh, Payne, Wetherell. (n135) 770

¹⁵³ Collins, L.M. and Murtha, M. ‘Indigenous Environmental Rights in Canada: The Right to Conservation Implicit in Treaty and Aboriginal Rights to Hunt, Fish, and Trap’ (2010) 47 *Alta. L. Rev.* 959, 960

¹⁵⁴ Berry, S. and Brink, J *Aboriginal Cultures in Alberta: Five Hundred Generations* (University of Alberta Press, Edmonton, 2004) 33

however has shaped the structure and culture of many indigenous nations within Canada, and aided in the formation of an entirely new one, the Metis.¹⁵⁵

Previously the distinct cultural groupings within the First Nations indigenous peoples of Canada, such as the Cree and Chipewyan, were far easier to identify. Geographical location within Canada had been a clear mark of the particular nation or lineage to which individuals belonged, this is however no longer the case as a result of European settlement.¹⁵⁶ The rewards of the fur trade promoted expansion and the need to secure prime hunting grounds and trade routes amongst the First Nations. Arguably the role the nations played in the fur trade also preserved their individual heritages as otherwise the settlers would have been inclined simply to overrun them or attempt to assimilate them into their own culture as was seen in the US in their relations with the indigenous Indian populace. Finkel goes so far as to suggest they became, 'social actors, not victims like Natives elsewhere in the Americas who had become slaves or landless and confined to small reserves.'¹⁵⁷

Thus the nations moved to more economically advantageous locations and sought to do the bidding of the settlers who controlled the prosperity and resources they sought. Each nation took on new skills to survive and adapted to new locations, breaking with the traditions which had once identified them. As a result the nations shifted from their traditional roots but remain defined by their environment, having, 'retained many of their

¹⁵⁵ An indigenous group, formally recognised, who trace their origins to combined European and First Nation sources.

¹⁵⁶ Indeed Jennifer Brown goes so far as to describe the impact of the fur trade as a centrifuge which dispersed previously rooted familial groups along trade routes. See in this regard her translation of her own article: Brown, J. 'Noms et métaphores dans l'historiographie métisse: anciennes catégories et nouvelles perspectives' [2008] 37 *Recherches amérindiennes au Québec* 7

¹⁵⁷ Finkel, A. *The Fur Trade and Early European Settlement* in Finkel, A. *Working People in Alberta: A History* (Athabasca University Press, Edmonton, 2012) 24

core beliefs,¹⁵⁸ hunting bison on the plains, caribou in the forests and fishing in river basins, regardless of their initial heritage.

The Cree First Nations within Alberta to be discussed within the thesis almost exclusively belong to one of the numerous subdivisions of Cree in existence within Canada, the Woodland Cree. Those nations in the north of Alberta are largely Woodland Cree, and are based within the unique ecosystem of the boreal forest. This is the sole habitat supportive of the boreal woodland caribou on which such tribes use to sustain themselves, both in terms of food but also with clothing and other materials necessary for cultural practices and traditions. The Woodland Cree have also been recorded utilising fishing as a means of sustenance and to express cultural values. Again however this is heavily dependent upon geographical location proximity to a river system able to support such practices.

The Cree people were originally from the James Bay region of eastern Canada, but spread upon becoming hunters and guides for the French and English settlers and their fur trade. The term 'Cree' is itself etymologically derived from French and was applied to the indigenous peoples of the region by the settlers.¹⁵⁹ This history is somewhat disputed though, as is much of the history of the indigenous peoples of Canada generally, having been diluted to such a great extent by the arrival of European settlers and being recorded prior to this purely in the oral tradition.¹⁶⁰ Consensus was that the Cree spread from James Bay, though some argue that the Woodland Cree of areas such as northern Alberta were present there long before that arrival.¹⁶¹ Similarly the conflict between the Chipewyan Indians and the Cree

¹⁵⁸ *ibid.*

¹⁵⁹ Rodriguez, J.P. *The Louisiana Purchase: A Historical and Geographical Encyclopedia* (ABC-CLIO Inc, Santa Barbara, 2002) 89

¹⁶⁰ Morantz, T.E. *The White Man's Gonna Getcha: The Colonial Challenge to the Crees in Quebec* (Mc-Gill Queen's University Press, Montreal, 2002) 10

¹⁶¹ Magocsi, P.R. (ed) *Encyclopaedia of Canada's Peoples* (University of Toronto Press, Toronto, 1999) 43

which supposedly raged in the mid-seventeenth century and the culmination of which is argued to have been negotiated and agreed towards its end is disputed amongst historians and ethnographers researching the indigenous peoples of Canada.¹⁶² The opposing argument is that European settlement, specifically resultant disease,¹⁶³ towards the end of the seventeenth century, and rife especially amongst the Cree and Chipewyan groups, resulted in their current geographical spread. This is said in turn to have determined the practices and traditions of the specific First Nations and reserves that make them up, to a far greater extent than any historical influence which has been highlighted. In particular Scott et al suggest that it was this that finally ended any nomadic traditions amongst aboriginal peoples in the province and developed their current social hierarchies.¹⁶⁴

Similar problems occur when attempting to define the Chipewyan group, their name itself means ‘pointed skins’ and is a reference to the pointed hoods of parkas their ancestors wore. The people themselves however often regard this as a derogatory term, believing it was conceived during times of conflict between the various groups of indigenous peoples in Canada.¹⁶⁵ Beyond this however their development, as that of the Cree, is also an area of some dispute. The subdivision of the group resident in Alberta is that of the Athabaskan Chipewyan, a reference to the base of their local dialect, as opposed to that of the Cree language which is Algonquian. Thus their subdivision is based again on geographical

¹⁶² Contrast the writing of Daschuk describing brutal, indeed military conflict with that described by Brumbach and Jarvenpa of wary and cautious yet generally peaceful interaction, where conflict was based on cultural idiosyncrasies rather than resource sovereignty : Daschuk, J. *Clearing the Plains: Disease, Politics of Starvation, and the Loss of Aboriginal Life* (University of Regina Press, Regina, 2013) 17 and Jarvenpa, R. and Brumbach, H.J. *Circumpolar Lives and Livelihood: A Comparative Ethnoarchaeology of Gender and Subsistence* (University of Nebraska Press, Lincoln, 2006) 48

¹⁶³ Although the vast majority of deaths during this period were attributed to smallpox, large outbreaks of influenza, and the spread of sexually transmitted infections are also eluded to in historical accounts.

¹⁶⁴ Scott, D.E. Scott, S. Dixon, K. Okoko, J.M. and Dixon, R. *Indigenous Principals' Perspectives on Leadership Development* in Slater, C.L. and Nelson, S.W. *Understanding the Principalship: An International Guide to Principal Preparation* (Emerald Group Publishing, Bingley, 2013) 334

¹⁶⁵ Kendrick, A. Lyver, P.O.B. and K'e, L 'Denesoline (Chipewyan) Knowledge of Barren-Ground Caribou (*Rangiferus tarandus groenlandicus*) Movements' (June 2005) 58 (2) Artic 175, 176

location, which they chose in order to trade with the European settlers. The divisions are so indistinguishable in fact that recent studies have found that the 'Athabaska' referred to by settlers and explorers in Alberta writing during the seventeenth and early eighteenth centuries were actually of Cree lineage.¹⁶⁶

Such definitions are also difficult as in some nations, such as the Fort McMurray First Nation, the Cree and Chipewyan share a reserve, with no separation between the two cultural backgrounds; hence their subsistence based lifestyle takes precedent and forms the basis of their culture. A note should be made however of a greater focus historically on the arts in the Chipewyan culture (famed for their affinity for decorative clothing and music). As with the Cree, the lack of knowledge and records of the existence of the indigenous peoples of the province of Alberta, and indeed Canada as a whole, prior to the earliest European explorers makes being able to argue with absolute certainty whether or not the Chipewyans were native to the regions in which they now reside before the influence of the fur trade almost impossible. Timoney refers to them simply as nomadic in nature prior to European contact, followers of the very caribou on which they now rely to continue to express their culture.¹⁶⁷

The Chipewyan came later to the fur trade than the Cree, as first contact with indigenous peoples was made around James Bay with the Swampy Cree subdivision of the Cree group. They played much the same role as the Cree did in their relationships with the settlers, namely that of guide and hunter, essentially profiting from their traditional expertise. Records also show the Chipewyan acting as intermediaries between the settlers and

¹⁶⁶ Indeed Patricia Clark goes so far as to list both an Athabaka Cree and Athabaska Chipewyan group in her seminal list of the tribal names of North American Indians so as to ensure complete coverage of all groups referred to in period texts: Clark, P.R. *Tribal Names of the Americas: Spelling Variants and Alternative Forms, Cross-Referenced* (McFarland and Company Inc, Jefferson, 2009) 29

¹⁶⁷ Timoney, K.P. *The Peace-Athabasca Delta: Portrait of a Dynamic Ecosystem* (University of Alberta Press, Edmonton, 2013) 297

indigenous groups in the east and others in the west in the fur trade.¹⁶⁸ Expansion of the trade post network into these regions in the later decades of the seventeenth century all but eliminated the need for this role.

The dilution of the culture of the indigenous peoples of the region is also seen in the incredibly high levels of conversion to Christianity amongst the Chipewyans recorded in the early twentieth century, arguably illustrating a lack of an inherent religious belief system within the culture, and indicative of an almost unbridled focus on subsistence. In this regard the lifestyles of the various nations of Chipewyans within the province of Alberta, like those of the Cree, vary according to geographical location.¹⁶⁹ Northern nations based in the boreal forest will hunt caribou, trap smaller mammals and fish where appropriate and those further south and to the east living on the plains will exploit the more available bison and again fish where it is pertinent to do so.

In relation to the thesis the distinction between Chipewyan and Cree is of little use, instead the focus will be on geographical location and the resulting environment inhabited by particular nations of Indians, regardless of their lineage. This is of far greater importance as it is the effects upon these environments as a result of the tar sands projects which will affect their culture and lifestyle directly and most severely. As such the largest distinction in the groups which can be drawn is provided by the Cree divisions of woodland (boreal forest) and plains, and it is these distinctions on which the thesis will draw most often.

¹⁶⁸ *ibid.* 299

¹⁶⁹ Timoney again provides descriptions of the varied impacts upon the indigenous peoples of Alberta of rapid European settlement and equally hasty subsequent abandonment of the fur trade, all of which occurred within a century: *ibid.* 297-301

Although it will be largely these groups of Indians with which the research is concerned, to say that those groups with weaker ties to their ancestral heritage, or who have adapted to their more developed surroundings are unaffected would be inattentive to say the least. Despite differing developments over the centuries since European settlement, a commonality is shared in the harm incurred as a result of tar sands development.

A similar note is needed at this juncture in relation to the debate surrounding the terms 'tar sands' and 'oil sands.' Both terms are utilised in the debate surrounding the extraction of the same material. Activist discourse has adopted the term tar sands, whilst industry and science prefers the term oil sands. Whilst the thesis will strive to remain impartial with regards to the conclusions drawn, and take full account of the immense potential benefits of the extraction of this material for Alberta and Canada as a whole, the prevalence of the discourse and literature with which the thesis will concern itself utilises the term tar sands. However, the term oil sands will also be utilised throughout, and in this regard it should be noted that the terminology should in this context be considered synonymic.

2.6 Concluding Remarks

The aim of this chapter was to afford to the necessary background information to support the legal arguments to follow. In particular there was a need to establish the inextricable nature of the relationship between the indigenous populace of the regions exploited to access the tar sands and the ecosystems they inhabit. In order to support the discussion to follow the threats to particular features of those environments and the severity of the resultant impact this might have upon the First Nations had to be illustrated. From the context afforded above the peculiarly acute nature of the impacts to indigenous peoples are

apparent, and it is upon this inimitable connection which the arguments contained within the thesis rest.

Chapter 3

Canadian Human Rights Law and the Tar Sands

3.1 Introduction

A variety of domestic instruments and ratified external provisions, as well as non-binding but influential texts, comprise what might broadly be termed as Canadian human rights law. As has been discussed the thesis will consider regional and international legal instruments in later chapters of the work. Before assessing specific domestic rights applicable to the focus of the piece, the restriction or cession of tar sands extraction with deleterious environmental impacts, a brief overview of this broad corpus is necessary. This will both narrow the scope of texts to be considered but also provide an insight into the roles and approaches of the Canadian judiciary and the provincial and federal legislature in relation to human rights law. Domestic legislation pertinent to the aims of the piece will then be highlighted and will be scrutinised with regards that aim. As a result an assessment will be made of their utility in the construction of a viable basis for an action against the authorities approving tar sands extraction projects in spite of resultant breaches of rights afforded to the indigenous populace caused by environmental harms.

3.2 Human Rights in the context of the Canadian Legal System

Canada and its government have established a dualist position with regard to legal provisions originating beyond the borders of the State.¹⁷⁰ The reasoning for this is varied, and very specific in relation to the regional provisions under the auspices of the Organisation of American States (OAS) as will be eluded to later, but the position remains constant. Thus the influence of provisions conceived outside the jurisdiction of the Canadian legislature and

¹⁷⁰ Whilst there have been cases where this has not been upheld as staunchly as it might, more recent decisions have maintained this overbearing position. Contrast the relatively monist decision in *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817, and that of a more dualist nature in *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] SCC 1.

executive rarely exceeds that of source of interpretation for its judiciary. Although the same cannot be said for customary international law, which Canadian courts have shown willing to incorporate without legislative action into the domestic legal system of the state and federal divisions, the thesis will not consider any such laws.¹⁷¹ As such, it is pertinent to discuss, in brief, the interpretative attitudes towards human rights within the Canadian domestic legal system, as this is the most probable starting point for any legal challenge to the tar sands projects.

There are three core human rights texts within the Canadian system, the Canadian Human Rights Act,¹⁷² the Canadian Bill of Rights,¹⁷³ and finally the Canadian Charter of Rights and Freedoms (CCRF).¹⁷⁴ The focus however shall be on the provisions of the Canadian Charter of Rights and Freedoms. This is as the Charter contains those rights considered by some scholars¹⁷⁵ as of primary status, and referred to as civil and political rights in the international legal context. Within the international legal sphere the two strands of rights are regarded as indivisible, as demonstrated in the preamble to the International Covenant on Civil and Political Rights (ICCPR)¹⁷⁶ and reiterated in the Vienna Declaration and Programme of Action,¹⁷⁷ and yet the Canadian legal system adopts an opposing approach.

¹⁷¹ The position of Canada, and thus its federal divisions is thus a mirror of that in the United Kingdom and the English common law method of applying international law, following the dualist approach with regards to treaties law and the monist approach in relation to customary international law. In this regard see, Van Ert 'Using Treaties in Canadian Courts' (2000) 38 Canadian Yearbook of International Law 3

¹⁷² Canadian Human Rights Act R.S., 1985 c.H-6 (CHR Act)

¹⁷³ Canadian Bill of Rights S.C. 1960 c.44

¹⁷⁴ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11.

¹⁷⁵ Alston, P. Goodman, R. and Steiner, H. *International Human Rights in Context: Law, Politics, Morals* (3rd edn, OUP, Oxford, 2007) 263

¹⁷⁶ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/63/16 (1966), 999 U.N.T.S. 171, entered into force 23rd March 1976. (ICCPR)

¹⁷⁷ Vienna Declaration and Programme of Action 1993 A/Conf.157/24

As Lugtig and Parkes illustrate, ‘Canadian courts have steadfastly maintained that social and economic rights are not rights at all; they are merely policy goals to which Canada aspires.’¹⁷⁸ Lugtig and Parkes present the argument that this approach is a result largely of another characterisation of human rights into ‘positive’ and ‘negative’ rights. Under this approach, those which, ‘protect people from the coercive power of the state’¹⁷⁹ are the latter and the former, ‘require government action and expenditure.’¹⁸⁰ In their estimation economic, social and cultural rights are largely speaking ‘positive’ by these definitions and civil and political rights conversely ‘negative,’ citing this as the reasoning for the application of the latter within the domestic legal system of Canada and opposition, both political and judicial, to the former. This is despite the acquiescence of the state to international agreements protecting both categories of right regardless of their labelling.

Manfredi argues that this reluctance is largely born out of an inherent desire within the constitutional structure of Canada to preserve the separation of powers between the executive and judiciary. He suggests that the enforcement of such ‘positive’ rights would encroach upon, ‘the presumption that democratically accountable decision-makers should exercise principle responsibility for substantive policy decisions.’¹⁸¹ In spite of this Manfredi suggests a progression towards a more ‘positive’ judicial approach has already begun. He argues that, ‘the remedies necessary to vindicate minority-language educational rights will revolutionise Canadian constitutional jurisprudence by requiring courts to make positive declarations about government obligations.’¹⁸² As Donald Smiley elucidated when he made,

¹⁷⁸ Lugtig, S. & Parkes, D. ‘Where do we go from here?’ (2002) 15(4) *Horizons* 14, 16

¹⁷⁹ *ibid.* 17

¹⁸⁰ *ibid.* 17

¹⁸¹ Manfredi, C.P. ‘Appropriate and just in the Circumstances:’ Public Policy and the Enforcement of Rights under the Canadian Charter of Rights and Freedoms’ (1996) 27 *The American Political Science Review* 4, 463

¹⁸² *ibid.* 455

‘The Case Against the Charter of Human Rights’¹⁸³ in Canada before its enactment in 1969, ‘the scope of human rights and the priority given to the various kinds of human rights undergo constant change.’¹⁸⁴ He goes on to state that an argument against the notion that the prominence of economic, social and cultural rights has grown significantly in influence and recognition internationally and at all levels of legal enforcement would be difficult to support.

Thus although the Canadian judicial approach to human rights continues to evolve, and indeed has done for some time, the recognition and enforcement of so called, ‘secondary’ or ‘positive’ rights, remains almost non-existent, beyond those existing in domestic law in other forms, often not enforced as rights as such. This is not to say that Canadian domestic legal provisions provide no recourse for the damage done by the tar sands project to the indigenous peoples of Alberta. Indeed as has been referred to previously a case concerning Treaty 6, between the Canadian state and a number of First Nations, is ongoing, but there is no inherent constitutional right to ‘necessities of life for all people,’¹⁸⁵ represented in the core provisions relating to economic, social and cultural rights.

With respect to the central focus of the thesis this presents a significant issue, in that there is a lack of explicit protection for the damage done by the tar sands projects to economic, social and cultural interest of the indigenous peoples. As such, and as has been seen in a number of Western legal systems,¹⁸⁶ such rights must therefore be enforced via broad judicial interpretation of the rights more immediately available to the indigenous people of Canada. A similar situation might be true in relation to the regional system

¹⁸³ Smiley, D. ‘The Case against the Canadian Charter of Human Rights’ (1969) 2 Canadian Journal of Political Science 3, 277

¹⁸⁴ *ibid.* 281

¹⁸⁵ Lugtig & Parkes (n178) 16

¹⁸⁶ Seminal cases in which such an approach has been taken within the European legal sphere, which will be discussed in greater detail later in the piece are: *Hatton v United Kingdom* (2002) 34 EHRR 1; (2003) 37 EHRR 28, *Lopez Ostra v Spain* (1994) 20 EHRR 277.

enforced in the Inter-American Court of Human Rights, and governed by the American Convention on Human Rights,¹⁸⁷ to which the Canadian state is not a signatory. Consequently Canada has also declined to sign the additional protocol in relation to economic, social and cultural rights.¹⁸⁸ The complex issue of Canadian membership to the organisation and adherence to its legal provisions arising from its stance with regards to abortion laws will be discussed later in the piece. The purpose of the following chapters is to establish the rights protected within both the regional system protected by the American Convention, internationally under various treaties to which the Canadian state is party, and in the Canadian domestic system by the Charter of Rights and Freedoms, which might form the basis for a legal challenge to the damage done by the tar sands.

The foundation for this argument will be the rights guaranteed to the indigenous peoples of Alberta by Treaties 6¹⁸⁹ and 8,¹⁹⁰ which the Beaver Lake Cree First Nation argue have been breached in their Statement of Claim against the Province of Alberta and the state of Canada. Corresponding human rights protected at the three levels of legal enforcement will be attributed to the practices to which rights were granted under the Treaty and said to have been broken as a result of the industrial extraction and processing of crude oil from the tar sands. The effects of the tar sands upon the indigenous peoples of Alberta can therefore be related to specific duties on the part of the Canadian and Albertan governments arising from the human rights highlighted which are inextricably bound up with their culture. This approach will provide both a limit to the rights encompassed by the thesis, whilst also

¹⁸⁷ American Convention on Human Rights O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 entered into force July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992). (ACHR)

¹⁸⁸ Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights ('San Salvador Protocol') O.A.S. Treaty Series No. 69 (1988), Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 67 (1992). (AP-ACHR)

¹⁸⁹ Treaties 6 and 8 (n68)

¹⁹⁰ Treaties 6 and 8 (n68)

maintaining a connection to the specific issues facing the Indians occupying land affected by the extraction projects. In turn this will be consistently relative to their individual culture and heritage beyond the effects to health and well being felt by all persons in proximity to the projects. Such an approach will also highlight the basis for a legal challenge against the tar sands overlooked in the Statement of Claim issued by the Beaver Lake Cree Indians.¹⁹¹

The methodological approach is admittedly reliant upon a significant element of innovative judicial interpretation by the Canadian judiciary at various levels. Although such judicial interpretation within the Canadian legal system is not unfounded owing to the specific nature of the domestic legal system of Canada, progression can prove to be something of a battle.¹⁹² The constitutional law of the state, of which the CCRF is in itself a constituent part,¹⁹³ presents some barriers to interpretation, and yet significant strides have been made and indeed fundamental principles of interpretation laid down. Similarly case precedents and conventions have been established and to an extent entrenched in case law over the relatively short period since its enactment.

The Constitution Act 1867¹⁹⁴ provided the Canadian Parliament with the power, ‘to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures

¹⁹¹ Beaver Lake Cree *Statement of Claim against the Province of Alberta and the Attorney General of Canada*. 2008. < <http://www.beaverlakecreerecreation.ca/upload/documents/statementofclaim.pdf> > Accessed 13th December 2011

¹⁹² See in this regard the overview of judicial interpretation of the CCRF by Frank Iacobucci: Iacobucci, F. *Judicial Review by the Supreme Court of Canada Under the Canadian Charter of Rights and Freedoms: The First Ten Years* in Beatty, D.M. (ed.) *Human Rights and Judicial Review : A Comparative Perspective* (Kluwer Academic Publishers, Norwell MA, 1994) 93

¹⁹³ CCRF (n174)

¹⁹⁴ The Constitution Act, 1867 (U.K.), 30 & 31 Victoria, c. 3.

of the Provinces.¹⁹⁵ This power, qualified within itself by the provincial structure of the Canadian legal and political systems, is further qualified by judicial interpretation of those same provisions which form its basis. The interpretative role of the judiciary was cemented in the seminal case of *Edwards v A-G Can.*¹⁹⁶ in which the widely accepted ‘living tree doctrine,’ of Canadian constitutional law was conceived. This doctrine supposes that the constitution of Canada is not a fixed concept, but is, ‘a living tree capable of growth and expansion within its natural limits.’¹⁹⁷

The case was seminal in its precedent for the Canadian legal system, but also in its more widespread progression of constitutional jurisprudence at the time. As well as this it provides an integral basis for the following arguments in the thesis in that it facilitates the interpretation of established Canadian law beyond a literal and narrow interpretation, and even beyond any interpretation previously conceived.¹⁹⁸ This approach to the constitutional law of Canada generally, was made applicable to the niche of that field represented by human rights law, in the case of *Que. v. Blaikie*.¹⁹⁹ The case itself considered the language rights protected under a section of the Constitution Act 1982²⁰⁰ not considered part of the CCRF. However, *obiter dicta* the court upheld that rights should be given, ‘generous interpretation.....suitable to give to individuals the full measure of the fundamental rights and freedoms referred to,’ as stated in the case of *Minister of Home Affairs v. Fisher*.²⁰¹ This principle has been applied and reinforced in relation to the rights protected under the Charter,

¹⁹⁵ *ibid.*

¹⁹⁶ *Edwards v A-G Can.*[1930] A.C. 124, 136

¹⁹⁷ *ibid.* 136

¹⁹⁸ The elaborative footnote (note 78) of Joyal, S. *Conclusion: The Senate as the Embodiment of the Federal Principle* in Joyal, S. (ed.) *Protecting Canadian Democracy: The Senate You Never Knew* (Mc-Gill Queen’s Press, Kingston, 2003) 312

¹⁹⁹ *A.-G. Que. v. Blaikie*, [1979] 2 SCR 1016

²⁰⁰ Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11.

²⁰¹ *Minister of Home Affairs v. Fisher* [1980] A.C. 319, 328 per Lord Wilberforce.

itself a constituent part of the aforementioned act, in numerous subsequent cases.²⁰² As such it has been established by the Supreme Court of Canada (SCC) that interpretation of the human rights protected under the constitutional law of the state is both possible and indeed integral to the assurance that such rights are enforced and applied as intended and in accordance with the spirit in which they were created.

The chronicling of the establishment of this principle is necessary as the interpretation of established human rights within the Canadian legal system is fundamental to the arguments to be put forward throughout the work. Indeed the notion of the Canadian Parliament's power to legislate, 'for the Peace, Order, and good Government of Canada,'²⁰³ and that this law is subject to interpretation by the judiciary of the state will form one requirement for the breaches of human rights to be proposed to overcome. This is as all law created at the federal level must meet this criteria. As such so must any proposed interpretation of human rights legislation suggested in the conclusion of the piece as forming a viable basis for a case against the current approach to the licensing of tar sands projects. A number of interpretative approaches have been considered by numerous jurists in relation to the Canadian judiciary, and indeed vast swathes of *obiter dicta* could be quoted in this regard. However, the principle established by the cases of *Edwards v A-G Can.*²⁰⁴ and *Que. v. Blaikie*²⁰⁵ that the rights protected are necessarily subject to interpretation is sufficient for the purposes of the arguments the piece hopes to put forward. A constant consideration will therefore be the immense economic benefit of tar sands extraction to both Alberta and

²⁰² See *Law Society of Upper Can. v. Skapinker* [1984] 1 S.C.R. 375 regarding the right to remain in Canada, *Hunter v. Southam* [1984] 2 S.C.R. 375 regarding the right security from unreasonable search or seizure, and *Re. B.C. Motor Vehicle Act* [1985] 2 S.C.R. 486 regarding the right to life, liberty and the security of the person.

²⁰³ The Constitution Act, 1867 (U.K.), 30 & 31 Victoria, c. 3.s.91

²⁰⁴ *Edwards* (n196)

²⁰⁵ *Blaikie* (n199)

Canada as a whole, and whether this can outweigh the harm done in order to access the raw material generating it.

The second boundary to the proposals to be put forward in the conclusion will be formed by the same limitations placed upon any laws attempting to subvert the rights enshrined in the CCRF by the domestic legal system of Canada. These are found within s.1 of the Charter itself,²⁰⁶ and expanded upon by subsequent case law. The seminal case in this regard is that of *R. v. Oakes*²⁰⁷ before the SCC, in which the court laid down the test for the justification of the limitation of the human rights protected by the Charter. The first section of the CCRF was intended to eliminate the possibility of rights conflicting with laws essential to, ‘a free and democratic society.’²⁰⁸ An example might be the obvious conflict between laws regarding defamation and the right to freedom of expression.

The *Oakes*²⁰⁹ case established a justification test for any limitations placed upon Charter rights. The contention that any action is not for the peace, order and good government of Canada owing to inhibition of the fundamental freedoms might thus be rebutted using this test on the grounds that it is, ‘demonstrably justifiable in a free and democratic society.’²¹⁰ The test, based on the text of the constitution, demands;

‘respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.’²¹¹

In order to establish a legitimate breach the court in *Oakes* demanded that two conditions be met. Firstly, the reason for breaching a right must be, ‘of sufficient importance to warrant overriding

²⁰⁶ CCRF (n174)

²⁰⁷ *R. v. Oakes* [1986] 1 S.C.R. 103

²⁰⁸ CCRF (n174) s. 1

²⁰⁹ *Oakes* (n207)

²¹⁰ CCRF (n174) s. 1

²¹¹ *Oakes* (n207), 64

a constitutionally protected right or freedom.’²¹² Secondly the measure must be deemed proportional based on three criteria. These are that it must be designed to achieve the objective set, have the least impact upon rights and freedoms achievable, and the limitations caused must be proportionate to the aim to be achieved.²¹³

The decision in *Oakes* has become a seminal facet of Canadian constitutional law, and regarded as one of the most influential cases in Canadian legal history. Hogg describes the judgement as having, ‘taken on some of the character of holy writ.’²¹⁴ The test establishes whether a legal provision (and thus the administrative processes and bodies they create) which is suggested as inhibiting rights enshrined within the CCRF does so reasonably. The test is undoubtedly pertinent to the action proposed by the thesis, given that it suggests a failing on the part of the federal and provincial governments to consider the impacts to the indigenous peoples of Alberta caused by tar sands extraction and refinement. Three elements are assessed in judging the reasonableness of a provision; rationality, minimal effect/intrusion, and proportionality.

The rationality criteria determines whether the purpose for the limit on the rights of the individual is of, ‘sufficient importance to warrant overriding a constitutionally protected right or freedom.’²¹⁵²¹⁶ The economic benefit to Canada and the province of Alberta of extracting the tar sands is undeniable, and the case of *Singh v Minister of Employment and Immigration*²¹⁷ suggested that prohibitive costs to compliance with Charter rights might be deemed a legitimate breach thereof. Ritter J. accepted that situations, such as that arising in this instance from the debate over the tar sands,

‘requires balancing sensitive environmental concerns with general economic well being and social needs of the Province of Alberta. None of environmental concerns, economic benefits or social development is an invariable trump card. By its very nature balancing of factors will mean that sometimes one factor will gain ascendancy and sometimes another. In some cases environmental concerns may receive less attention because the economic and social benefits outweigh the deleterious environmental effect(s). In other

²¹² *R. v. Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295, 352.

²¹³ *Oakes (n207)*, 69

²¹⁴ Hogg, P.W. *Constitutional Law of Canada: Student Edition* (Carswell Thomson Professional Publishing, Scarborough, Ontario, 1999), 728

²¹⁵ *Oakes (n207)*, 138

²¹⁶ A test of causation or a ‘rational connection’ between the law implemented and the objective is also possible as part of the *Oakes* test, but here the connection between legislation outlining the permitting process for tar sands projects and the administrative authorities which do in fact permit them is sufficiently apparent to negate the need for further discussion in this regard.

²¹⁷ *Singh v Minister of Employment and Immigration* [1985] 1 S.C.R. 177

instances economic advantages may be lost entirely because the impact on the environment measured against the economic advantage is greater. In some cases compromises may be possible which address both environmental effects and economic or social advantages associated with the proposed development. Some cases will be close calls so that the ascendancy of more than one factor could be reasonable.²¹⁸

Indeed as Hogg notes, the declaration absolutely of inadmissibility of legislative objectives is rare. Indeed at the time of writing in 1999, he pointed out that, ‘there has so far been only one case in which the Supreme Court of Canada has unequivocally rejected the legislative objective.’²¹⁹ As such to suggest that the Canadian courts might reject the economic benefits of the tar sands projects as an objective not of ‘sufficient importance to warrant overriding a constitutionally protected right or freedom’ would be remiss.²²⁰

The adoption of the ‘least drastic means’²²¹ in terms of the impairment of rights and freedoms caused by a measure deemed to have a rational connection to its aims is also assessed under the precedent in *Oakes*. This component is the most common basis for a challenge to the validity of legislation or the administrative procedures it imposes as the other criteria of the test are rarely upheld as not having been met by the courts. Minimum impairment is however difficult to ascertain, and as such the judgement of measures has much become one of legitimate justification. This was apparent in the case of *Hill v Church of Scientology*²²² in which the law of defamation was deemed a least drastic means to protect the dignity of individuals despite not being the least drastic inhibition of the freedom of expression of others. In the context of the extraction of tar sands the question must therefore be regarded as whether the current licensing approach is the least drastic means of obtaining the crude oil potential of the tar sands, rather than the minimum impairment of the various rights discussed in the thesis. The current mechanisms would therefore have to be shown to inhibit excessively the rights discussed in the piece. Causal connections would suffer somewhat in this regard as establishing that a licensing authority had failed to account for a potential impact with currently unascertainable extent

²¹⁸ *Castle-Crown Wilderness Coalition v. Alberta (Director of Regulatory Assurance Division, Alberta Environment)* [2005] ABCA 283,55

²¹⁹ Hogg (n214), 735-736. This was an instance of discrimination on the basis of sexual discrimination in the case of *Vriend v Alberta* [1998] 1 SCR 493

²²⁰ *Oakes* (n207), 60

²²¹ The term afforded by eminent Canadian constitutional lawyer Peter Hogg to this concept of minimum impairment of rights by a justifiable legal measure.

²²² *Hill v Church of Scientology* [1995] 2 S.C.R. 1130

would be difficult. This is especially true in instances such as the consumption of water from natural courses, where the permitting procedure already imposes perpetual reductions in water usage and recycling.

The proportionality of the licensing of the tar sands is also questionable, though is basically assessment of risk which can easily be assessed utilising the precautionary principle and the justifiable level of harm given the available benefits. Essentially the question would be whether the environmental risks of tar sands extraction, in light of the measures undertaken by the authorities to assess them within the licensing procedures in place, were accounted for sufficiently and are thus outweighed correctly by the economic benefits offered. The *Oakes* test merely requires a justifiable consideration of the effects of measures and the goal they achieve. Put simply that the risk or harm undertaken is proportionate to the goal achieved. Lamer C.J. summarised the concept succinctly in relation to the focus of the thesis in *Dagenais v. CBC*²²³ stating that the necessary hurdle to overcome was, ‘proportionality between the deleterious and the salutary effects of the measures.’²²⁴ An assessment of the tar sands licensing procedures would thus turn on the sufficiency of their consideration of, and action in response to, the actual and potential environmental impacts of permitted projects as well as any reasonably foreseeable.

In relation to foreseeable impacts therefore the assessment in relation to proportionality in this regard would likely follow any decision made in relation to the least drastic means. Should an environmental harm not be foreseen the least drastic means to obtain the tar sands raw material and the most proportionate means of extraction would likely be deemed identical owing to the inherent uncertainty involved. The assessment with regard to ascertainable and agreed harms resulting from extraction however might be different. The least harmful means of obtaining the raw material and one which is proportionate to the aim would not necessarily be one and the same. To illustrate, the risk of the bioaccumulation of contaminants in water courses is unknown and given the need for monitoring of tailings seepage which is imposed upon extractors,²²⁵ suggesting that measures put in place were either disproportionate or did not represent the least drastic means of storing tailings would be difficult. This is in contrast to the consumption of water from courses in the north east of Alberta which is both measurable and the

²²³ *Dagenais v. CBC* [1994] 3 S.C.R. 835

²²⁴ *ibid.* 889

²²⁵ The monitoring of tailings is a necessary element of all licences granted to date, ensuring compliance with the Environmental Protection and Enhancement Act, RSA 2000, c E-12.

potential impacts of which, if excessive, are known.²²⁶ As such any suggestion of a disproportionate inhibition of rights in order to obtain the oil contained within the tar sands would have to be made on the basis of the established impacts thereof.

The measurement of the effects of tar sands extraction is, as has been discussed, heatedly debated. The indirect effects discussed in the piece add to this fervent speculation as to the true potential for environmental harm resulting from the extraction of this inimitably valuable resource. Many of the impacts discussed herein will inevitably occur, but it is the extent to which they do so which is not agreed upon. Accurate statements as to the effectiveness of attempts to combat said impacts are also therefore not forthcoming. The proportionality of the potential inhibitions of Charter rights arising from environmental impacts in relation to the aim of tar sands extraction is as a result also difficult to ascertain. Indeed Hogg suggests for reasons akin to this that this aspect of the *Oakes* test is ‘redundant’ and has, ‘never had any influence on the outcome of any case.’²²⁷ He proposes that the question of proportionality is, as has been considered, already established by other aspects of the *Oakes* test. Regarding the environmental impacts of tar sands extraction, this assessment is certainly accurate. To suggest that unaddressed potential environmental impacts are at their least drastic, and that the attainment of the aim of the gargantuan economic benefits of the tar sands is a sufficiently important objective for Canada, but that the two were not proportionate would be absurd. Quite simply the court would be hard pressed to suggest that an unascertainable cost outweighed such a considerable benefit, and it is this which Hogg suggests on the basis of precedent is key.²²⁸ As is suggested in the case of *R. v. Pennington*,²²⁹ the courts ‘are not concerned with wisdom but only with the absence of capriciousness or arbitrariness.’²³⁰

Thus the application of the *Oakes* test to the case at hand would suggest the validity of the broad approach to the permitting of tar sands extraction at present in Alberta might only be challenged on the basis of a contention that the means permitted to do so was not the least drastic. Meeting the burden of proof for such a suggestion may however inhibit it to being of only limited and certainly speculative utility in relation to the aim of the piece. One final

²²⁶ This is in spite of the difficulties as regards the ascertainment of the impacts to fish reproduction conceded by the regulatory authorities. The fact negative impacts will occur is known, it is their extent which is not. Ayles, G.B. Dube, M and Rosenberg, D. *Oil Sands Regional Aquatic Monitoring Program (RAMP) Scientific Peer Review of the Five Year Report (1997-2001)*, 14 (RAMP)

²²⁷ Hogg, (n214), 750

²²⁸ *ibid.* 750

²²⁹ *R. v. Pennington* (1981) ABCA 190

²³⁰ *ibid.* 14

contention might be made however, and that is an accusation of inactivity on the part of the regulatory authorities with regard to potential environmental impacts to features of significance in relation to the expression of culture. In the face of incontrovertible evidence of impacts such a suggestion would be valid, and represent a regulatory approach which did not represent the ‘least drastic means’ of permitting the obtaining of crude oil potential of the province. Such a suggestion in relation to debated or as yet undeveloped impacts such as those to the boreal woodland caribou would arguably be supported by the precedents set in *Brooks v. Canada Safeway Ltd*²³¹ and reiterated in the case of *Vriend v. Alberta*²³² In both cases the question of whether inaction on the part of the legislature, federal or provincial, could result in a breach of section 1 of the Charter under the test in *Oakes*. Both cases concerned instances of alleged discrimination and in both the principle that, ‘Under inclusion may be simply a backhanded way of permitting discrimination’²³³ was upheld. As such to not act in the face of a clear breach of rights espoused under the Charter is a potential basis for a challenge to the current regulatory framework in Alberta.

Each of the *Oakes* criteria has of course been extensively discussed by jurists across a broad range of competencies, and to discuss each in any depth would require a thesis of its own.²³⁴ However, on a basic level these criteria will be considered stringently against any argument proposed within the following chapters in the conclusion of the piece as a whole. Thus the bounds of any proposal on which the conclusions of the piece are based will be bound by established Canadian constitutional law principles. Firstly the purpose of any supposed breach of human rights and thus the discontinuation or limitation of the tar sands projects must meet the requirement of ensuring, ‘the Peace, Order and good Government of Canada,’²³⁵ whilst being bound also by the limitation that any breach is not capable of being, ‘demonstrably justified in a free and democratic society.’²³⁶ The aim of these restrictions is twofold, firstly, in physical terms, it will prevent excessive expansion of the thesis and the arguments within it. Secondly, it will ensure that any conclusions are set within the framework of the Canadian legal system so as to avoid them being based purely in theory whilst also ensuring feasible arguments which therefore might be of use beyond the academic

²³¹ *Brooks v. Canada Safeway Ltd* [1989] 1 S.C.R. 1219

²³² *Vriend* (n219)

²³³ *Brooks* (n231), 1240

²³⁴ Hogg as the seminal writer on Canadian constitutional law is arguably the most approachable in his handling of these criteria, and even in his widely used textbook on the Canadian system separates these out for individual discussion. Hogg, (n214) 728-751

²³⁵ The Constitution Act, 1867 (U.K.), 30 & 31 Victoria, c. 3.at s.91

²³⁶ CCRF (n174) s.1

sphere alone. Also the application of these criteria will highlight which effects of the tar sands projects will give rise to the strongest claims for a breach of enforceable human rights and highlight any potential issues with arguably weaker claims.

As specific rights are considered, and especially those common to the national, regional and international systems, such as the inherent right to life of all people, specific limitations placed upon their application will also be considered. These criteria will be based upon established judicial precedent and decisions of the courts protecting those rights. An example of this is found in the application of the right to private and family life to instances of environmental damage. The European Court of Human Rights ruled in *Lopez Ostra v. Spain*²³⁷ that only where said damage was preventable and resulted in the environment becoming incapable of supporting healthy human habitation, the right was breached and the government liable to compensate those injured. The significance of the European regional system for Canadian law will be explained in the chapter concerning regional provisions, however it can be stated that there is a recognised jurisprudential connection between the two systems.

Thus the bounds of a government failure and an incapability to sustain human habitation would be placed on any proposed application of this right within a legal challenge to the damage caused by the tar sands projects based on human rights. Where appropriate such criteria, which might influence the likelihood of their successful practical application will be outlined when a particular right is argued to be being breached by an adverse effect of the tar sands project. Thus the aforementioned example might be discussed in greater detail in

²³⁷ *Lopez Ostra* (n186). Note should be made that the SCC has used the jurisprudence of the European human rights system and its court as an interpretative aid on a number of occasion as will be discussed later in the piece in relation to the potential role of regional provisions in the aim of the piece.

relation to water pollution caused by tar sands extraction developments, as the *Lopez Ostra* case²³⁸ also concerned analogous effects.

3.21 The Influence of Canadian Provincial Law

The Canadian legal system is, like the US system, federal, consisting of a central state legislature, and various provincial legislatures. In the case of Alberta this legislature is the Legislative Assembly (LAA). Created by the Alberta Act²³⁹ in 1905, like all the provincial legislatures in Canada, the Assembly has the power to ‘make provision for the constitution and administration of any such province, and for the passing of laws for the peace, order and good government of [the] province.’²⁴⁰ This encompasses those matters listed under sections 91 and 92 of the Constitution Act 1867,²⁴¹ with legislative competency over all other matters remaining in the hands of the Canadian Parliament. This is contrasted to the federal systems of the US and Australia, in which the powers of the federal legislature are defined and all residual matters are the remit of the respective provincial bodies.

In both cases the structure is intended to ensure any matter on which legislation might be passed is done so by a competent authority. With respect to human rights the legislative competency for Canada rests with the Canadian Parliament, at a federal, rather than provincial level. This ensures that all legislation both federal and provincial is compliant with its provisions and that rights within Canada are universal to all. The Human Rights Act of Alberta,²⁴² and similar provisions from other provincial legislative bodies, concern solely matters regarding discrimination. This reality is designed to prevent discrimination in relation

²³⁸ *Lopez Ostra* (n186)

²³⁹ Alberta Act, 1905, 4-5 Edw. VII, c. 3

²⁴⁰ Preamble to Alberta Act, 1905, 4-5 Edw. VII, c. 3

²⁴¹ The Constitution Act, 1867 (U.K.), 30 & 31 Victoria, c. 3.at s.91 and s.92

²⁴² Alberta Human Rights Act, R.S.A. 2000, c. A-25.5 (AHR Act)

to specific provincial legislation, and administrative regulations. As discussed in relation to the Canadian Human Rights Act,²⁴³ the provincial act therefore has little, if any, bearing on the thesis.

The boundaries set with regard to all assertions of potential bases for a legal challenge to the tar sands projects originating in human rights provisions are pertinent to both the federal and provincial legal settings. Also any challenge to administrative measures or emanations of the state, on the basis of human rights would be possible regardless of them being federal or provincial in nature as a result of human rights law in Canada being derived from the federal level and forming part of the constitutional law of the state itself. As such the limits of ‘peace, order and good government,’ and ‘justification in a free and democratic society’ are equally relevant and applicable to all levels of enforcement within the Canadian domestic legal system and can be used in assessing the validity of the suggestions made in the work without need for further clarification. Such an approach also increases the likelihood of said recommendations having a viable practical application based on conformity with established precedents.

3.22 The Influence of Regional/Multinational Law

The Canadian position with regard to international law has traditionally been highly dualistic, with most treaty obligations being preserved outside of the Canadian domestic legal system via a staunch refusal to transform them through the enactment of a statute to that effect. In relation to the Organisation of American States,²⁴⁴ Canada has taken convoluted

²⁴³ CHR Act (n243)

²⁴⁴ A multinational organisation with membership comprising North and South American states whose self appointed purposes are the achievement and maintenance of peace, security, democracy and human rights in across the two continents.

approach to enforcement and transformation of legal provisions. This position is as a result primarily of disputes concerning a single fundamental principle of the human rights body established under the umbrella of the organisation.

Canada is a fully ratified member of the organisation and its charter.²⁴⁵ However, in relation to the American Convention of Human Rights,²⁴⁶ (ACHR) and the court overseeing its enforcement, the American Court of Human Rights, Canada is morally blocked from acquiescing to the extent it might otherwise wish to. This is owing to the drafting of a single provision, Article 4,²⁴⁷ which concerns the right to life. The article is drafted in such a manner as to prohibit abortion, legal under Canadian domestic law, with the words, ‘from the moment of conception.’²⁴⁸ This provision is a result of the predominance of Catholicism as the naturalistic basis for the rights and their drafting emanating from the Latin American states in the organisation. These States outnumber the more liberal North American states, and thus Canada has simply refused to even sign the convention.

The Inter-American Commission on Human Rights, to which Canada is subject as a member of the OAS, is able to issue recommendations, including proposing compensation, based upon the broader American Declaration on the Rights and Duties of Man (ADRD),²⁴⁹ to which Canada is a ratified party. These however are not legally binding, and besides political and media pressure, have no tangible enforcement mechanisms. Thus, except where the Canadian legislature and executive choose to adopt the recommendations of the Commission, the role of the American Declaration is at best an interpretive instrument for the

²⁴⁵ Charter of the Organization of American States, 119 U.N.T.S. 3, entered into force December 13, 1951

²⁴⁶ ACHR (n187)

²⁴⁷ *ibid.* Art. 4

²⁴⁸ *ibid.* Art. 4

²⁴⁹ American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter- American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992). (ADRD)

Canadian domestic legal system. As such in relation to the thesis the provisions of the ADRD²⁵⁰ will form an interpretive aid to established, and thus enforceable, Canadian domestic law provisions. The opinions of the Commission and provisions contained within the Declaration will therefore be cited as interpretive approaches to enacted Canadian human rights provisions within the bounds of ‘peace, order and good government’²⁵¹ on the one hand and justifiability in a ‘free and democratic society’²⁵² on the other. Similarly assessments as to the likelihood of the suggestions made being upheld in practice will also be considered based on established precedents from binding fora.

3.23 The Influence of International Law

The position of the Canadian legislature and executive in relation to international law operational beyond the confines of the OAS is clearer, though still retains one ambiguity to the generally dualistic approach of the state. Canada is a signed and ratified party to the International Covenant on Civil and Political Rights²⁵³ (ICCPR) and the International Covenant on Economic Social and Cultural Rights²⁵⁴ (ICESCR), but has transformed neither into its domestic law. As a ratified party to the First Optional Protocol to the ICCPR²⁵⁵ however, the Canadian government has permitted its citizens to take complaints to the Human Rights Committee of the United Nations (UNHRC). Decisions of this committee however, like those of the Inter-American Commission, are not legally binding, though arguably wield considerably more political pressure than the regional equivalent.

²⁵⁰ *ibid.*

²⁵¹ The Constitution Act, 1867 (U.K.), 30 & 31 Victoria, c. 3.s.91

²⁵² CCRF (n174) s.1

²⁵³ ICCPR (n176)

²⁵⁴ International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976. (ICESCR)

²⁵⁵ Optional Protocol to the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, entered into force 23rd March 1976. (OP-ICCPR)

Thus much like the American Declaration on Human Rights,²⁵⁶ and the recommendations of the corresponding commission, the provisions of the twin covenants and Views of the UNHRC are of use solely as interpretative measures of established Canadian domestic law provisions. As such, their application to the thesis will be akin to that of the multinational provisions and procedures under the OAS. Any basis for a legal challenge to the tar sands projects suggested as potentially resulting from them in the conclusion to the piece will therefore also be bound by the criteria of being for the purpose of ‘peace, order and good government,’²⁵⁷ whilst being ‘justifiable in a free and democratic society.’²⁵⁸ Added to this will be the continuing assessment of the likelihood of said suggestions being upheld in practice by the fora proposed as the most appropriate for such a challenge in that conclusion.

3.3 Harms Against the Person Prohibited By Canadian Human Rights Law

3.31 Section 7 CCRF

Right to Physical and Mental Wellbeing of the Individual

In legal systems at all levels, the ability to access clean water for the purposes of sanitation and nutrition is inextricably bound up with human rights concerning the basic physical integrity of individuals.²⁵⁹ Limitations to such rights are far less likely to be

²⁵⁶ ADRD (n249)

²⁵⁷ The Constitution Act, 1867 (U.K.), 30 & 31 Victoria, c. 3.s.91

²⁵⁸ CCRF (n174) s.1

²⁵⁹ Canada is no exception to this, see: Government of Alberta, Environment and Water Ministry, Water Webpage <http://environment.alberta.ca/01157.html> (Last accessed 4th April 2012). This position is also supported by the United Nations Committee on Economic, Social and Cultural Rights, see: Committee on Economic, Social and Cultural Rights, General Comment 15, The Right to Water (Twenty-ninth session, 2003), U.N. Doc. E/C.12/2002/11 (2002)

permitted by the Canadian courts owing to the fundamental moral foundations of human rights preserving the individual against such abuses by the state. These primarily relate to the physical and mental wellbeing of the individual, and ensure that threats to the health of an individual, of either nature, should not result from the actions of the government or aligned authorities. Undoubtedly the most significant of this group of provisions is the right to life, liberty and security of the person protected under section 7 of the CCRF.²⁶⁰ The link between water and life is a well-established one, with bodies at all levels of influence identifying the resource as essential to, 'ensure a healthy environment and high quality of life.'²⁶¹ The position of Canada with regards to any tangible right to water at a regional and international level is a source of some controversy amongst jurists and activists as will be discussed later. Thus, domestically at least, it is primarily through the suggestion of a breach of the right to life, liberty and security of the person, arising from the excessive extraction of the resource from the water courses of the province that any 'right to water' akin to that recognised regionally and internationally might be enforced.

Whilst the provincial authorities governing water resources have accepted that, 'Water is not only a resource, it is a life source,'²⁶² proving a link to the aforementioned domestic 'right to life, liberty and security of the person,'²⁶³ has been the source of some debate. Arguably however, considering precedents set by the Canadian courts, the lack of provision of adequate water to support the most basic of purposes could breach all three elements of this right. A view supported by the judicial clerk to the Court of Appeal in

²⁶⁰ CCRF (n174) s.7

²⁶¹ Water Act, RSA 2000, c W-3 Part 2 s.2(a)

²⁶² Government of Alberta, Environment and Water Ministry, Water Webpage <http://environment.alberta.ca/01157.html> (Last accessed 4th April 2012)

²⁶³ CCRF (n174) s.7

Ontario, and former environmental campaigner, James Harnum.²⁶⁴ The Supreme Court of Canada (SCC) has conceived a two part test in order for any breach of the right protected by section 7 of the CCRF to be upheld. Firstly, on the balance of probabilities that the alleged breach has in fact occurred, secondly that the breach is an affront to the principles of fundamental justice.²⁶⁵ More specifically this relates to natural justice principles as well as principles established by more orthodox procedural means.²⁶⁶ Thus it goes without saying that any proposed basis for a case against the tar sands developments founded on an alleged breach of the right to life, liberty and security of the person would consequentially have to pass this test.

In instances of restricted access to water the ‘life’ element of the section 7 right, is *prima facie* the most obviously breached element of the right, water being recognised universally as key to survival.²⁶⁷ However, the burden of proving that the lack of access to water has reached a sufficient level as to constitute a breach of such severity as to threaten ‘life’ is potentially the most difficult. The burden of proof is arguably the highest of the elements of section 7 of the Charter. However, if upheld a breach would undoubtedly give rise to the greatest impact, necessitating as a minimum the cession of particular extraction projects as well as altering dramatically the licensing policy for the industry as a whole.

For the indigenous peoples of Canada access to water for the basic purposes most developed nations take for granted is not as forthcoming as might be imagined in such a developed nation. Indeed over 100 First Nations tribes have consistently been subject to

²⁶⁴ Harnum, J. ‘*Deriving the Right to Water from the Right to Life, Liberty and Security of the Person: Section 7 of the Canadian Charter of Rights and Freedoms and Aboriginal Communities in Canada*’ (2010) Review of European Community and International Environmental Law 19 (3)

²⁶⁵ *Blencoe v. British Columbia (Human Rights Commission)*, [2000] SCC 44, at 47

²⁶⁶ *Re B.C. Motor Vehicle Act* (n202)

²⁶⁷ Committee on Economic, Social and Cultural Rights, General Comment 15, The Right to Water (Twenty-ninth session, 2003), U.N. Doc. E/C.12/2002/11 (2002)

‘advisories’ concerning drinking water issued by the Health Canada department of the federal government, ‘to protect public health from waterborne contaminants that could be, or are known to be, present in drinking water.’²⁶⁸ Whilst the implications of pollution to water sources bear clear and provable links to the health and in severe cases life of indigenous peoples, there has been no suggestion as yet that the quantity of water removed from the water courses of Alberta by the tar sands developments has a direct impact on the health of the peoples themselves. This is largely as today most First Nations bands are supplied with more than adequate quantities of water to fulfil their requirements as regards sanitation and thirst by modern means such as pipelines and man-made wells.

With regards to the ‘life’ element of section 7 of the CCRF therefore it would be required that the impacts to fish populations in the regions affected by frivolous water licensing on the part of the provincial government removed the ability of the indigenous peoples to sustain themselves to such an extent that they were at risk of starvation. Historically such an eventuality might have been a possible result of industrial impacts of the scale seen in Alberta as a result of the rapid development of the tar sands. However, even the most remote of indigenous tribes today are not reliant solely upon fishing for their sustenance. Even where the majority of their nutritional intake is from fish, none would use solely traditional methods to catch the numbers of fish required to support the considerably larger modern tribes. A considerable wealth of case law in this regard suggests that once such practices become ‘commercial’ or non-traditional in nature, they are no longer subject to the protections afforded by the numbered treaties.²⁶⁹ As such they would have to be considered as breaches of human rights with no consideration given to indigenous rights, and thus could

²⁶⁸ As of February 2012 this number was 112 First Nations, and this does not take into account the numbers of Inuits and Metis tribes also affected. Figures and quotation obtained from Health Canada website: http://www.hc-sc.gc.ca/fniah-spnia/promotion/public-publique/water-eau-eng.php#how_many (Last accessed 4th April 2012)

²⁶⁹ Established in the case of *R. v. Badger*, [1996] 1 S.C.R. 771

not give rise to injunctive relief against the governments of Canada or Alberta.²⁷⁰ Thus, whilst the impact to their way of life is potentially a significant one, their plight is not applicable to a claim based upon a breach of the right to life linked to the numbered treaty rights negotiated in the early development of the Canadian state. Thus this contention is of little use in relation to the discussion of water consumption in the thesis as a basis for a legal challenge.²⁷¹

The lack of any element of incarceration as a result of the impacts of the tar sands developments on the environment upon which the First Nations rely would *prima facie* also eliminate the ‘liberty and security’ component of the section 7 right afforded under the CCRF from being of any potential use in a case of the type proposed by the thesis. Historically, the application of section 7 to allegations of breaches of liberty and security has been interpreted as revolving almost solely around infringements to the concepts in the context of criminal proceedings.²⁷² Their focus has been predominantly aimed at ensuring freedom from unfair proceedings or treatment, coercion and any semblance of arbitrary power. An initial assessment of this reality would understandably lead to the conclusion that the provisions of section 7 are of little utility in relation to the construction of a case against the licensing of tar sands developments in Alberta. This position however fails to take into account the inherent links to the specific reserved lands which the First Nations tribes have and which are constitutionally protected under the numbered treaties. Such notions have also received some, if restricted, application in cases within the Canadian legal system.

²⁷⁰ *ibid.*

²⁷¹ This is in contrast to the approach of the UNHRC in the communication of *Poma Poma v Peru* Communication No. 1457/2006 U.N. Doc. CCPR/C/95/D/1457/2006 in which the Committee permitted economic activity to be afforded cultural significance.

²⁷² See the discussion of the impact of the legal rights afforded under the Charter upon federal criminal statutes by Frederick Vaughan: Vaughan, F. *Judicial Politics in Canada* in Howe, P. and Russell, P.H. *Judicial Power and Canadian Democracy* (McGill-Queens University Press, Kingston, 2001) 20- 23

In the case of *Corbiere v Canada (Minister of Indian and Northern Affairs)*,²⁷³ the Supreme Court held that the decision whether to live on a reserve land was of, ‘particular cultural and social significance,’²⁷⁴ and went further to hold this was one of fundamental importance to band members. Water quality was the primary issue in the case, and it was found that the inhibition of basic necessities of life, such as clean drinking water, which would encourage band members to leave the reserved lands could constitute a breach of the right to liberty as protected by section 7 of the Charter, an argument posited and advocated again by Harnum.²⁷⁵ The *ratio decidendi* of the case was that failure to provide water of a sufficient quality removed the free choice of the indigenous peoples to decide objectively whether to remain on the reserved lands and enjoy the benefits of doing so.

Were the same principles to be applied to the impacts felt by the First Nations peoples of Alberta in the regions impacted upon by the tar sands developments, a potential basis for a case based upon the breach of the right to ‘liberty’ under section 7 could be suggested. The inability of these peoples to express themselves through traditional fishing methods, also protected under the numbered treaties, in a manner of particular ‘cultural and social significance,’²⁷⁶ would by extension constitute a breach of section 7 as it had in *Corbiere*.²⁷⁷ As an established interpretation of the rights afforded under section 7 of the CCRF, this basis for a case against the tar sands, despite being dependent upon proof of the severe inhibition of fish stocks and as a result health, would represent arguably the strongest of the potential claims against the developments linked to water quantity. The necessity of, and uncertainty relating to evidence demonstrating this impact is however equally as likely to ensure no case

²⁷³ *Corbiere v. Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203

²⁷⁴ *ibid.* at 62

²⁷⁵ Harnum (n264) 309

²⁷⁶ *Corbiere* (n273) 62

²⁷⁷ *ibid.*

could be brought, regardless of its jurisprudential potential for success.²⁷⁸ Equally the provision of water for the basic needs of drinking and sanitation by conventional means to most First Nations bands as has been alluded to would prevent any case being brought on this more direct basis, except where movement from reserved lands was necessary, not merely opted for.

The ‘security’ component of the section 7 right whilst potentially offering another viable basis for such a case when considered in the light of established precedent from the Canadian Supreme Court is of less use than it might at first appear. The case of *Chalouli v Quebec (Attorney General)*,²⁷⁹ held that impacts to human health caused by the actions and decisions of government organs could give rise to a breach of the right to security of the person protected under section 7 of the Charter. Again however, the need for evidence of this could potentially prove an unavoidable hurdle to overcome. This is owing to the debate regarding the harm caused by the provision of an insufficient quantity of water potentially preventing this forming the basis of a case against tar sands developments in the north east of Alberta. The difficulty can be identified as resulting largely from the fact that First Nations peoples of the region are generally provided with quantities of water more than capable of meeting that necessary for their basic and social needs.

The question therefore would arise as to whether the provision of water need be culturally relevant, and indeed this would arguably be the key issue in relation to suggesting a

²⁷⁸ This is illustrative of the double edged nature of the lack of uncontested scientific research in this regard conceded by Alberta Environment Fisheries And Oceans Canada. The lack of evidence is equally as damning for a demand of cession as it is for continuation. Thus provided adequate precaution based on existing knowledge is proven, suggested impacts would not halt extraction. See: Alberta Environment Fisheries and Oceans Canada *Water Management Framework: Instream Flow Needs And Water Management System For The Lower Athabasca River*, February 2007, 31.

<http://environment.alberta.ca/documents/athabasca_rwmf_technical.pdf> Accessed 30th July 2014.

(WMSLAR)

²⁷⁹ *Chaoulli v. Quebec (Attorney General)* [2005] 1 SCR 791

case against the tar sands developments brought on the basis of the impact of water consumption. Failing to prove the need for a particular type of water provision would result in any challenge to the developments on this basis being easily rebutted by the establishment of a sufficient water infrastructure on the reserved lands of the indigenous peoples of Alberta. This assessment being clearly supported by the precedent set in *Corbiere*.²⁸⁰ Despite asserting that non-fatal damages to health necessitating relocation could breach section 7, the case placed this development within highly restrictive parameters demanding no other reasonable option be available to avoid the damage incurred.²⁸¹

Whilst the case of *R v. Morgentaler*²⁸² established the belief of the Supreme Court that the concept of ‘security of the person’ provided by section 7 of the CCRF²⁸³ could be breached by risk to the health of an individual, the extent of this ruling is unclear in relation to the impacts of the tar sands. Whilst direct threats to health are considered breaches, as was made clear in the case of *Morgentaler*,²⁸⁴ the impacts of the reduction in water of a particular form are far less direct and can be avoided on a basic level via the provision of water from another source. As such the risk to health could be both averted, and arguably reduced, as far greater quality water can be provided to the First Nations peoples via the use of modern water infrastructure technology. Similarly the risk to mental health of the indigenous peoples of the regions affected by the developments, whilst in theory a viable basis for a case opposing their continuation, as suggested by the case of *Mills v. the Queen*,²⁸⁵ would be difficult to establish as having been caused by the developments. Again this would require an indirect link between the water consumption of the developments leading to a particular form of water

²⁸⁰ *Corbiere* (n273)

²⁸¹ *ibid.* 126

²⁸² *R v. Morgentaler* [1988] 1 S.C.R. 30

²⁸³ CCRF (n174) s.7

²⁸⁴ *Morgentaler* contested that the cumbersome administrative procedures concerning abortion decisions restricted her access to the procedure and as such increased the risk to her health.

²⁸⁵ *Mills v. The Queen* [1986] 1 S.C.R. 863

provision being removed and a consequential deterioration in the mental health of the Indians being upheld by the courts.²⁸⁶

Potentially the most significant obstacle for this suggested basis to overcome however is the reluctance of the SCC to consider fundamentally economic considerations in relation to the provisions of section 7.²⁸⁷ The position of the SCC, largely dictated by the reticence to repeat issues which arose in the legal system of the USA in the early 20th Century,²⁸⁸ has been restrictive in relation to any alleged breach of section 7 which is not directly linked to the physical liberty and integrity of the individual. Specifically the provision has predominantly been applied, as one would expect, in relation to incarceration as a result of criminal proceedings. In particular, ‘Canadian courts have steadfastly maintained that social and economic rights are not rights at all,’ and this position shaped the drafting and development of the Charter.²⁸⁹ Thus in relation to the issue at hand, the suggestion that a reduction in fish stocks would necessitate either relocation or the abandonment of traditional practices would constitute a breach of the Charter, the lack of a direct impact to human health which could breach this restriction,²⁹⁰ could negate this contention. This assessment however fails to take into account the special status of the indigenous peoples of Canada within their legal system and indeed the Constitution and Charter specifically.²⁹¹

²⁸⁶ Note should be made that the distress caused by relocation might be the only possible contention in this regard, but the ‘mobility rights’ afforded under the CCRF are more appropriate provisions to consider as a basis for a case in this regard.

²⁸⁷ CCRF (n174) s.7

²⁸⁸ *Lochner v. New York* (1905) 198 U.S. 45 held, until being overturned in 1937, that minimum wages, maximum work hours and health and safety standards would not be mandatory as they infringed the ‘economic liberty’ of industrialists. As a result the term ‘property’ was omitted from section 7 of the CCRF to avoid a reproduction of such a decision being delivered in Canada, and hence only the life, liberty and security of the person are afforded.

²⁸⁹ Lugtig & Parkes (n178) 14

²⁹⁰ This is given both the reluctance to afford economic rights highlight by Lugtig and Parkes (ibid.) and the decision to not afford *lex specialis* protection to indigenous practices which had taken on a cultural nature in the case of *Badger* (n269)

²⁹¹ Constitution Act (n200) s.35 and ²⁹¹ CCRF (n174) s.27

In the instance of an indigenous populace, or ‘aboriginals’ as the Charter defines them, section 25 of the Charter,²⁹² adds to this position by protecting established aboriginal rights from being detracted from in any way by the other rights contained within it. This provision therefore removes any potential negative impact of the implementation of rights contained within the Charter on the reserved lands provided under the numbered treaties²⁹³ between the Crown and the First Nations negotiated almost a century earlier. Similarly section 26 of the Charter affords a similar protection to all rights applicable in Canadian law, preventing the text being, ‘construed as denying the existence of any other rights or freedoms that exist in Canada.’²⁹⁴ Thus unless it can be proven that the nature of the practice is commercial, to fail to take into account the particular context of an indigenous peoples and their traditions as a governmental authority would itself potentially be a breach of the Charter. However, the lack of a direct harm to physical integrity, and the rebuttable nature of the only basis on which that integrity might be threatened, namely the lack of nutrition and sanitation, remain considerable hurdles to overcome. This obstacle suggests that the ‘security of the person,’ protected under section 7, would not be likely to be held as having been breached by the licensing of arguably excessive consumption of natural water courses in the province of Alberta.

The severity of the potential impacts to flora and fauna of the province would require connection to a particular right afforded under the Canadian Charter of Rights and Freedoms.²⁹⁵ This is owing to the fact that rights enshrined within the text are protected for citizens of Canada, and there is no specific right to an environmental standard therein.²⁹⁶ As discussed, the impacts of both land usage and water quantity might be mitigated to an extent

²⁹² CCRF (n174) s.25

²⁹³ Treaties 6 and 8 (n68)

²⁹⁴ CCRF (n174) s.26

²⁹⁵ CCRF (n174)

²⁹⁶ The non-proprietary nature of the rights sought by the First Nations and enshrined within the numbered treaties discussed in the piece remove the desire on their part to apply Canadian Land Law, and indeed if they did so, title historically would rest with either the Crown (federal government) or the province.

satisfactory to the judicial authorities to avoid breaching the most fundamental of these rights. This might be achieved by, for example, supplying water for drinking and sanitation via pipelines, or funding relocation to areas of a similar ecosystem without underlying tar sands raw material. By contrast should the impacts of the seepage of tailings ponds, and specifically harmful contaminants contained within them transfer to human inhabitants of the areas of Alberta exploited for the bitumen within the tar sands, thus affecting them directly, mitigation would be far less easily achieved if at all possible. Any such direct impact to the health of any citizens of the province, not just the First Nations peoples, would be of immense significance as it would potentially breach the provisions of section 7 of the Charter.²⁹⁷ The provision, whilst being derogable in respect of ‘security’ and ‘liberty,’ would necessitate a specific and severe circumstance to permit such a derogation. The effects of water quantity reductions in natural water courses, and land use would arguably not breach this provision therefore. As such they would likely be deemed justifiable limitations upon derogable rights on the basis of the massive economic and political benefits of the tar sands industry to not only Alberta itself, but also Canada as a whole.

Such factors would not however be able to limit the Article 7 right, particularly not in relation to the rights to ‘life,’ and ‘security’ in the context of physical security or health. The likelihood of effects to human health is minimal to say the least, the only suggestion of any such direct impact arises from tailings contaminants. Concerns in this regard are represented by the suggestion of increased rates of cancer in communities downstream from extraction and refinement projects, which were the subject of considerable controversy.²⁹⁸ However the potential alone, if verified scientifically, for such impacts would be of considerable weight in

²⁹⁷ CCRF (n174) s. 7

²⁹⁸ Contrast the conclusions of a study by the University of Alberta, <<http://www.ualberta.ca/~avnish/rls-2009-02-06-fort-chipewyan-study.pdf>> Accessed 30th July 2014 with those of Alberta Health Services, <<http://www.albertahealthservices.ca/poph/hi-poph-surv-cancer-appendix-i-fort-chip-2014-02-07.pdf>> Accessed 30th July 2014

itself. Essentially the contention would be that the risk to human health was too great to be outweighed by the benefits, economic and political, of extracting and refining the tar sands raw material using current methods and without greater knowledge of the implications for the local populace.

Uncertainty with regards to the extent, if any, of the impacts suggested as having the potential to result from the continuation of operations as they are undertaken at present is common amongst the suggested bases for a case against the licensing of such projects.²⁹⁹ However, the difference in relation to the seepage of tailings is the unavoidable nature of the impact. Whilst alternatives can be provided to potential damage to the life and security of individuals, indigenous or otherwise caused by reduced wildlife numbers or water quantity in the region which would mitigate damage done to such a degree as would be deemed reasonable by the courts, this is not the case in relation to tailings leakage.

In this instance the damage is potentially done by an addition or contaminant to the natural ecosystem. Excessive water usage, or disturbance of native wildlife and its habitat by contrast both involve the removal to some degree of a naturally occurring feature. As such the provision of alternatives, or equivalents is not an available method of mitigating damage, nor is utilising other means of fulfilling the demand for inputs to the extraction and refinement process.³⁰⁰ This fundamental difference between the impact of tailings and those of water consumption and wildlife disturbance, and generally between consumption and contamination, especially in the context of impacts to human health and life, is key in relation to the construction of a case opposing the licensing of tar sands projects based in human rights law. The inability to mitigate contamination considerably and quickly by any means

²⁹⁹ WMSLAR (n278)

³⁰⁰ In this case recycling water or increasing usage efficiency.

other than direct reduction of production considerably constricts options to rebut the argument put forward. Coupled with the finality of the impacts felt, the result is as strong a basis for a case against the tar sands extraction and refinement projects of north east Alberta as has been suggested thus far.

Proving this impact is however a significant issue in relation to this contention as effects to human health would be highly contentious and need to be conclusive beyond any reasonable criticism. Given the current debate surrounding the carcinogenic impact of projects to aquatic species in the region³⁰¹ and humans in one instance³⁰², the likelihood of attaining irrefutable evidence of such impacts is small. The provisions of Article 7 of the CCRF³⁰³ afford potentially one of the strongest bases for a case against the tar sands projects in terms of the potential outcomes for extraction projects should impacts be deemed a breach of this non-derogable and fundamental right.³⁰⁴ The proof of such a breach however is required to be equally as strong, which with present knowledge it is incapable of being.³⁰⁵

³⁰¹ Athabasca Chipewyan First Nation and Misikew Cree First Nation, *Environmental and Human Health Implications of the Athabasca Oil Sands for the Mikisew Cree First Nation and Athabasca Chipewyan First Nation in Northern Alberta Phase Two Report*. <<https://intercontinentalcry.org/wp-content/uploads/2014/07/Executive-Summary-Fort-Chipewyan-Env-Health-Report-July-2014-Media.pdf>> Accessed 30th July 2014. Note should be made that this report was funded entirely by the First Nations suggesting the adverse impacts to the environment in proximity to extraction projects.

³⁰² Alberta Health Services, *Appendix I Fort Chipewyan Update Feb 7 2014* <<http://www.albertahealthservices.ca/poph/hi-poph-surv-cancer-appendix-i-fort-chip-2014-02-07.pdf>> Accessed 30th July 2014

³⁰³ CCRF (n174)s. 7

³⁰⁴ Such outcomes would include, as a minimum, a temporary injunction on harmful activity until satisfactory evidence of safety and adequate precaution had been provided.

³⁰⁵ See for example: WMSLAR (n278).

3.32 Section 12 CCRF

Cruel and Unusual Treatment Resulting From Environmental Impacts

The potential for impacts to human health also allows for the suggestion of a breach of Article 12 of the Charter.³⁰⁶ A number of seminal cases would support the assertion that impacts to human health are considered far more highly than those to the wider ecosystem in the estimation of the courts.³⁰⁷ Where such impacts have not, or could not have, caused death, or were not deemed to have had a significant enough adverse effect they would not breach the personal security of the individual protected under section 7 of the Charter.³⁰⁸ However, persistent adversity faced by the indigenous populace as a result of leakage from tailings ponds in particular³⁰⁹ could be argued to constitute, ‘cruel and unusual treatment.’³¹⁰ Such a suggestion would have to again be supported by considerable and verifiable empirical evidence of an impact capable of constituting such treatment.

Given the traditional conception of provisions akin to this across various jurisdictions and at all levels of legal enforcement as being applicable to torture establishing the impacts of seepage of contaminants from tailings ponds had caused such harm would be a substantial undertaking. The case of *Rodriguez v British Columbia (Attorney General)*³¹¹ in the Supreme Court of Canada however increased the potential utility of this provision by loosening this conceptual connection somewhat. The case suggested that, “‘treatment’” within the meaning

³⁰⁶ CCRF (n174) s. 12

³⁰⁷ *Hatton* (n186)

³⁰⁸ CCRF (n174) s. 7

³⁰⁹ This is owing to the aforementioned lack of direct impact to human health afforded by adversity faced primarily by flora and fauna of a non-human nature, and the ability to avoid impacts owing to water consumption via the provision of water via pipelines.

³¹⁰ CCRF (n174) s. 12

³¹¹ *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519

of section 12 may include that imposed by the state in contexts other than penal or quasi-penal, ... There must be some active state process in operation, involving an exercise of state control over the individual.’³¹² Thus in order to propose that the licensing of projects was harmful enough to indigenous peoples to breach the rights afforded under section 12 of the Charter, a two stage test must be overcome. Firstly the action causing the alleged harm must be deemed ‘treatment’ as loosely defined in *Rodriguez*,³¹³ and secondly said treatment must be proved of a cruel and unusual nature.

The notion of treatment remains relatively undefined, beyond that it must involve being subject to the state administration or justice system in this context.³¹⁴ In this particular instance, it is suggested that the administrative process involved in the licensing of tar sands extraction projects is ample to constitute the ‘active state process’ as espoused under the *Rodriguez* definition. The difficulty would come in establishing whether this process involved the ‘exercise of control over the individual.’ Whilst the licensing process is not an example of direct control over the individual in a manner akin to incarceration, it does have undeniable impacts upon the populace with which the piece is concerned. An issue here might be the contention that the protections afforded under section 12 are construed only as applicable to the individual, thus demanding that the alleged impact be felt by an individual. However as numerous individuals could bring the same case in this particular context, such an argument would be rebutted.³¹⁵

³¹² *ibid.* 612 per La Forest C.J.

³¹³ *ibid.*

³¹⁴ *ibid.*

³¹⁵ Such an eventuality was considered by the UNHRC in the communication concerning the Lubicon Lake Band, though their then leader, Bernard Ominayak was permitted to bring a case in his name alone on their behalf. *Lubicon Lake Band v. Canada*, Communication No. 167/1984 (26 March 1990), U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990).

The contention would be a valid one were the proposed breach an impact felt only where an individual was a member of the group and was in no other way different. In this instance the suggestion would have to be therefore that a non-indigenous person who sought his livelihood and sustenance from the specific ecosystem of the region would not feel the impacts of the extraction projects as he was not a member of a First Nation. Such a suggestion clearly would be seen as farcical in this instance, as an individual who had also continued to seek his livelihood from traditional practices in the manner that the First Nations do so, would be impacted upon identically. The issue therefore is that the provisions of section 12 does not *prima facie* account for the cultural significance of acts.³¹⁶ Thus whilst the concept of treatment under section 12 was expanded by *Rodriguez* and is of undeniable utility to the piece in allowing the suggestion of a breach, the broad construction presents potential issues of its own.

Unlike the broad definition applied to the concept of treatment however, there is an established test for whether ‘cruel and unusual,’ nature, namely the question as to whether it is ‘so excessive as to outrage standards of decency.’³¹⁷ The consistent nature and degree of harm would likely be key to such a suggestion. As such the inhibition of reproductive function in humans such as that seen in aquatic species such as frogs and fish³¹⁸ would be a

³¹⁶ This assessment fits with established precedents in this regard, with the focus being the severity of harm, though the consideration of impacts which cannot be medically ascertained was considered in a case concerning section 7 of the CCRF where it was deemed that impacts need only be, ‘greater than ordinary.’ *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 SCR 46, 60

³¹⁷ *Miller et al. v. The Queen*, [1977] 2 SCR 680, 681 per Laskin C.J.

³¹⁸ Athabasca Chipewyan First Nation and Misikew Cree First Nation, *Environmental and Human Health Implications of the Athabasca Oil Sands for the Mikisew Cree First Nation and Athabasca Chipewyan First Nation in Northern Alberta Phase Two Report*. <<https://intercontinentalcry.org/wp-content/uploads/2014/07/Executive-Summary-Fort-Chipewyan-Env-Health-Report-July-2014-Media.pdf>> Accessed 30th July 2014. Note should be made that this report was funded entirely by the First Nations suggesting the adverse impacts to the environment in proximity to extraction projects.

potential breach of this provision.³¹⁹ Similarly continuous and restrictive or painful and severely uncomfortable impacts having physical or psychological effects might also breach the right afforded by Article 12.³²⁰ The breach of the threshold of outraging standards of decency may prove difficult where impacts are not as direct as in the traditional conception of cruel and unusual treatment as being akin to torture.³²¹

In this context the case of *Rodriguez* is again of particular relevance as here it was the suggestion that ‘a mere prohibition’³²² could not be deemed treatment, but that an actual denial of autonomy and decision making for the individual coupled with physical ramifications might be deemed as being treatment of a ‘cruel and unusual’ nature. The case concerned the prohibition of assisted suicide and it was deemed that the provision itself could not constitute treatment and thus breach section 12, but that a positive action on the part of the state could. Thus the *obiter dicta* comments of Justice La Forest allow for the use of section 12 in the context of the piece by expanding the concept of cruel and unusual treatment beyond merely potential instances arising in the pursuit of criminal sanctions to include broader contexts affecting the liberty of the individual.

The difficulty again would lie in the significant burden of proof attached to any suggested breach of articles bearing such implications of harm to humans. Whilst impacts to human health have been suggested, the veracity of these claims has been subject to unresolved media debate, and uncontested and confirmed scientific studies regarding such concerns are not available. The lack of evidence of such impacts might simply be owing to

³¹⁹ Such an impact would undoubtedly, ‘outrage standards of decency’ as prescribed in *Miller et al. v. The Queen*, [1977] 2 SCR 680, 681

³²⁰ CCRF (n174) s.12

³²¹ The concept of ‘greater than ordinary’ impact (*New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 SCR 46, 60) might be suggested here, but again the requisite severity and immediacy of harm is somewhat lacking.

³²² *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, 522

the delayed impacts of contaminants to species higher within food webs and chains, as a result of the need for said substances to build up within those species lower in the chain before their impacts are felt within its higher echelons.³²³ In the case of the indigenous populace of the north east of Alberta, the sharing of traditionally hunted food within the social group, and the hunting of such species only in seasons where they are present on the land,³²⁴ would significantly increase the time taken for such impacts to be noticeable. Conversely however this unique utilisation would also, once any impacts had become apparent, add significant weight to any case proposed. The acute nature of impacts to the indigenous populace and thus heightened severity to them in comparison to other Albertans, would support the suggestion that they were treatment of a ‘cruel and unusual’ nature, not merely a prohibition.

These assertions are however considerably speculative, and although substances contained within the tailings ponds material are capable of having impacts such as those described above, the likelihood of them occurring is at present unascertainable.³²⁵ The extent of seepage and its contents are certainly not accurately known and as such any suggestion as to the utility of this article for the construction of a case against the licensing of extraction and refinement projects on this basis must be treated with an equal measure of uncertainty. In a manner akin to the provision of section 7³²⁶ regarding life liberty and security of the person, this right is generally considered of a non-derogable nature.³²⁷ The strength of a case on the basis of a breach of this right would therefore be substantial. However, the burden of proof

³²³ A process known as, and hereinafter referred to as, bioaccumulation.

³²⁴ The boreal woodland caribou is a wild and migratory species, and as such hunting them is only possible in seasons where they are present within the reserve lands of the First Nations.

³²⁵ See for example: WMSLAR (n278)

³²⁶ CCRF (n174) s.7

³²⁷ Theoretically Article 1 of the Charter allows derogation from all articles of the text, though precedents of the Canadian courts would suggest that this is not the case in relation to a handful of provisions.

required to be shown by the court to afford the significant protection and highly restrictive outcome to the government enshrined by the provision, would likely be too great.

Similarly, whilst the suggestion *obiter dicta* in the case of *Rodriguez* that ‘treatment’ could be constituted by actions other than penal or quasi-penal in nature,³²⁸ this has been restrictively applied. As such, the vast majority of precedents in this regard undeniably concern actions of such a nature. From the perspective of a legal representative constructing a case such as that suggested by the piece, based on the breach of established human rights as a result of the licensing of projects, this gives rise to another concern. A case brought on the basis of cruel and unusual treatment would have to cross two interpretative hurdles. Firstly that the damage incurred as a result of the seepage of permitted tailings ponds and other impacts constituted treatment, and secondly that the impacts arising were so severe as to be deemed cruel and unusual in nature. Whilst such a suggestion does not detract from the validity of the legal argument presented here, given the aim of the piece to construct a basis for a case against the licensing of the tar sands in human rights law, the practical issues of any suggested bases must also be considered where of significance. The burden of proof attached to the provision concerning cruel and unusual treatment,³²⁹ owing to its links to concepts of torture and inhumane harm, would be likely to inhibit its potential use given the lack of incontrovertible evidence to suggest harm of a requisite severity as has been discussed.

³²⁸ *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, 522

³²⁹ CCRF (n174) s.12

3.4 Suppressions of Abilities Protected by Canadian Human Rights Law

3.41 Section 6 CCRF

Right to Pursue the Gaining of a Livelihood

Upon a cursory examination of the provisions of the CCRF, the mobility rights afforded under section 6³³⁰ may not be the first freedom suggested as protecting the securing of the most fundamental requirements for life through a means of one's own choosing. Indeed understandably section 7 of the CCRF protecting the right to life, liberty and security of the person³³¹ would often be suggested in such circumstances as being the most appropriate provision. The principle being that it is a basic economic liberty to possess the unrestricted ability to choose a form of work, and to be able to work more broadly within reasonable bounds.³³² However, as Hogg states in relation to constraints upon the notion of a right to work, 'Despite some lower court decisions to the contrary,' they, 'should be regarded as restrictions on economic liberty that are outside the scope of s.7.'³³³ The liberty described therein is, though not absolutely, 'mainly addressed to the rights of individuals in the criminal justice system,'³³⁴ as has been discussed.

Section 6(2)(a) of the CCRF however offers an alternative approach to the protection of environmental features upon which the traditional practices of the First Nations peoples of

³³⁰ *ibid.* s.6

³³¹ *ibid.* s.7

³³² Limits to such liberties are permitted under the strict criteria for limitations to rights prescribed by s.1 of the CCRF and the aligned case precedents expanding thereon.

³³³ Hogg, (n214) 903

³³⁴ *ibid.*

the Alberta are reliant. The ‘mobility right’ affords protection to the ability, ‘to move to and take up residence in any province, and to pursue the gaining of a livelihood.’³³⁵ The issue of mobility however is not one with which most First Nations are concerned, indeed owing to their inherent links to particular geographical, ecological and topographical constants by virtue of their culture, the exact opposite is nearer the truth. The so-called ‘mobility rights’ enshrined within Section 6 were incorporated into the text of the CCRF to facilitate movement between provinces, and avoid the restriction of such practice to the benefit or detriment of one province over another. The policy this represents is highly akin to that of the free movements of persons and work within the context of European Union Law.³³⁶ The provision thus reflects a desire to avoid exploitation of the federal structure by the citizen and the state alike through the protection of the rights therein themselves.

The discussion of the utility of this provision will therefore surround the ability it affords to remain, and to take up particular activities to provide for oneself and family. Specifically the impacts of the tar sands extraction projects upon the efficacy of remaining on traditional lands and using established cultural practices to secure a livelihood, or aspects thereof will be the central focus. The reasoning for this focus is the established precedent that, ‘The Charter has never before and still does not protect economic liberty or property rights.’³³⁷ As such the suggestion of a breach must be based upon an impact of the requisite severity to deter establishing in a particular geographic region, or to promote relocation from one, obviously the more relevant impact to the focus of the piece.

³³⁵ CCRF (n174) s.6(2)(a)

³³⁶ Treaty on European Union and the Treaty on the Functioning of the European Union [2012] OJ C 326 /47 Art. 45

³³⁷ *Archibald v. Canada (T.D.)* [1997] 3 F.C. 335

The notion of livelihood encompasses not only a more traditional conception of financial self-sufficiency, but, ‘a means of securing the necessities of life.’³³⁸ Caribou represent such a ‘necessity of life’ for indigenous peoples in the province, especially in the north eastern region of Alberta, home to the Beaver Lake Cree First Nation. In their legal challenge to the granting of numerous extraction licences, they refer to the reduction in, ‘the abundance and diversity of wildlife species,’ ‘the available wildlife habitat,’ and, ‘the access to key hunting....areas’ and add that the developments have the effect of, ‘compromising the ecological, cultural and/or spiritual integrity of the Core Traditional Territory.’³³⁹ The challenge was brought, however, on the basis of the breach of the constitutionally protected aboriginal rights provided under the numbered treaties and no mention of any applicable human rights provisions is made.

The effect to caribou and other wildlife numbers in the province, especially in its north eastern quarter, is one on which such a challenge might be mounted as a result of this relatively liberal application of domestic human rights provisions with respect to individuals rather than structural issues by the various levels of the Canadian judiciary.³⁴⁰ A study into the recent decline in numbers of boreal woodland caribou in the ‘Core Traditional Territory’ of the Beaver Lake Cree First Nation, which covers approximately 39000 square kilometres of the north east of Alberta, where it borders Saskatchewan, has found their population to have been reduced ‘ten-fold from historical numbers,’ and predicts that at the current rate of decline this type of caribou will be locally extinct shortly after 2040, with the species

³³⁸ A definition common across dictionaries, and also that utilised by the Red Cross (UK) and numerous aid agencies as well as academic authors. See for example: Morse, S. and McNamara, N. *Sustainable Livelihood Approach: A Critique of Theory and Practice* (Springer Science and Business Media, Dordrecht, 2013) 8

³³⁹ Beaver Lake Cree *Statement of Claim against the Province of Alberta and the Attorney General of Canada*. 2008 at 7. <<http://www.beaverlakecreeration.ca/upload/documents/statementofclaim.pdf>> Accessed 13th December 2011

³⁴⁰ Galabuzi, G-E. *Equalizing Social and Cultural Rights: Approaches to Equity Across Ethnic and Racial Groups* in Heyman, J and Cassola, A. (eds.) *Making Equal Rights Real: Taking Effective Action to Overcome Global Challenges* (Cambridge University Press, Cambridge, 2012) 173

reaching a level deemed 'non-recoverable' by 2025.³⁴¹ Reasons other than the tar sands developments can be cited as contributory to this decline, such as the growth of agriculture in the province, as this causes significant habitat loss. However, the decline has accelerated beyond levels which could reasonably be attributed to this. As such the habitat loss and increased mortality owing to the tar sands developments in the ranges of the herds of north eastern Alberta are suggested to be largely to blame for this decline towards unsustainable numbers.³⁴²

Despite this clear decline in woodland caribou numbers and similar disturbances to other wildlife in the region, tar sands development projects continue apace, and are approved and permitted by the governmental authorities of Alberta. The lack of recognition for, and continuation in spite of, the damage wrought to the ecosystem so inextricably linked to the indigenous peoples of the province as to threaten their way of life and continued existence is suggested by the piece as being the basis for a human rights law challenge to the government. The numbered treaties contain provisions allowing for use of the land reserved for the indigenous peoples of Alberta by the Crown in certain instances, as is the case the other numbered treaties concerning the provinces forming Canada. Both Treaty 6 and Treaty 8 contain very similar provisions protecting the right to, 'hunting, trapping and fishing, throughout the tract surrendered excepting such tracts as may be required for settlement, mining, lumbering, trading or other purposes.'³⁴³ The SCC has held however that the use of aboriginal land for such purposes, 'must not be irreconcilable with the nature of the

³⁴¹ The Cooperative *Save the Caribou: Stop the Tar Sands*. (2010) < <http://www.co-operative.coop/upload/ToxicFuels/docs/caribou-report.pdf> > Accessed 13th December 2011. pp. 2. Note should be made that this report was funded by the Cooperative, and although conducted by an academic and scientific expert, was sought by them to support an ongoing campaign opposing tar sands extraction projects in the regions outlined therein.

³⁴² *ibid.* 6

³⁴³ Treaties 6 and 8 (n68)

attachment to the land which forms the basis of the particular group's aboriginal title.³⁴⁴ Hogg uses the practice of hunting as an illustration of the practical implications of the ruling in *Guerin v. The Queen*,³⁴⁵ stating that, 'land occupied for hunting purposes could not be converted to strip mining, for example.'³⁴⁶

In the territory of the Beaver Lake Cree, and other nations in Alberta, however, vast swathes of land have been strip mined in order for the tar sands to be extracted before refinement into highly lucrative crude oil. Note should be made that not all land affected by the developments is subject to the reservations for the indigenous populous as their specific dwelling sites are not within a reasonable proximity of those projects, nor can it be shown to be hunting grounds for caribou, potential or actual. Similarly considerable debate surrounds not the results of the scientific studies into caribou herds, but the solutions or policies suggested by them. The response of some tribes has in some instances been to forego their traditional ways in order to secure legally enforceable employment quotas and shares in extraction companies,³⁴⁷ and even to establish their own companies in the industry. Undeniably however, even the less visually apparent use of in-situ mining as a means of extraction where such open pit mining is not viable is severely restrictive on the utility of the land for the purpose of hunting caribou as has been discussed.³⁴⁸ Thus the land surrendered to the Crown under the numbered treaties is protected from any action which would inhibit the purpose for which it was reserved, one of which is the ability to sustain those inhabiting it

³⁴⁴Hogg (n214) 592

³⁴⁵*Guerin v. The Queen* [1984] 2 S.C.R. 335

³⁴⁶Hogg, (n214) 592

³⁴⁷ See in relation to the projects the Syncrude Canada corporation: Anderson, R.B. *Economic Development Among the Aboriginal Peoples of Canada: The Hope for the Future* (Captus Press Inc. Concord, Ontario, 1999) 97-128

³⁴⁸ Industry acceptance of such impacts is arguably evident from considerable investment in projects aimed at reducing such effects, sometimes beyond that required by the criteria placed upon the permitting of their projects.

through such practices, a right also protected under human rights provisions in the domestic law of Canada.³⁴⁹

The weight of physical and thus largely irrefutable evidence in relation to this issue, such as the studies into the impacts on specific and significant wildlife in the province, which bears inextricable links to the indigenous peoples themselves, is however almost unique in the debate surrounding the tar sands. Many elements of evidence presented by the opposing interested parties are often disputed, and mirrored by contradictory claims and evidence as is to be expected, but this is not the case in relation to much of the data concerning the effects upon caribou specifically. Indeed there is even agreement across tar sands support and opposition groups that impacts are felt by the ecosystem as a whole, their degree and the most appropriate response to them is the main bone of contention.

Difficulties in proving the adverse effects to caribou arise however owing to the efforts to prevent such environmental damage by extraction companies. Added to this is the reality that the migratory nature of the species ensures it is problematic to illustrate the extinguishment of the ability to hunt them effectively. As a result the likelihood of a judicial body ruling that said damage outweighs the considerable economic benefit of the tar sands is significantly reduced. In spite of this, the unique consensus on the damage wrought and its highly visible nature makes rebutting concerns over the impacts by citing the economic benefits of the extraction projects more difficult than in relation to less apparent effects. As such to entirely disregard this as forming at least a potential aspect of a human rights based challenge to the tar sands developments would be remiss to say the least.

³⁴⁹ CCRF (n174) and Treaties 6 and 8 (n68).

The right to gain a livelihood³⁵⁰ could also be argued to have been breached by the excessive extraction of water from the watercourses of the province. However, a clear impact of that extraction on fish health and numbers, or a lack of sufficient consideration for the potential for such impacts would have to be shown. In this regard connecting the right to ‘hunt, trap and fish’ afforded under the numbered treaties³⁵¹ to the right to gaining a livelihood in the CCRF would be reliant solely upon establishing the link between river flow levels and fish populations. This is as no physical barriers *per se*³⁵² are imposed upon the First Nations peoples who continue to fish using traditional methods. A number of difficulties arise in relation to establishing this impact, most prominently that even the scientists tasked with ascertaining those impacts are unsure as to the potential adverse effects, if indeed any of note would be felt.³⁵³ Whilst the reduction in the flow rates of water courses to levels incapable of supporting the physical space required for fish migration and spawning might constitute a breach of the aforementioned rights, there is no suggestion that this is likely, and would be avoided using the current monitoring and licensing approach.

The key factor is whether the withdrawals of water, both current and those planned for which licences have already been applied, would reduce river flow rates to such a level to have an adverse impact significant enough to prevent or severely limit the ability of the few First Nations who continue to do so to fish using traditional methods. Numerous studies have attempted to ascertain at what level such impacts would be felt, though few have established any findings capable of supporting an agreed policy.³⁵⁴ The variability in the climate of the boreal forest and opposite seasonal changes from northern to southern Alberta are most often

³⁵⁰ CCRF (n174) s.6

³⁵¹ Treaties 6 and 8 (n68)

³⁵² In itself.

³⁵³ As illustrated by the statement of the provincial government relating to fish stocks impacted upon by water consumption in the tar sands industry. WMSLAR (n278)

³⁵⁴ *ibid.*

highlighted as the reasoning for this. As Andrew Nikiforuk, a journalist, author, and prolific opponent to the tar sands developments, states, ‘To date, nobody can say with any certainty whether the province’s promiscuous permission-granting has left enough water in the Athabasca for the fish.’³⁵⁵

The authorities governing the ‘Water Management Framework’ for the Lower Athabasca River, the portion predominantly affected by the tar sands developments, have openly admitted that, ‘Methods for directly determining the impact of reduced water availability on the aquatic ecosystem are not available for the lower Athabasca River and to our knowledge are rare in the international scientific literature.’³⁵⁶ Nikiforuk goes further than implying mere lack of knowledge however, suggesting that, ‘except for members of the Alberta government and one industry group...most observers now recognise that current water usage on the Athabasca River is recklessly unsustainable.’³⁵⁷ Whilst quantitative evidence cannot at present fully support either side of this crucial debate, it would appear that Nikiforuk’s assertion that most parties are aware that some changes need to be made to ensure tar sands extraction and processing is more sustainable is correct.

Despite these acceptances, extraction continues unabated, indeed within the Alberta government’s own ‘Water for Life’ Action Plan designed to ensure water quality and quantity in the province, the establishment of a new licensing framework is not scheduled until 2015.³⁵⁸ Whilst this reform might avoid the current position whereby industry is to some extent incentivised to withdraw all the water permitted under their license, current levels of usage and projected expansions in the years between now and then may result in irreparable

³⁵⁵ Nikiforuk, A. *Tar Sands: Dirty Oil and the Future of a Continent* (2010, Vancouver, Greystone Books) 65

³⁵⁶ WMSLAR (n278)

³⁵⁷ Nikiforuk, A. *Tar Sands: Dirty Oil and the Future of a Continent* (2010, Vancouver, Greystone Books) 68

³⁵⁸ Government of Alberta, ‘*Water for Life*’ (2009) <<http://environment.gov.ab.ca/info/library/8236.pdf>> at page 15 (Last accessed 2nd April 2012)

damage to the ecosystems supported by the rivers affected before such a reform could be implemented.³⁵⁹

Whilst sections 6(1) and 6(2)(b) are *prima facie* of reduced utility in relation to contaminant seepage than to the other impacts discussed, the provision of section 6(2)(b) regarding the right, ‘to pursue the gaining of a livelihood in any province,’³⁶⁰ is worthy of further consideration. Unlike the aforementioned provisions, section 6(2)(b) might be breached prior to the impact of the leakage of tailings ponds becoming irreversible, or beyond a point at which taking legal action for the purposes of protection of the environment would be futile, and would instead be based upon seeking compensation. This is due to the subject matter of the article, and its potential applicability in relation to non-human factors. As has been clarified above, the damage required to compel the indigenous populace of the regions exploited to vacate or deter them from inhabiting their lands would be considerable, potentially to the point of being irrevocable. This would undermine the aim of the piece to protect, not to compensate for, those environmental features inextricably linked to the cultures of the First Nations peoples.

The level and nature of contamination which would inhibit the ability of the indigenous populace, ‘to pursue the gaining of a livelihood,’³⁶¹ or an element thereof would be lower and take less time to develop than direct harms to human health. This is owing to the process of bioaccumulation through the food chains of the ecosystem. Note should be taken that, as has been discussed, the concept of a livelihood requires the attainment of

³⁵⁹ See in this regard the report of the Pembina Institute outlining the flaws present in the current approach to licensing water withdrawals in the industry: Pembina Institute *Troubled Waters, Troubling Trends: Technology and Policy Options to Reduce Water Use in Oil and Oil Sands Development in Alberta*. May 2006 <http://www.pembina.org/reports/TroubledW_Full.pdf> Accessed 30th July 2014.

³⁶⁰ CCRF (n174) s.6(2)(b)

³⁶¹ *ibid.*

rewards or benefits of a pecuniary or alternatively a non-pecuniary nature.³⁶² In the case of the First Nations inhabiting the boreal forest ecosystems where tar sands extraction is at its most prevalent in Alberta, the hunting of caribou, trapping of smaller mammals, and fishing are all used as a means of both securing sustenance and also as an expression of culture through traditional practices. As such effects felt in species below humans in the food chain of the ecosystem in question might arguably breach the rights afforded to any citizens of Canada opting to exploit those species in the pursuit of a livelihood enshrined within section 6(2)(b).

Any suggestion of a breach of section 6 in its entirety, though especially in the case of section 6(2)(b), would be supported significantly by the status of the boreal woodland caribou, on the list of species highlighted as areas of concern within the Species at Risk Act 1985.³⁶³ The suggestion could be made that the impacts of a limited amount of tailings pond seepage was reasonable under the precedent of the *Oakes*³⁶⁴ case owing to having been sustained in pursuit of economic and political rewards. Such a proposition would however be significantly weakened if not rebutted entirely by the added concern to the continuation of the species affected. Thus impacts to the boreal woodland caribou are amplified both due to their already low numbers and by the reliance on them to facilitate the cultural expression of the First Nations. The inextricable links between species native to the region and the culture of the aboriginal populace of the same territory, undeniably strengthen the argument that the seepage of tailings ponds threatens those links as a result of the reality that one of the key species in question is itself already a scarce resource. From the perspective of the utility of

³⁶² The notion of a 'standard of living' within the section 6 right as opposed to particular features thereof supports this assertion as does precedent, particularly in the field of divorce law. See the consideration of components classified as an aspect of a 'standard of living in: *Droit de la famille* - 111526, 2011 QCCS 2662

³⁶³ Species At Risk Act 1985 S.C. 2002 c.29

³⁶⁴ *Oakes* (n207).

section 6(2)(b)³⁶⁵ it is the combination of both the nature of the potential damage of the seepage from tailings ponds and the ‘at risk’ status of the species which add considerable influence.

The potential for the impact to eradicate, not just force the relocation of the indigenous fauna on which their culture is predicated, eliminates the capacity of the governmental authorities to negate the impact by facilitating relocation of tribes or providing reserves elsewhere. Was this not the case, relocation would preserve the status quo and add to the contention of reasonableness of the projects given the substantial economic rewards conceivably on offer. Add to this the precarious position of a highly significant species amongst those potentially affected also reducing the likelihood of any impact thereto being deemed reasonable, and the contention of the continued licensing of projects being a justifiable balance of all outcomes and effects begins to appear a very weak one indeed. The utility of this article for the purposes of establishing a basis for a case against the licensing of tar sands extraction projects owing to the impacts to water quantity and direct land consumption by means of disturbance is, though comparatively far less than in relation to the contamination caused by seepage from tailings ponds, is certainly not negligible.

The finality of the potential effects of contaminants to the flora and fauna of north east Alberta, where extraction, and as a result tailings ponds are at their most prevalent, coupled with the lack of predictability of those impacts under present measurement regimes, suggests that they would potentially be deemed to have breached the ability of First Nations to, ‘pursue the gaining of a livelihood.’³⁶⁶ The only caveat to this being that the lack of scientific monitoring of the impact of tailings leakage and the extent thereof is the epitome of

³⁶⁵ CCRF (n174) s.6(2)(b)

³⁶⁶ *ibid.* s. 6(2)(b)

a proverbial double edged sword. This is as the inherent risk of ignoring the potential impacts, is easily parried by the contention that also they cannot be easily proven. Thus whilst the impact of the tailings leakage is potentially the most damaging of the impacts assessed to the ability of the First Nations to express their cultural heritage through hunting and fishing using traditional techniques, it is ironically also one of the hardest to prove.

3.42 Section 15 CCRF

Equality of Consideration of Impacts in the Licensing Process

The majority of the breaches proposed by the piece concern a failure in the licensing process to implement measures to avoid adverse impacts, or a lack of consideration of the risks of extraction. However failing to consider correctly impacts acknowledged as occurring which have particularly acute and onerous effects upon a particular subset of the populace might give rise to a breach of the rights of those peoples to special consideration. The impacts of the tar sands projects are highly visible and in some way impact upon a considerable proportion of the population of Alberta, whether positively or negatively. This reality inhibits some arguments made in the piece, as said impacts must be weighed and balanced by governing authorities. The level of harm specifically to the indigenous populace of Alberta specifically as a result of adverse impacts from tar sands extraction remains however of considerable utility.

The potential impacts of tailings pond leakage, excessive water consumption and land usage would affect all peoples of the regions exploited in the pursuit of oil reserves. However, it could be said that greater effects are felt by the First Nations peoples as a result of these impacts. The leakage of contaminants from tailings ponds would also have impacts felt solely,

and most pointedly, by the indigenous First Nations population of the north east of Alberta, which may go otherwise unfelt by those not following and practising the cultural traditions of those peoples. This distinction in the manner in which the impacts are felt, rather than their severity specifically is key to the contention that an instance of discrimination arises upon an assessment of the licensing process used for tar sands projects.

In relation to section 12 the severity of said impacts supported the contention that they would constitute ‘cruel and unusual treatment.’³⁶⁷ However, in this instance, the suggestion is that the increased and specific impacts to the indigenous populace are worthy of particular consideration within the licensing process, in order to take account of their peculiarly acute nature. As such it is the failure to consider potential heightened impacts to these peoples above and beyond those felt by the general populace of affected regions that is key. At present where impacts are ascertainable, such as those of deforestation, they are taken into account.³⁶⁸ However potential impacts, such as those from seepage of tailings fluid which are not yet fully ascertainable, where taken into account are not assessed for their heightened effect upon the proximal indigenous populace.³⁶⁹ Similarly requirements for the monitoring potential impacts are not necessitated by current legislation. Federal and provincial governments are bound to take such impacts peculiar to the indigenous peoples

³⁶⁷ CCRF (n174) s.12

³⁶⁸ See the guidelines for completing the required Environmental Field Report component of an application for a license to extract oil sands in Alberta: <http://esrd.alberta.ca/forms-maps-services/forms/lands-forms/guides-forms-completion/documents/EnvironmentalFieldReports-Instructions-SurfaceDispositions-May2008.pdf> Accessed 30th July 2014.

³⁶⁹ Even in the case of the specific First Nations Oil and Gas Moneys Management Act SC 2005 c48 and annexed First Nations Oil and Gas Environmental Assessment Regulations, SOR/2007-272 under which First Nations can manage industrial projects physically occupying their own reserve lands, traditional and community knowledge does not have to be taken into account in environmental impact assessments. Under existing measures, those applying for a licence to extract need only consult with First Nations regarding environmental impacts, as required by the Environmental Field Report aspect of their project approval. See the guidelines for completion of such a report: <http://esrd.alberta.ca/forms-maps-services/forms/lands-forms/guides-forms-completion/documents/EnvironmentalFieldReports-Instructions-SurfaceDispositions-May2008.pdf> Accessed 30th July 2014.

and their lands into account.³⁷⁰ As such, this failure to consider is suggested as giving rise to an instance of discrimination and breach of section 15 of the CCRF³⁷¹ and provincial legislation prohibiting discrimination in the conduct of public administration, including licensing procedures.

The reason for this is the idiosyncratic connection these peoples have with the particular environment which they inhabit, and specifically their sourcing of foodstuffs primarily, if not solely, from the ecosystem on which their culture is based. All peoples of Alberta might eat fish taken from the rivers and other water courses of the regions impacted and, as has been eluded to, indigenous populations relying on this source alone are few in number. The difference between the cultural backgrounds is found in the consumption of larger fauna, in this instance the boreal woodland caribou.³⁷² By eating the fauna of the region, in which over time the contaminants seeping into natural watercourses would build up, the First Nations hunting boreal woodland caribou as a source of sustenance would become exposed to said contaminants themselves via a process of bioaccumulation.³⁷³ Similarly the exhaustion of natural water courses, whilst not preventing access to water should pipelines be installed, removes the ability of First Nations to fish, and would likely deter native wildlife from surrounding areas. As such the impacts to them would be considerably greater in this regard than to other sections of communities of the regions where existing tars sands

³⁷⁰ Under their duty to consult and accommodate aboriginal peoples in decision making processes espoused in *R v Van der Peet* [1996] 2 S.C.R. 507 and reiterated in the case of *Haida Nation v BC* [2004] 3 S.C.R. 511, [2004] S.C.C. 73

³⁷¹ CCRF (n174) s.15

³⁷² The First Nations regularly hunt and trap other animals than the boreal woodland caribou as has been outlined. However, the volume of meat taken from a caribou, its distribution amongst communities, as well as the focus of scientific research into the impact of the tar sands on fauna being upon this species make it the most relevant animal to discuss in the context of the piece.

³⁷³ Defined by Alberta Environment as, 'A widespread term that describes a process by which chemical compounds are taken up by terrestrial and aquatic organisms from the medium directly and through the consumption of contaminated food' in their 'Glossary of Reclamation and Remediation Terms Used in Alberta: Alberta Environment. *Glossary of Reclamation and Remediation Terms Used in Alberta* 7th edition May 2002 <<http://environment.gov.ab.ca/info/library/6843.pdf>>. Accessed 30th July 2014.

operations are active and new projects continue to be licensed. The particular nature and degree of these impacts or the possibility thereof, if not taken into consideration when licensing projects despite impacts of more universal influence being so, could also be argued to constitute discrimination against the First Nations peoples.

Until relatively recently such a suggestion would have faced a number of obstacles which have only recently been removed by a progression towards the granting of absolute equality with regards to legal rights to the aboriginal peoples of Canada.³⁷⁴ First Nations, and especially those whose bands had signed the numbered treaties³⁷⁵ had been restricted with regards to their ability to suggest they had been discriminated against under the Canadian Human Rights Act.³⁷⁶ Specifically this was in relation to the provision of services by governmental authorities where they were born out of powers under the Indian Act 1985³⁷⁷. The Indian Act governs the legal rights of Indians in relation to a wide range of issues, including the recognition and definition of the term Indian itself. Thus the ability to claim its provisions for those to whom it applied or was being so incorrectly due to ‘discriminatory practices’³⁷⁸ was of paramount significance. This exemption was due to the wording of section 67 of the Canadian Human Rights Act³⁷⁹ which stipulated that, ‘Nothing in this Act affects any provision of the Indian Act or any provision made under or pursuant to that Act.’³⁸⁰

³⁷⁴ Assembly of First Nations. *Canadian Human Rights Act Applies to First Nations Governments* May 2011 <<http://www.afn.ca/index.php/en/news-media/current-issues/canadian-human-rights-act-applies-to-first-nation-governments-on-june->> Accessed 30th July 2014.

³⁷⁵ Treaties 6 and 8 (n68)

³⁷⁶ CHR Act (n243)

³⁷⁷ Indian Act R.S.C. 1985, c.1-5

³⁷⁸ Defined in detail in section 5 of the CHR Act (n243)

³⁷⁹ CHR Act (n243) s. 67

³⁸⁰ *ibid.*

Only in 2008 were First Nations peoples resident on reserve lands afforded under the numbered treaties able to have standing on the basis of discrimination against the federal and respective provincial governments in relation to any actions based on the powers afforded to them under the Indian Act.³⁸¹ This was in spite of their being subject to the legislation and administration they laid down as Canadian citizens owing to the provisions of the same Act. Not until 2011 however, were such peoples able to bring cases accusing discrimination against First Nations as government bodies were granted period of exemption to apply necessary reforms.³⁸² In relation to any case against decisions regarding tar sands licensing and regulations relating to the construction and management of tailings ponds such a case would be brought against the federal government. Thus such a case has only recently been possible should it be contested that the services provided by the provincial government in this regard were afforded in a discriminatory manner. Prior to this, however such an action was possible under the Canadian Charter of Rights and Freedoms.³⁸³ This divide in the potential avenues for the construction of a case in relation to discriminatory practice is due to the Canadian Human Rights Act³⁸⁴ being focused primarily on the protection of individuals in relation to employment and public services. The consideration here must be made as to whether the licensing of tar sands projects, regulation of the tailings ponds, and monitoring thereof, constitute services.

Similar issues must also be considered in relation to section 15 of the CCRF,³⁸⁵ which on a restrictive *prima facie* reading only protects discrimination, ‘before and under the law,’³⁸⁶ though more expansive approaches established in case precedents³⁸⁷ would suggest a

³⁸¹ Indian Act R.S.C. 1985, c.1-5

³⁸² Assembly of First Nations. (n349)

³⁸³ CCRF (n174)

³⁸⁴ CHR Act (n243)

³⁸⁵ CCRF (n174) s. 15

³⁸⁶ *ibid.* s. 15(1)

far broader protection than this might suggest is afforded. As a result of the potential utility of both instruments in the pursuance of a viable basis for a case against the permitting of the tar sands extraction projects based in human rights law, they will both be considered in the piece in relation to the use of powers exclusively possessed by the federal government. Where the services in question are attributable to powers exclusively possessed by the provincial legislatures of Canada, in this case Alberta, the piece shall consider the provisions of the Alberta Human Rights Act 2000,³⁸⁸ though these are for the purposes of the piece almost indistinguishable to those of the federal legislation governing the same issues.³⁸⁹

The federal³⁹⁰ and provincial³⁹¹ human rights instruments concerning the provision of, ‘services...that are customarily available to the public,’³⁹² are highly restricted in their use in relation to the construction of a case against the licensing of tar sands projects. Such an action must be brought against a federally regulated organisation or against a measure authorised by federal statute. Protection from the adverse impacts of tailings pond seepage into the natural water courses and bodies of the north east of Alberta, and maintenance of water levels might well be described as such a service. Other impacts such as excessive water consumption, or land usage are not afforded to the First Nations directly, the impacts to them are merely corollary³⁹³ to a service, licensing, to which they are not a party.³⁹⁴

³⁸⁷ *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497 and *R. v. Kapp* [2008] 2 S.C.R. 483

³⁸⁸ AHR Act (n242)

³⁸⁹ CHR Act (n243)

³⁹⁰ *ibid.*

³⁹¹ AHR Act (n242)

³⁹² *ibid.* s. 4(a) and found in a mirror provision in the CHR Act (n243) s.5(a).

³⁹³ The assumption here being that a supply of water other than that existing in the natural sources is afforded by way of replacement to rebut claims made on this basis.

³⁹⁴ Whilst First Nations are entitled to some forms of consultation in relation to the licensing process, any contention of lack of access to a role in the process would be far more appropriately based on a breach of access to justice and fair trial, rather than a suggestion of discrimination. Unless however it could be shown that the First Nations alone were restricted from such roles.

For the purposes of the Acts, said service must be unavailable or inaccessible to one of the four groups outlined in the text of the Employment Equity Act,³⁹⁵ of which the First Nations are included as an example of the broader grouping of aboriginal people. At present the imposition of monitoring upon companies engaged in the extraction of tar sands raw material and the refinement thereof, is the only service as such provided by the governmental authorities in this context. The prohibition on the establishment of barriers to services afforded under the Acts³⁹⁶ could be suggested therefore to afford some protection to the indigenous peoples of the regions affected should monitoring be deemed inadequate in addressing the potential impacts felt by them specifically.

For example by contaminating the lands utilised by the indigenous peoples of the region and thus the wildlife thereon there is arguably a direct inhibition of their ability to, 'pursue the gaining of a livelihood,'³⁹⁷ in the culturally expressive manner which they have practiced for centuries. This is as hunting boreal woodland caribou, trapping smaller native mammals and fishing in the natural water courses of their traditional lands would be significantly more difficult as a result of such impacts. Such services therefore, if applied without due consideration for the increased impact to First Nations peoples could be suggested as having been done so in a discriminatory nature. This suggestion is however tenuous at best, and far from the best basis on which to construct a case against the licensing process.

³⁹⁵ The four listed groupings in the Employment Equity Act S.C. 1995, c.44 are; women, aboriginal peoples, persons with disabilities and members of visible minorities, though precedents concerning the CHR Act (n243) and AHR Act (n242) are not strictly limited to these groups.

³⁹⁶ CHR Act (n243) and AHR Act (n242)

³⁹⁷ CCRF (n174) s. 6 (2) (b)

The restrictions as to the utility of the Acts,³⁹⁸ arising from their definition of services, is however not the most limiting aspect of the contention of discrimination as a result of a lack of recognition of the acute impacts of tar sands extraction upon the First Nations of Alberta. Although not an aspect of the legal argument put forward by the piece as such, the distribution of powers between the federal and provincial Parliaments, and thus administrative authorities, may present a significant obstacle to the contention at hand. Note should be made at this stage that whilst Canada operates an ‘asymmetrical federal structure,’³⁹⁹ thus not all divisions of the federal power have identical powers and rights, there being both ‘territories’ and ‘provinces.’

As Alberta is itself a province, it is purely this category, and the powers vested therein with which the piece shall be concerned. The federal structure of the Canadian legal and political system, as highlighted in the introduction to the piece, operates in an inverted manner to that of its geographical neighbour, the United States of America, Australia and indeed the bulk of federal States in existence. To simplify, under this approach all matters on which legislation (and administrative decisions resulting therefrom) can be made are deemed to belong to the federal government unless outlined within sections 91, 92 A(3), and 92A (6) of the Constitution Act 1867.⁴⁰⁰ This approach has been curtailed somewhat, and where powers are not explicitly assigned, the competency of the Canadian Parliament on a matter must be shown to belong to a gap in the drafting,⁴⁰¹ be necessitated by an emergency,⁴⁰² or have a national dimension.⁴⁰³

³⁹⁸ CHR Act (n243) and AHR Act (n242)

³⁹⁹ Tarlton, C. D. ‘Symmetry and Asymmetry as Elements of Federalism: A Theoretical Speculation’ (1965) 27 (4) The Journal of Politics 861

⁴⁰⁰ The Constitution Act, 1867 (UK), 30 & 31 Victoria, c. 3

⁴⁰¹ Known as the ‘gap branch’ and arising from the general provision of the Constitution Act 1867 (UK) 30 & 31 Victoria c.3 s.92 granting the Canadian Parliament powers to create legislation for the ‘peace, order and good government’ of Canada, which has been held to include the filling of any gaps in the distribution of powers between federal and provincial legislatures, as supported by the precedent in *Re. Regulation and Control of Radio Communication in Canada* [1932] A.C. 304

In relation to the case at hand, this gives rise to a potential issue regarding the respondent to any case constructed. Due to the distinction between matters on which the federal and provincial legislatures are able to legislate, and thus create binding administrative structures within their jurisdictions, certain issues in relation to the curbing of tailings pond leakage are governed in practice by separate authorities and different levels within the federal structure. For example, matters concerning Indians and Indian reserves, inland fisheries, quarantine (if required), and works connecting provinces or to the advantage of Canada or more than one province, all of which are arguably relevant to the seepage of contaminants from stored tailings and maintenance of water levels and quality, are recognised as being within the purview of the Parliament of Canada.⁴⁰⁴ By contrast, the Legislative Assembly of Alberta possesses exclusive powers in relation to the management and sale of public lands belonging to the province, should the ponds not be on reserved land under the numbered treaties, but have impacts upon such territory.⁴⁰⁵ Following the Constitution Act 1930,⁴⁰⁶ the province also controls issues concerning natural resources contained upon or within said lands, a provision now enshrined within the consolidated constitution also.⁴⁰⁷

⁴⁰² The test for the 'emergency' branch was first suggested in the *Board of Commerce* [1922] 1 A.C. 191 case though the term of an 'emergency' was not used explicitly, and now is seen largely as a temporary measure borne out of necessity to alter the relationship between federal and provincial legislatures for a limited period as established in *Re. Anti-Inflation Act* [1976] 2 S.C.R. 373 by Justice Beetz.

⁴⁰³ The 'national concern doctrine' can be traced back as far as the case of *Russell v. The Queen* (1882) 7 App. Cas. 829, though the name arose as a result of the *Canada Temperance Federation* [1946] A.C. 193 case and was most recently, of note, applied in *R. v. Crown Zellerbach* [1988] 1 S.C.R. 401 in which marine pollution was deemed as being of a nature giving rise to 'national concern.'

⁴⁰⁴ Parliament of Canada *Our Country, Our Parliament*

<http://www.parl.gc.ca/About/Parliament/Education/OurCountryOurParliament/html_booklet/division-powers-e.html> Accessed 30th July 2014

⁴⁰⁵ Note should be made that under the First Nations Oil and Gas Moneys Management Act SC 2005 c48 groups living on reserves can opt to manage projects on reserve lands themselves, subsuming the role of the provincial authorities in this regard.

⁴⁰⁶ British North America Act 1930 20-21 Geo. V, c.26 (U.K.)

⁴⁰⁷ The Constitution Act, 1867 (UK), 30 & 31 Victoria, c. 3 at s.92(A)

As a result, dependent upon the actual impact in question any case suggested by the piece on the basis of discrimination as a result of lack of consideration of the effects pertinent to the First Nations specifically, arising from the provisions of the Canadian and Alberta Human Rights Acts,⁴⁰⁸ or the Charter,⁴⁰⁹ might be divided into two, or more, separate actions against the relevant federal and provincial authorities. Given the existing potential breadth for the adverse impacts of the leakage of tailings material containing harmful substances and excessive water consumption, the bifurcation of any case suggesting discrimination through non-consideration, an interpretative leap in itself, would undoubtedly limit its strength. Added to this would be the need for the cases to be further divided dependent upon whether or not the land initially affected was reserve in status,⁴¹⁰ as these lands are within federal jurisdiction. Also from a pragmatic standpoint, the likelihood of First Nations bands generating the level of funding required for such a series of cases is minimal.⁴¹¹ As such the utility of this already speculative basis is reduced almost to the point of absolute inefficacy, and whilst discrimination of the form suggested might be occurring, proving said practice would, in the face of considerable legal, practical and financial obstacles, be nigh on impossible.

The suggestion of discrimination under the Charter provision would arguably have the greatest chance of success given its universal application to federal and provincial authorities alike, negating the need for divided litigation efforts. However, even this narrow basis would be subject to a balancing on the part of the judiciary against the considerable benefits of the

⁴⁰⁸ CHR Act (n243) and AHR Act (n242)

⁴⁰⁹ CCRF (n174) s. 15

⁴¹⁰ Whilst there is the potential for an issue of internal administrative trans-boundary harm of an environmental nature, this is not the concern of the piece and will not be considered.

⁴¹¹ This is evident from the requests for donations to fund the aforementioned action of the Beaver Lake Cree, who are incapable of financially backing the process themselves. See: Respecting Aboriginal Values and Environmental Needs Trust (RAVEN Trust) *How You Can Help* 2014

<<http://www.raventrust.com/beaverlakecree/howcanyouhelp.html>> Accessed 30th July 2014.

extraction projects to Alberta and Canada as a whole. Given the ever growing concerns internationally in relation to energy security, the contention that the exploitation of the tar sands would ensure this for Canada for generations to come would be a persuasive one. This is especially true in the face of a *prima facie* less convincing argument that the failure to consider the heightened impacts to the indigenous populace was tantamount to discrimination. As such were consideration deemed to not have taken place, successfully opposing the view that energy security outweighed effects to the First Nations would likely also have to be successfully achieved before partial cessation of projects or an increased effort to assess and mitigate damage was ordered by the courts.

Similarly, consultation processes have been undertaken by the provincial authorities, and within the most recent Lower Athabasca Regional Plan the Alberta Government has committed itself to the, ‘engagement of Alberta’s aboriginal communities.’⁴¹² As a result it has facilitated the setting up of stewardship schemes such as the Richardson Initiative.⁴¹³ The aim being to afford the aboriginal peoples, ‘their constitutionally protected rights’⁴¹⁴ and ensure that, ‘input from such consultations continues to be considered prior to the decision.’⁴¹⁵ Thus to say that the provincial and federal governments had failed in their, ‘duty to consult and accommodate,’ as first intimated in the case of *Van Der Peet*,⁴¹⁶ would be remiss and certainly be unlikely to be upheld by a court until sufficient time had passed to suggest evidence such initiatives were merely facades. The courts have stipulated that such consultation and accommodation is required, ‘and indeed is an essential corollary to the

⁴¹² LARP (n109) 34

⁴¹³ Such schemes are essentially power sharing arrangements with regards to land and/or resource management between the aboriginal peoples and the relevant government agencies. There is considerable variation between such arrangements dependent upon a number of factors, and concerns remain as to the efficacy and equity of such arrangements.

⁴¹⁴ LARP (n109) 34

⁴¹⁵ *ibid.*

⁴¹⁶ *R v Van der Peet* [1996] 2 S.C.R. 507 and furthered in the case of *Haida Nation v BC* [2004] 3 S.C.R. 511, [2004] S.C.C. 73

honourable process of reconciliation.’⁴¹⁷ The presence of programs such as the Richardson Initiative however, and the inclusion of such processes in the plan for the development of the region would, at present, would meet any measures which might be reasonably be expected of such authorities at this time by the courts. This assertion is supported by the decision in *Athabasca Chipewyan First Nation v. Alberta (Minister of Energy)*, in which it was held that, ‘the degree to which conduct contemplated by the Crown would adversely affect the treaty rights so as to trigger the duty to consult,’⁴¹⁸ should be considered. As such only where severe impacts of tar sands extraction were proven would an absolute duty to consult arise. Thus suggesting a failure to consider the acute impacts to First Nations potentially arising from tar sands projects amounting to an instance of discrimination, would be difficult, if not remiss.

The scientific uncertainty with regard to the extent or specific nature of any impacts with regards to tailings contaminant seepage would further decrease the utility of provisions relating to discrimination. This is as the stewardship initiatives outlined above would meet any duties with regards to consultation, and accommodation of peculiar impacts to the First Nations would arguably not be required to be fulfilled owing to this same lack of knowledge. Until the gaps in that understanding were filled, not only would it be unreasonable to expect action to further mitigate damage and account for heightened impacts to particular societal minorities, but that action might also add to the impacts in itself. As such the contention of discrimination of the First Nations peoples of the north east of Alberta, where tar sands extraction and refinement projects are at their most intense is of little utility as a basis for a case against the licensing of the projects by the relevant provincial and federal authorities.

⁴¹⁷ *Haida Nation v BC* [2004] 3 S.C.R. 511, [2004] S.C.C. 73 at para. 38

⁴¹⁸ *Athabasca Chipewyan First Nation v. Alberta (Minister of Energy)* [2009] ABQB 576 at 70

The duty to accommodate the specific needs of the aboriginal peoples and consider the heightened nature of impacts to them imposed upon said authorities, which has a firm precedent in Canadian case law,⁴¹⁹ must be founded on evidence of specific needs and adverse effects resulting from the lack thereof. Without incontrovertible evidence as to the nature and extent of the impacts to the flora and fauna of the region, or human health, such a case would be significantly weakened. Also in the face of established consultation procedures, or plans to establish them, the suggestion of discrimination by virtue of non-consideration in the authorising of tar sands projects would be even more difficult to prove and have upheld.

Thus whilst the nature of the potential impact of the leakage of contaminants into the ecosystem of Alberta is significant, and *prima facie* one of the strongest bases for a case such as that outlined as the aim of the piece, it is clouded by a vicissitude of uncertainties. The exact impacts of such seepage from the tailing ponds and the extent thereof are at present unknown, and not likely to be fully ascertainable in the short term. Thus legal action may regrettably only be taken with confidence once the only remaining aim is seeking compensation from the authorities and industries concerned with the projects, and their cessation is no longer viable.

Whilst some effects have been measured, the science behind them has been contested as inaccurate or too narrow in scope to form the basis of a contention that projects ought to cease entirely or consideration of such impacts taken in their licensing to a greater degree than they already are.⁴²⁰ Similarly the spread of such impacts to the human populace of the region, through bioaccumulation is equally as speculative an assertion. Harm to aquatic

⁴¹⁹ See *R v Van der Peet* [1996] 2 S.C.R. 507, *Haida Nation v BC* [2004] 3 S.C.R. 511, [2004] S.C.C. 73 and the general principle of protection of aboriginal peoples from discriminatory, unconsidered or malign use of provincial legislative power established in the case of *R v. Sparrow* [1990] 1 S.C.R. 1075.

⁴²⁰ WMSLAR (n278)

species in the event of seepage is undeniable; it is the direct attribution of this to tailings contaminants on a level satisfactory to dissuade the scrutiny of the scientific community which is at issue. Even the highly critical report of the Royal Society of Canada⁴²¹ indicates that;

‘Only a few published studies present seepage measurements and track groundwater contamination from tailings ponds. These studies indicate seepage rates highly depend on local geological materials, including those underlying dykes, and transport of NA [naphthenic acid] in groundwater is poorly characterized.’⁴²²

Therefore the validity of utilising the impacts of the seepage from tailings ponds is undermined as a basis for a case suggesting a breach of the prohibition of discrimination under the CCRF for failing to consider them in administrative processes. The inability to attribute damage through the use of evidence to such leaks for the foreseeable future, certainly to a level sufficient to breach the burden of proof required to enforce action on the part of companies to avoid such occurrences in the licensing process is apparent. An action to cease or restrict existing projects, and those planned for the future would therefore not benefit from this assertion, until the impacts outlined had already been felt and were likely beyond repair or control. As such as a basis for a case for the indigenous populace the suggested breach of provisions relating to discrimination is of negligible utility.

Equally as heated scientific and political debate surrounds the reclamation of land used to store the tailings material. The same report suggests that, ‘The unresolved challenge of demonstrating long-term reclamation success of wetland landscapes poses a concern for

⁴²¹ EPR (n119)

⁴²² *ibid.* 285

groundwater regimes.⁴²³ The initial impacts of the failure of reclamation are akin to those of land usage outlined earlier in the piece. However, it is where limited or slow progress is made in relation to the reclamation of tailings ponds that the potentially most harmful impacts to the indigenous peoples in proximity might occur. The growth of non-native flora and ecosystems where there had previously been established boreal forest of significant age and development is the focus of concern. This is owing to the widespread impact to all species previously resident within that ecosystem as it will necessitate either relocation or significant adaptation on their part. Where habitat or species numbers are already deemed as being at alarming levels this is a potentially devastating outcome of supposedly successful reclamation.

Impacts are also foreseen as being severe where industries are unable to reclaim land at a sufficient rate to counteract that at which it is being utilised to extract or refine the tar sands raw material. Such slow rates of reclamation to previous capacity have resulted in the implanting of ecosystems which are more quickly established as described above, facilitating positive media campaigns showing prosperous flora and fauna for the extraction firms, but undermining native species.⁴²⁴ The reclamation of exploited land to a standard fit to inhabit, rather than to the ecosystem previously in-situ is of little consequence to most Canadians or Albertans. The alteration however has a particularly acute and devastating impact to the indigenous populace who have inextricable historical and cultural links to the naturally occurring ecosystem as a result of which they rely upon it to some degree for a portion of the necessities of life.

⁴²³ *ibid.* 285

⁴²⁴ See for example the reclamation of Wapisiw Lookout and the surrounding area: Suncor Energy *Wapisiw Lookout Reclamation* 2010 < www.suncor.com/wapisiw > Accessed July 30th 2014.

Whilst the handful of successful reclamation projects highly lauded by the federal and provincial authorities and industry alike have achieved the reinstatement of a natural ecosystem, it is not that which was once present, boreal woodland.⁴²⁵ First Nations peoples of the regions affected are culturally and historically inextricably linked to that ecosystem which has not been successfully reclaimed, and indeed given the time needed for established boreal woodland to regrow, will not be so in time to avoid irreversible impacts to them specifically. The immediate impacts to aquatic and land dwelling species alike, both in terms of contamination and relocation as a result of the creation and accumulation of tailings ponds, are by far the most grave as they threaten the continued existence of indigenous cultures in their present form, and as a result the heritage of Canada itself.

The reclamation of the land used for the storing and drying of tailings to a standard capable of supporting wood bison was achieved in the case of a project undertaken by Syncrude, one of the largest extractors of tar sands, in conjunction with the Fort McKay First Nation.⁴²⁶ Wood bison⁴²⁷ were however not native to this region prior to its exploitation to attain bitumen for refinement, though are a native species of Alberta. As such the heritage of First Nations tribes in that region was not founded upon bison hunting, but upon boreal woodland caribou, which actively avoid the type of ecosystem ‘reclaimed’ from the tailings pond in this instance. This policy of allowing extractors to return reclaimed land to an ‘equivalent capacity’ rather than to a state as close to that once present as is possible is arguably indicative of the lack of consideration for the indigenous populace in the licensing process, which it is suggested constitutes discrimination.

⁴²⁵ *ibid.*

⁴²⁶ This project was reported upon in highly differing manners by various bodies, in the interest of balance, following are examples of a positive and negative report: Alberta Oil Magazine. *Syncrude Canada pioneers unique land reclamation in oil sands*. 1st October 2009 <<http://www.albertaoilmagazine.com/2009/10/back-to-life/>> Accessed July 30th 2014. Parkland Institute. *Reclamation Illusions in Oil Sands Country*. 2009 <http://parklandinstitute.ca/post/story/reclamation_illusions_in_oil_sands_country/> Accessed July 30th 2014.

⁴²⁷ Latin name: *bison bison athabascae*

By way of explanation, the state of 'equivalent capacity' is of ambivalent effect to the majority of the Albertan population, few would visit or utilise areas including a reclaimed pond. By contrast the indigenous populace are both more likely to interact with the residual ecosystem and are reliant upon it either being in that form, or not detracting from the capability of the surrounding area to support their culturally significant lifestyle. One aspect of which is the proposals of extractors for land reclamation following the completion of the project for which a licence is sought. The failure to consider this peculiar connection in the licensing of projects is by extension a failure to consider the realities of the indigenous populace in a manner equal to that of the other inhabitants of the regions impacted upon. Were such impacts felt by the population of the oil sands fields as a whole, greater consideration would undoubtedly be paid by the administrative process to said effects. As such, the difference in consideration of repercussions of the licensing of projects, and the disposal of their by-products, represents it is suggested discrimination against the indigenous populace in the procedure affording such permissions.

Thus the lack of consideration for the inextricable relationship of the First Nations inhabitants of exploited lands and the naturally occurring boreal forest ecosystem within both regulatory and licensing procedure for extraction projects and in the imposition of reclamation requirements, would be the basis of a contention of a breach of established human rights to non-discrimination in domestic Canadian law. The failure to, as a minimum, consider the restriction of the ability of those peoples to perform culturally significant practices already enshrined in the constitutional law of Canada under the numbered treaties,⁴²⁸ would it is suggested constitute such a breach. The heightened impact to the

⁴²⁸ Treaties 6 and 8 (n68)

indigenous populace of potential impacts of tailings seepage, and failings of the current legislative framework in relation to reclamation, preserving the established ecosystem on which they rely so heavily is at the core of this contention. Thus it is suggested that domestic human rights afford a heightened level of protection to these environmental features, namely those comprising boreal forest, on their behalf where said features are inextricable from the continuation of indigenous cultural practices. This contention is at its most relevant in relation to the unforeseeable and progressive effects of poor tailings management and containment owing to existing knowledge of the significance of those features and concerns regarding them, but a lack of specific consideration of them in measures addressing tailings and reclamation in the licensing processes.⁴²⁹

3.5 Concluding Remarks

The consideration of the human rights provisions of the domestic Canadian system has highlighted immediate evidential distinction between rights termed by the piece as pertaining to harms against the person, and those relating to the suppression of abilities. Breaching provisions pertaining to harms against the person have been highlighted as necessitating a degree of evidence not immediately available to the indigenous populace of Alberta, or indeed the scientific community inextricably involved in the heated debate over the safety of tar sands extraction. By contrast provisions relating to the suppression of abilities need only establish an inhibition of ability to perform activities necessary to the maintaining of a livelihood in a traditional manner. This void in evidentiary burdens

⁴²⁹ This contention is supported by the acknowledgement of the need to consult First Nations peoples who might be impacted by tar sands extraction projects within the environmental report which must be submitted by prospective extractors in order to attain permission to begin an operation. See the guidelines for completing the required Environmental Field Report component of an application for a license to extract oil sands in Alberta: <http://esrd.alberta.ca/forms-maps-services/forms/lands-forms/guides-forms-completion/documents/EnvironmentalFieldReports-Instructions-SurfaceDispositions-May2008.pdf> Accessed 30th July 2014.

immediately places such rights as the preferential approach to an action such as that suggested as possible by the piece. This is owing to the current unavailability of incontrovertible evidence of severe harms to human health arising from tar sands extraction and refinement.

Provisions relating to the suppression of abilities in the domestic context are found in two broad rights, that to the securing of a livelihood and that of equality of consideration in administrative and legislative procedures. Equality of consideration in proceedings as discussed affords only *ex post facto*⁴³⁰ protection, and would not guarantee a role influential enough to achieve the aims of the piece within said proceedings. As such the protection afforded to the securing of a livelihood, interpreted as including the choice to do so by traditional means, emerges as the most appropriate provision to securing the cession or restriction of tar sands extraction projects in the domestic legal context.

⁴³⁰ After the fact.

Chapter 4

Regional Human Rights Mechanisms and the Tar Sands

4.1 Introduction

Beyond the obligations imposed upon the federal and provincial governments by domestic human rights provisions, the regional legal spheres of both the Americas and Europe afford, as a minimum, interpretative insight into their application. The Inter-American system also offers an alternate forum for a litigious action of the type suggested by the piece, though non-binding in nature. As such the provisions contained within the human rights instruments concerning these geographical areas will be analysed for their utility in relation to the restriction or cession of tar sands extraction operations in Alberta. This will be assessed both in terms of the interpretative additions afforded to the domestic rights discussed above, and also in their potential application directly within in the Inter-American system where relevant.

A note is required at this point to justify the separation of the discussion of international and regional legal instruments. The reasoning for this approach is twofold. Firstly, the strained relations between the Canadian state and the regional mechanism to which it, geographically at least, belongs. The Inter-American human rights mechanisms offer similarly drafted, though not identical, rights to those found at the international level. Aside from the interpretative nuances even these minor variations offer the piece, they also present the reasoning for the failure of Canada to ratify any binding instrument in that jurisdiction which will be discussed in more detail in the chapter concerning the mechanism and that of Europe. At this point it suffices to state that the unique relationship this has created between Canada and the authorities of that system warrants its separate analysis.

Secondly, the precedents of cases and communications within the two jurisdictions originate from differing bodies. The Views of the United Nations Committees to be discussed and the precedent of cases before the Inter-American Court and Commission and the European Court of Human Rights have varying degrees of interpretative applicability within the Canadian domestic legal system. This is owing to the nature of Canada as located within the American regional system geographically, but having greater jurisprudential connections with the European context owing to its colonial history. This has in turn affected the interpretation of domestic human rights obligations with regard to those arising in the international sphere. Again this will be discussed in greater detail in the respective chapters concerning these jurisdictions. However, the Canadian judicial approach to the application of its own and external human rights law is representative of this bifurcation of geography and jurisprudence and on this basis their separate discussion is again necessitated.

Finally, the approach of the two regional systems discussed in the piece, that of Europe and that of the Americas, differs in relation to the application of human rights to environmental protection. In turn therefore they will be seen to differ somewhat from the international approaches illustrated by communications brought to committees within the United Nations under the auspices of optional protocols to the treaties to be discussed. To combine discussions of the instruments would be to falsely suggest uniformity in the application of rights with similar drafting to the issues raised in the piece. As will be shown precedents suggest this is not the case, and with regards to the aim of the piece these variations are crucial in establishing the most appropriate forum in which to suggest an action against the tar sand developments might be undertaken.

4.2 Harms Against the Person Prohibited By Regional Human Rights Law

4.21 Article I ADHR

Right to Life

The right to life contained within the Convention ⁴³¹ remains the subject of controversy between the Canadian government and the other members of the Inter-American regional system of human rights protection. The provision within the non-binding text of the Declaration which affords this right ⁴³² is broader in its drafting and does not overtly stipulate an opposition to the practice of abortion. The former provision guards the right of every person, ‘to have his life protected...from the moment of conception,’⁴³³ whereas as the more broadly drafted article of the Declaration affords protection of, ‘life, liberty and security of the person.’⁴³⁴ The binding Convention does, it should be noted, protect the physical security of individuals within other provisions of its text, but as has been outlined the piece will concern itself solely with the Declaration.

These issues stated, there is undeniably a protection of the physical integrity of the individual afforded at a regional level under the Inter-American system. However, the controversy surrounding the interpretative breadth of the right to life in the drafting and jurisprudence of the Inter-American regional system, significantly reduces the utility of the article in relation to the aim of the piece. Crucially in this regard, the presence of a near identical, binding, and effectively enforced provision within the domestic Canadian human

⁴³¹ ACHR (n187) Art. 4

⁴³² ADRD (n249)Art.I

⁴³³ ACHR (n187) Art. 4(1)

⁴³⁴ ADRD (n249)Art.I

rights instruments,⁴³⁵ containing protection of both ‘life’ and the ‘liberty and security’ of the person also all but eradicates a considerable portion of the value of this article within the piece.

The progressive approach to environmental protection extending from fundamental rights afforded under the regional system by both the Inter-American Court and Commission, rights mirrored within the domestic Canadian system, is however worthy of note, especially in relation to the particular potential impacts of tailings ponds. The case of *Yanomami v. Brazil*⁴³⁶ concerned both the construction of a bulk road through traditional lands of the Yanomami people, and the authorisation of extraction of various natural resources from them. The tribe contested that the developments breached their right to life and the Inter-American Commission ruled in their favour. However this was primarily owing to the indirect impact of the presence of non-indigenous people within the regions affected. This presence brought with it a number of diseases and illnesses to which the Yanomami were particularly susceptible, having had little contact with the outside world beyond their traditional lands. The influence of members of a comparatively developed society into the traditional social context of the Yanomami also brought unforeseen impacts, such as prostitution and the questioning of traditional beliefs.⁴³⁷

There is no suggestion that a similar effect might be felt by the First Nations tribes of Alberta to that of the Yanomami. Certainly there could be no contention that the mere presence of more people and urban development in the previously undisturbed regions of Alberta was having as severe an impact as was felt by the Yanomami. The suggestion that the *Yanomami* case offers a direct precedent for the case at hand or indeed more broadly

⁴³⁵ CCRF (n174) s. 7

⁴³⁶ *Yanomami Case*, Case 7615, Inter-Am. C.H.R. Res. No. 12/85, OEA/Ser.L/V/II.66, doc. 10, rev. 1, 24 (1985)

⁴³⁷ Such social impacts are not however suggested as breaching the right to life afforded under the ADHR.

therefore would be remiss.⁴³⁸ Firstly it should be noted that the *Yanomami* case was held before the Commission of the Inter-American system and is therefore not legally binding in nature. Similarly the recommendation of the Commission suggesting a breach of the Article I right to life focused heavily upon the relatively uncontacted nature of the Yanomami people, suggesting that this connection was brought about only as a result of this particular context. The recommendations however specifically stated that the government of Brazil should, ‘take preventative and curative measures to protect the lives and health of Indians exposed to infectious or contagious diseases.’⁴³⁹ Thus the Commission based the suggested breach, or potential therefore, upon the impacts felt as result of the action sanctioned by the government of Brazil without recognition and limitation of the impact of said action.

As such whilst not a binding precedent, the Commission established an interpretative approach that impacts directly attributable to environmental alterations and damage incurred can, where deemed of the requisite severity to be potentially, or have actually, proven fatal, breach the right to life afforded under Article I of the American Declaration.⁴⁴⁰ The impact of tailings ponds however is questioned within the scientific community, and the extent, if any, of the effect of these storage facilities upon human health is not yet known and is unlikely to be accurately ascertained through any means other than its own realisation. Whilst this reality would support the suggestion that a degree of precaution ought to be applied in line with the jurisprudence of environmental law to which Canada has acquiesced,⁴⁴¹ a suggestion of a breach of the right to life of the First Nations populace of the north east of Alberta would be unlikely to succeed for this very reason.

⁴³⁸ Such a suggestion would undoubtedly give rise to an overwhelming wave of similar cases in this, and other jurisdictions where cases with similar facts might give rise to suggestions of breaches.

⁴³⁹ *Yanomami* (n436)

⁴⁴⁰ ADRD (n249)Art.I

⁴⁴¹ See the definition of the precautionary principle within the Rio Declaration on Environment and Development (1992), UN Doc. A/CONF.151/26 (vol. I) / 31 ILM 874.

The excessive consumption of water potentially could reduce levels to such a degree that insufficient water was present in the province to provide for the most basic needs of nutrition and sanitation for the indigenous inhabitants. The majority of said peoples have piped water, and both the European and Inter-American systems have iterated in a number of instances that the right to life, owing to its non-derogable nature, can only be breached where water is knowingly and actively not provided in any form congruent to supporting life.⁴⁴² Within the Inter-American system the right to life has been said to include, ‘not being prevented access to conditions that may guarantee a decent life,’⁴⁴³ but does not elaborate upon the cultural relativity of those conditions. A less expansive approach in the European court has held that the right to life demands states, ‘take appropriate steps to safeguard the lives of those within its jurisdiction,’⁴⁴⁴ but again stipulates nothing beyond basic preservation of life. As such, to breach this right the water consumption would have to reach such a level as to prevent almost any water reaching the indigenous peoples of the regions affected, and for the government then to fail to provide any alternative source of water. For the purposes of the right to life therefore, no margin for appreciation with regard to the cultural relativity of the source of water is afforded in either regional system, instead the preservation of life and sanitation are the sole concerns of such binding provisions with regard to water.

This lofty threshold for displaying a breach of the right to life is also present in most domestic legal systems in relation to the provision of water and food. Indeed such a suggestion relating to food provision, in this instance impacts to the prevalence native fauna

⁴⁴² See for example: *Yakye Axa* (n31) and *Xakmok Kasek Indigenous Community v Paraguay* Case 0326/01, Report No. 11/03, Inter-Am. C.H.R., OEA/Ser.L/V/II.118 Doc. 70 rev. 2 en 390 (2003).

⁴⁴³ *Sawhoyamaya Indigenous Community v Paraguay* Case 0322/2001, Report No. 12/03, Inter-Am. C.H.R., OEA/Ser.L/V/II.118 Doc. 70 rev. 2 at 378 (2003) para. 153

⁴⁴⁴ *L.C.B. v U.K.* 29 EHRR 245, 36

which the indigenous populace consume, would be even more tenuous. The relative rarity of regular consumers of these animals, coupled with the wide array of potential alternatives offering equal or improved nutrition would arguably make such a contention even less viable than that in relation to water provision. In relation to both food and water this is likely owing to the non-derogable nature of rights to these factors in all instances in which they are found, and as such is illustrative of both a concession of sorts to state sovereignty, subsidiarity with regards to the provision of food and water, and an acceptance of the economic and administrative limitations of states. As a result the right to life offers little to the construction of a case against the permitting of tar sands developments based upon the reading of regional human rights instruments into binding domestic provisions.

4.22 Art XI ADHR

Health and Well Being

The utility of the declaration for the formulation of a case such as that suggested by the piece is limited to an interpretative capacity. As such only those rights provided in the declaration which have clear links to legally binding and enforceable provisions within the Canadian domestic legal system, including also therefore those international provisions which the executive has ratified and the legislature transformed, might be utilised. Such rights contained within the declaration can then be justifiably said to have interpretative significance in relation to binding provisions by way of providing insight into the intentions of the executive and legislature when drafting or acquiescing to binding human rights law in Canada.⁴⁴⁵ Within the declaration there are a number of provisions with some relevance to

⁴⁴⁵ A statement supported by the expansive approach to the interpretation of human rights established in *Edwards* (n187), 136 and cemented in *Blaikie* (n190) and *Minister of Home Affairs v. Fisher* [1980] A.C. 319, 328 per Lord Wilberforce.

the damage to the wildlife of Alberta wrought by, and directly attributable to the tar sands, most notably Articles XI, XIII, XIV and XV.

Article XI provides that, ‘Every person has the right to the preservation of his health through ... social measures relating to food, ... to the extent permitted by public and community resources.’⁴⁴⁶ This article affords two interpretative insights into similar provisions enforceable within the Canadian domestic courts. Firstly the inextricable link between food and health is reaffirmed, thus opening the possibility of a link to the right to life in extreme cases of malnourishment. This viewpoint though is somewhat embryonic in academic debate and applied generally only in cases of intentional malnourishment of those incarcerated by the state, the right to life is simply put, ‘not a right to an appropriate standard of living.’⁴⁴⁷ Secondly the introduction of a social element to a right to the preservation of a basic standard of health is especially beneficial in the development of an argument relating to indigenous communities. Through the recognition of the role of ‘social measures’ and ‘public and community resources’ in the protection of this right the declaration allows the interpretation of rights to health and well being to acknowledge that in order for all the ‘necessities of life’ encompassed by the right to ‘pursue the gaining of a livelihood’⁴⁴⁸ to be met, communal as well as individual rights and resources must be ensured. Whilst the provision was clearly intended to place a duty upon States to provide basic sustenance, the preservation of existing social structures which afford said resources would undeniably be an example of such measures which the authorities, provincial or federal, would be under a duty to protect or replace.⁴⁴⁹

⁴⁴⁶ ADRD (n249)

⁴⁴⁷ Menghistu, F. *The Satisfaction of Survival Requirements* in Ramcharan, B.G. (ed.) *The Right to Life in International Law* (Martinus Nijhoff Publishers, Dordrecht, 1985) 64

⁴⁴⁸ CCRF (n174) ss. 6 and 7.

⁴⁴⁹ This would of course be subject to a margin of appreciation with regards to the economic capacity of the state in question. However, this is less of a concern for a relatively developed and prosperous state such as Canada.

In relation to the indigenous peoples of Alberta, and the damage to the native wildlife of the province this recognition bears some significance when considered in light of the integral role the hunting of caribou plays for many in the provision of sustenance on a communal level. The practice ensures the continued existence of the culture not only of those individuals who actively hunt but those for whom they themselves provide, and consequentially the indigenous nations as a whole. This alone could not be argued to suggest a collective right to a specific food, which would undeniably be breached by the damage caused by the tar sands developments in Alberta. However, reading the domestic human rights provisions of Canada contained within the CCRF in light of the provisions of the Declaration of the Rights and Duties of Man,⁴⁵⁰ in this context arguably does. Such an interpretation conceivably suggests the significant damage to an essential food source of individuals, and a community, would breach the right to pursuance of ‘a livelihood’ by virtue of the consequential inhibition of access to that which ensures the ‘necessities of life’ and ‘preservation of health.’⁴⁵¹ In this regard it is the social connection which the specific food sources afford which is key. Were the projects merely removing a source of food with no other significance and replacing it with a constant supply of food of equal or higher nutritious value, the suggested contention would easily be rebutted.⁴⁵²

Despite offering another basis for the case against the tar sands developments, Article XI of the Declaration⁴⁵³ suffers from many of the same issues as the right to inviolability of the home afforded under Article IX to be discussed. The ‘right to the preservation of health

⁴⁵⁰ ADRD (n249)

⁴⁵¹ CCRF (n174) ss. 6 and 7.

⁴⁵² See in this regard the discussion by Menghistu of rights ensuring life as not being culturally relative, but an imposition of minimum requirements, primarily survival: Menghistu, F. *The Satisfaction of Survival Requirements* in Ramcharan, B.G. (ed.) *The Right to Life in International Law* (Martinus Nijhoff Publishers, Dordrecht, 1985) 64

⁴⁵³ ADRD (n249) Art. XI

and to well being' afforded under the Article like Article IX is not directly mirrored in the domestic Canadian Charter. The closest interpretative link would be found in section 7 of the CCRF and the notion of 'life, liberty and security of the person.'⁴⁵⁴ The threshold for proving a breach of this right, which would have to be overcome in order to permit an expansive interpretative approach such as reading Article XI into the text, is understandably high. This is owing to the strict approach to any suggested derogations adopted by the Canadian courts.⁴⁵⁵

In relation to the impacts of the unsustainable consumption of water by industrial projects in the tar sands fields, establishing a breach of this necessarily onerous threshold would prove highly difficult. The need to show a threat to life, or physical integrity on a basic level has shown itself to be necessary in the eyes of the Canadian courts.⁴⁵⁶ Thus there is little, if any, room to suggest that culturally relative factors ensuring these rights ought to be preserved under this provision. This is especially true as the significance of the form of water for the purposes of health and wellbeing is negligible. Focus is instead upon the provision to meet basic biological needs.⁴⁵⁷ In the context of food obtained through hunting, the reality of the resource, the caribou, being shared communally after being hunted by a select few places a social significance on that specific form of sustenance which would deter a switch to another source entirely. In spite of a cultural and spiritual connection to rivers in some instances,⁴⁵⁸ and as such the potential to make a similar case on the basis of the inhibition of

⁴⁵⁴ CCRF (n174) s.7

⁴⁵⁵ See in particular the decision in *Re B.C. Motor Vehicle Act* (n202) and the majority discussion of breaches of section 7 being justifiable only in the most exceptional of circumstances.

⁴⁵⁶ In spite of the expansive approach taken in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 noted above, the section 7 right was still stated to concern harms to basic human dignity, physical and psychological integrity and the right to make choices none of which would be breached by an alternate form of water provision.

⁴⁵⁷ Menghistu, F. *The Satisfaction of Survival Requirements* in Ramcharan, B.G. (ed.) *The Right to Life in International Law* (Martinus Nijhoff Publishers, Dordrecht, 1985) 64

⁴⁵⁸ See the discussion of the need to control natural resources in the *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. IACHR Series C No 185 (2008) para. 141.

the ability to fish in rare instances where such practices support a discernible proportion of communal sustenance, there is no equivalent social aspect to water for the purposes of quenching thirst and cooking. Thus the constructed culturally relative interpretation possible in relation to food sources is not available in regards to water consumption.

Essentially, as has been discussed the expansive interpretation of the domestic right to life, liberty and security of the person, in light of the right to the preservation of health and well-being, affords only that this most basic of rights be protected in the most serious of circumstances.⁴⁵⁹ As such the right would likely be held to require only that sufficient water for the purposes of sanitation and the quenching of thirst be provided, with little regard as to its form. Consequentially the case against the tar sands would almost undoubtedly fail if based solely on the contention that this provision had been breached by excessive water consumption. The expansive approach to the suggested 'right to water' put forward by various NGOs would stipulate that water protected for such purposes be culturally relative.⁴⁶⁰ In practice however where courts have applied rights to 'life' and aligned concepts to situations in which water is not provided to an individual or group, the overwhelming majority of successful cases have been concerned with circumstances where water has been withheld in attempts to intentionally harm or coerce a victim, or with the knowledge actions restricting access would do harm.⁴⁶¹ Thus were the provincial authorities of Alberta to ensure access to clean and safe water for the purposes of sanitation and basic nutrition, whatever the

⁴⁵⁹ *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519

⁴⁶⁰ Most notably the UNSCESCR in a general comment on the issue, which although lacking in binding force has influenced considerable debate on the efficacy of such an approach: Committee on Economic, Social and Cultural Rights, General Comment 15, The Right to Water (Twenty-ninth session, 2003), U.N. Doc. E/C.12/2002/11 (2002)

⁴⁶¹ Ramcharan states that this is as, 'if a State deliberately withholds food [and water] from parts of its population, or knowingly acquiesces in such withholding, and this results in deaths, then it would be a serious violation of the right to life. However, beyond this proposition, there are different views with regard to a 'survival requirement.' Ramcharan, B.G. *The Concept and Dimensions of the Right to Life* in Ramcharan, B.G. (ed.) *The Right to Life in International Law* (Martinus Nijhoff Publishers, Dordrecht, 1985) 8.

form of that access, any argument that they had breached rights pertaining to life or physical security of an individual would likely be effectively rebutted.

The *Yanomami* case⁴⁶² before the Inter-American Commission on Human Rights considered the provisions of Article XI of the Declaration concerning the, ‘Right to the preservation of health and to wellbeing.’⁴⁶³ A similar result to that in relation to the right to life under Article I⁴⁶⁴ was reached, with the contention of the tribe being upheld by the Commission. The burden of proof required to be deemed constituting a breach of the right to life is understandably and necessarily high. By contrast, the standard of evidence and level of damage incurred by individuals or groups needed to establish a similar breach of the right to health and wellbeing is a lower threshold, and one with greater room for subjective consideration on the part of the Inter-American Commission. In relation to the suggestion of a breach of human rights resulting from the environmental impacts of the tailings ponds therefore, whilst the level of scientific scrutiny to which the assertions would be subjected would be the same, the damage incurred would not have to be so great in order to be deemed a breach. The suggested reparations⁴⁶⁵ for the Canadian authorities for breach would admittedly be lower than those achievable for a breach of the right to life. However, as the aim of the piece and indeed the indigenous peoples of the region is predominantly the cession or restriction of operations which inhibit their ability to live in a manner to which they have become accustomed and which is representative of their cultural beliefs, this would be of little concern as a similar result in this regard could be achieved *ex post facto*.⁴⁶⁶

⁴⁶² *Yanomami* (n436)

⁴⁶³ ADRD (n249)Art.XI

⁴⁶⁴ *ibid.* Art. I

⁴⁶⁵ Given that the case would have to be held before the Inter-American Commission and not the Court at the regional level, owing to the complex relationship of Canada with the regional system outlined at length earlier in the piece, any outcome would take only the form of suggested action.

⁴⁶⁶ This is as establishing harm and seeking compensation after the fact would be far easier under the auspices of Tort Law than suggesting the extraction projects present such a risk of harm in the future that they should be halted now on the basis of human rights breaches. Were financial recompense the only goal of the First Nations,

An arguably more significant hurdle would however remain, that of proving an impact to human health and wellbeing. The leaking of contaminants from tailings ponds created as a result of the use of open pit mines to extract tar sands raw material has been highlighted as an area of concern. Thus an impetus has been placed on progress by industry and campaign groups alike, despite a lack of knowledge as to the existence or extent of any detrimental effects upon human health.⁴⁶⁷ Whilst the notion of ‘wellbeing’ allows for consideration of factors beyond physical health, the dominant consideration would inevitably be in relation to a medically ascertainable and quantifiable affects. Thus whilst of potentially greater utility in the formation of a case against the tar sands developments than the right to life,⁴⁶⁸ the continued scientific debate surrounding the impacts to human health, when compared to the obvious effects seen in the avian and aquatic life of the region, would also reduce its efficacy to an undesirable degree for the purposes of the piece.

such a reality would be satisfactory, but as this is neither their objective, nor that of the piece it is of little consequence.

⁴⁶⁷ This is evidenced by the creation of Canada’s Oil Sands Innovation Alliance (previously the Oil Sands Tailing Consortium), a body comprised seven companies, which have opted to share technology and resources on the management of tailings in order to ensure continuing improvements in their storage, disposal and reclamation. See: Canada’s Oil Sands Innovation Alliance <<http://www.cosia.ca/>> Accessed 30th July 2014.

⁴⁶⁸ ADRD (n249) Art.I

4.3 Suppressions of Abilities Protected by Regional Human Rights Law

4.31 Article VIII ADHR

Right to Residence and to Remain.

Rights being common to all human rights texts, binding or otherwise is not surprising, with most being based on shared moral principles common to all cultures.⁴⁶⁹ Their interpretation and the extent of their application however is far less consistent across the different regions and states internationally. The aforementioned case of the approach to the right to life in the Inter-American system which has precluded Canada's ratification of its core binding texts is a clear example of this. The very same differences in relation to other rights however offer the potential for innovative interpretations of such common rights within the Canadian domestic legal system in respect of the indigenous populace. The right to residence and movement⁴⁷⁰ afforded under the American Declaration of the Rights and Duties of Man, is one such instance of this potential utility to be found in the differing interpretative and drafting approaches to rights concerning the same subject matter. Some interpretative variations arise as a result of minor dissimilarities in wording, and this is the case in relation to the right to residence and movement.⁴⁷¹ Whilst Section 6(a) of the CCRF⁴⁷² is drafted in a manner somewhat lacking in elaboration as, 'the right to enter, remain and leave Canada,'⁴⁷³ the mirror provision of the American Declaration affords by contrast;

⁴⁶⁹ The very purpose of their creation being to ensure 'inherent dignity,' preserve the 'conscience of mankind,' and a 'common understanding of these rights' as espoused in the preamble to the UDHR: UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (II)

⁴⁷⁰ ADRD (n249) Art. VIII

⁴⁷¹ *ibid.*

⁴⁷² CCRF (n174) s. 6 (a)

⁴⁷³ *ibid.*

‘the right to fix his residence within the territory of the state of which he is a national, to move about freely in such territory, and not to leave it except by his own will.’⁴⁷⁴

The inclusion of the concept of ‘will’ in this formulation is of great significance in relation to the indigenous peoples of the regions affected by the tar sands developments in Alberta.

‘Will’ implies an element of choice, thus preventing States from forcing individuals to leave their residence. Indirectly causing individuals to be unable to continue their residence in a particular location is however fraught with issues. Pure economic issues, such as unemployment and high living costs necessitating the abandonment of residence would be unlikely to constitute a breach of the right. Pollution, or the removal of aspects of a particular ecosystem or community by contrast are more easily avoided through administrative and executive prudence. The reasonable expectation of effective control over these indirect effects from the State has been shown to be key in a number of cases with specific reference to indigenous peoples.⁴⁷⁵ The Inter-American Court ruled to this effect in the case of the *Saramaka* people of Suriname, stating that for indigenous peoples, ‘the right to use and enjoy their traditionally owned lands necessarily implies a similar right with regards to the natural resources that are necessary for their survival.’⁴⁷⁶

Water by definition is one such natural resource necessary for survival, but further to this in the case of the First Nations tribes of Alberta, and indeed indigenous peoples across

⁴⁷⁴ ADRD (n249) Art. VIII

⁴⁷⁵ The case of *Mayagna (Sumo) Awas Tingni Community v Nicaragua* Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001) before the Inter American Court is one such seminal case, both in the context of property rights, and broadly that of indigenous peoples law. However, in relation to the case at hand its utility is severely inhibited. The decision in the case centred on the issues of territory delineation and access to justice. The indigenous peoples of Canada considered by the piece however have no such issues. Their territory is clearly delineated by the Numbered Treaties discussed at length in the piece, and access to complaint and judicial proceedings is not a contested issue in relation to First Nations peoples. The considerations within those proceedings are the focus of the contentions herein, restricting the utility of the *Awas Tingni* case in this instance.

⁴⁷⁶ *Saramaka* (n458) para. 141.

Canada, North America and the world, links to specific water sources, or types thereof, are fundamental also to the continuation of their cultures. With this approach to the interpretation of the right to lands afforded to indigenous peoples, such as those reserved under the numbered treaties,⁴⁷⁷ it is apparent that unsustainably consuming the natural resources of a region to the detriment of those peoples to the extent that their continued residence, or expression of culture is threatened would constitute a breach of established human rights provisions.

In relation to the First Nations specifically this might occur as a result of the reduction of natural water courses to levels incapable of sustaining traditional fishing, or be owing to the knock on effect of low water flow rates. The reduction in the prevalence of water in the regions impacted would alter the ecosystem, deterring flora and fauna upon which practices used to express culture are based. In turn this would necessitate, in extreme cases, their abandonment or the relocation of the group in order to preserve said culture. In such cases a breach of the rights discussed could be suggested as it is through no uninfluenced decision that such actions might have to be taken. Thus the 'will' of the individual or group would not be relevant outside of these two choices each bearing considerable negative ramifications. Applying this to the Canadian domestic provision mirroring this right to residence, the obligations of the provincial and federal authorities to the indigenous peoples of Alberta would undoubtedly include the avoidance of consumption of natural resources which might force their exodus from their lands, or extinguish their ability to express their culture on them.⁴⁷⁸

⁴⁷⁷ Treaties 6 and 8 (n68)

⁴⁷⁸ Discussion of specific cultural beliefs in the piece has been avoided owing to the variation in the spiritual bases for the connection to environmental features amongst the First Nations occupying regions impacted upon by the tar sands. For example the Blackfoot, Algonquin, Cree and Dene Chipewyan all pass on different creation myths predominantly through oral storytelling. As such even bands living in relatively close proximity and sharing ethnic roots can have differing interpretations on the spiritual element to their connection to the land. Overbearing beliefs in a creation myth heavily based upon the symbiotic nature of man's relationship with nature are present in all variations however, and thus it is on this basis that discussion of inhibitions of cultural expression are based rather than on a specific belief system.

The concepts of land, property and the home have arisen as key in the protection of environmental quality as an aspect of the human rights afforded under the text as has been discussed. A number of articles⁴⁷⁹ in the Declaration represent the protection of these concepts afforded therein and illustrate its significance. The broad notion of the, 'right to residence and movement,'⁴⁸⁰ prescribed under Article VIII is *prima facie* possibly the least useful of the provisions, owing to its narrow interpretation outlined above. The article though is worthy of consideration primarily in relation to the notion of 'residence,' and the impacts of the tailings ponds upon the indigenous populace of Alberta. Under the article, 'Every person has the right to fix his residence within the territory of the state of which he is a national...and not to leave it except by his own will,'⁴⁸¹ and it is the drafting of this provision which affords the ability to suggest an interpretation of worth to the case at hand.

As has been discussed, the increased presence of humans, and the disturbance created by the activities necessary to meet the legal requirements with regards to monitoring the settlement of tailings ponds, as well as the physical footprint of these vast man-made lakes, would all significantly disrupt or deter the presence of indigenous flora and fauna from this habitat. Should the species upon which the First Nations tribes rely to express their culture, as a food source and for a number of other purposes, be forced or dissuaded from frequenting their habitats and regular roaming or migratory grounds, they too would be forced to relocate. Such an inevitable relocation in the face alternatively of the abandonment of traditional values and practices, would, it is suggested, potentially breach the provisions of Article VIII of the Declaration.

⁴⁷⁹ Specifically Articles VIII, IX, and XXIII, all of which will be discussed herein.

⁴⁸⁰ ADRD (n249) Art. VIII

⁴⁸¹ *ibid.*

This impact is largely secondary in nature it has to be conceded, however, should the First Nations be left no alternative than to move to survive, or preserve a basic quality of life as a result of more severe impacts then such a suggestion would be of considerably greater weight. As a result, the efficacy of the article as a basis for litigation would be predicated upon the ability of industrial projects to reclaim the land in which the ponds were situated. The reintroduction of any ecosystem capable of supporting the self-sustaining lifestyle of the First Nations, though not necessarily their specific traditional methods, would be likely to be held as having rebutted the contention that the ponds forced relocation from an area of residence. Such an interpretative approach would also be likely to be adopted as it would reflect the domestic mechanisms already in effect in relation to the reclamation of tailings ponds enforced by the provincial government. At present the requirement is merely the reinstatement of, 'equivalent land capability,'⁴⁸² not its original form.⁴⁸³ Article VIII of the Declaration would therefore only be of use as a last resort in the event of blatant disregard for any environmental impact of extraction and refinement projects by industry and government alike.

4.32 Art XIII and Art XV ADHR

Cultural Life, and the Cultural Benefit of Free Time

The severity of the limitations of the Declaration owing both to its similar drafting to domestic provisions and non-binding effect on the Canadian state organs does not preclude its utility in relation to the aim of the piece as has been shown. The regional instrument is of particularly high value in relation to its use and protection of the concept of culture, and

⁴⁸² Environmental Protection and Enhancement Act, RSA 2000, c E-12, Art.146(b)

⁴⁸³ Given that a margin of appreciation (zone of discretion) is afforded to the state within Canadian law in *R. v. Edwards Books and Art Ltd.* [1986] 2 S.C.R. 713 the provision of equivalent capability of land in light of the technology available to extractors and the economic benefit to Alberta and Canada would likely be deemed justifiable in the face of only secondary impacts.

extensions thereof in relation to other fundamental rights. Although the Charter protecting such rights domestically elucidates a ‘catch-all’ provision demanding that all interpretations protect the multicultural heritage of Canada,⁴⁸⁴ this is somewhat unspecific in its application. In this regard, the Declaration becomes beneficial for the purposes of the construction of a case against the licensing of tar sands developments. Article XIII of the Declaration affords an unambiguous, ‘Right to the benefits of culture,’⁴⁸⁵ and goes on to elaborate upon this granting a basic notion of intellectual property, and protection of participation in the communal aspects of a culture. Thus although phrased as an individual right, concerning as it does ‘every person,’ the article encapsulates the collective nature of culture demanding the ability of individuals to, ‘take part in the cultural life of the community,’ and, ‘to enjoy the arts,’⁴⁸⁶ expressing their culture. This has the obvious implication of the right potentially being upheld collectively, but also suggests the view of the jurists involved in the drafting of the provision, and thus potentially one to which the state could be argued to have acquiesced, that culture is an integral aspect of the community.

The cultural significance of hunting caribou to the Indian nations of the province, is well documented, having formed part of their identity since modern records of their existence began when European settlers first encountered them. The expertise of the indigenous population in the hunting and trapping of the fauna of the region was noted and exploited in the early development of the fur trade and has been argued to have ensured the survival of their culture instead of it being subsumed into that of the settlers.⁴⁸⁷ There is some macabre irony in the fact that it is the pursuit of another hitherto unparalleled economic gain which now threatens the existence of that very same culture. The role of the caribou in the ‘cultural

⁴⁸⁴ CCRF (n174) s. 27

⁴⁸⁵ ADRD (n249) Art. XIII

⁴⁸⁶ *ibid.* at Art. XIII

⁴⁸⁷ Finkel, A. *The Fur Trade and Early European Settlement* in Finkel, A. *Working People in Alberta: A History* (Athabasca University Press, Edmonton, 2012) 24

life of the community' of many Indian nations in Alberta is undeniable, providing as it does both sustenance and a long established link to the traditions of those communities living in or in proximity to their boreal forest habitats. The link between culture and community life and the recognition in principle of the potential for these two elements of a society, regardless of size, to be entwined to the extent that they are almost symbiotic is crucial. Such a connection would add great weight to the argument that the damage being wrought to the indigenous wildlife of the province threatens also the continued existence of its indigenous peoples.

In relation to the excessive consumption of water by the extraction projects, it is the elaboration provided with regards to the 'right to the benefits of culture' which potentially afford greater protection via interpretation of the Declaration into the domestic Charter, than might be granted from the application of the domestic provisions alone. According to the elaborative statement of the core right, 'Every person has the right to take part in the cultural life of the community.'⁴⁸⁸ The reduction of the flow levels of the regional water courses to levels incapable of supporting fish stocks on which the cultural life of some First Nations relies arguably inhibits the ability of those peoples to take part in the cultural life to which they had become accustomed, and indeed is necessary to ensure the continuation of that culture. This was recognised in the *Maya Belize* case by the IACHR which ensured that, 'the use and enjoyment of the land and its resources are integral components of the physical and cultural survival of the indigenous communities.'⁴⁸⁹

The numbers of First Nations still reliant upon fishing, who practice it as an element of expression of their culture is however small. Indeed many such tribes in regions exceptionally close to tar sands developments have chosen to align themselves with the

⁴⁸⁸ ADRD (n249) Art. XIII

⁴⁸⁹ *Maya Indigenous Communities of the Toledo District Case* IACHR 12.053, Report No. 40/04 (Merits) (2004) para. 154-6

developers, foregoing their fishing heritage and profiting instead from aiding the corporations impacting upon their traditional lands.⁴⁹⁰ Such tribes have courted both high praise and vociferous criticism from opposing sides of the debate on the issue.⁴⁹¹ Thus impacts to the culture beyond that to fishing would have to be proposed to support the argument that the reduction of flow rates adversely affects the ability of the indigenous peoples of the province to, 'take part in the cultural life of the community.'⁴⁹² As a result of these factors, the utility of the article to the aim of the thesis is reduced to a degree approaching inefficacy in relation to the practice of fishing by traditional means.

The fundamental nature of water to the various aspects of life has however been highlighted by the Inter-American Commission on Human Rights on a number of occasions. More specifically it was stated in the *Yakye Axa* case that, 'in the case of indigenous peoples, access to their ancestral lands and to the use and enjoyment of the natural resources found on them is closely linked to obtaining food and access to clean water.'⁴⁹³ There is acceptance therefore on its part of the heavy reliance upon the natural world common to indigenous peoples the world over. This is equally true of the First Nations of Alberta, and water is crucial to all aspects of those ecosystems to which their culture is inextricably linked. Lower water flow rates impact not only upon aquatic flora and fauna, but indirectly on all life to which water is essential and the comments of the Commission recognise this reality.⁴⁹⁴ The

⁴⁹⁰ Snyder, J. 'Five Aboriginal Firms Find Success on the Oil Sands' (Alberta Oil Magazine, 3rd March 2012) <<http://www.albertaoilmagazine.com/2012/03/rising-up/>> Accessed 30th July 2014.

⁴⁹¹ See for example the case of the Fort McKay First Nation, who have opted to provide services to extractors and not extract on their own land, yet have still received significant criticism: Cattaneo, C. 'Fort McKay Aboriginals Take 'Good with the Bad' of the Oil Sands' (Financial Post, 22nd March 2013) <http://business.financialpost.com/2013/03/22/fort-mckay-aboriginals-take-good-with-the-bad-of-the-oil-sands/?__lsa=c179-ec8b> Accessed 30th July 2014.

⁴⁹² ADRD (n249) Art. XIII

⁴⁹³ *Yakye Axa* (n31) para 166.

⁴⁹⁴ The Inter-American Commission opted to grant precautionary measures to the indigenous peoples inhabiting a region impacted by mining for silver and gold owing to the wide ranging impacts of water extraction and contamination, not merely direct impacts to human health. *Communities of the Maya People (Sipakepense and*

wildlife upon which the First Nations rely to express their culture, especially the boreal woodland caribou whose uses include the production of food, clothing, and ornaments amongst others, are equally as reliant on healthy water flow rates in the courses of the north east of the province. Similarly the aspects of the ecosystems present in that region which maintain their presence there are dependent upon the current balance of natural elements.⁴⁹⁵

The boreal forest is an ecosystem unique to a small number of locations almost exclusively contained within Russia and Canada and along a specific latitude. Thus even minute changes to the factors which comprise the balance upon which it hinges can have catastrophic impacts. For the specific sub-species of caribou which frequents the regions exploited to attain tar sands raw material (unique to only two locations in Canada themselves), the lichen which grows most favourably in those conditions is a preferred source of sustenance. Thus should impacts to water levels in the region reduce flows to levels incapable of supporting the drinking needs of the caribou, or should they be sufficient to adversely affect the growth of lichen, the caribou might also be deterred from their traditional habitat ranges, which coincide with the reserved lands of the First Nations of the region. As a result, the indigenous peoples of the region would have to leave their reserved lands to be able to continue the practice of hunting caribou⁴⁹⁶ and thus preserve their culture. Otherwise they would have to forego it entirely and retain the legal benefits afforded to them on those lands specifically designated under the provisions of the numbered treaties.⁴⁹⁷

Mam) of the Sipacapa and San Miguel Ixtahuacán Municipalities in the Department of San Marcos, Guatemala
IACHR PM 260-07 (2010)

⁴⁹⁵ Note ought to be made that boreal woodland caribou are a migratory species and herds are therefore used to relocating and changing location to benefit from the best feeding grounds.

⁴⁹⁶ Such practice would however be subject to federal and provincial restrictions on hunting the species as a result of their 'at risk' status, and not being subject to the exemptions afforded on reserved lands and too the indigenous peoples of Canada.

⁴⁹⁷ Treaties 6 and 8 (n68)

The implications of forcing such inescapable decisions which bear considerable implications have been considered by the IACHR in the *Yakye Axa* case. In the action, the court iterated that the failure to recognise the title of indigenous peoples to their lands, thus requiring restitution through the granting of alternative land, ‘could affect other basic rights such as the right to cultural identity and the very survival of the indigenous communities and their members.’⁴⁹⁸ As such failing to recognise said connections to particular land would itself preordain a breach of these rights. Knowingly licensing water extraction to facilitate tar sands projects which result in these decisions having to be made would therefore constitute a breach of the right to the benefits of culture on the part of the governmental authorities.

Tailings ponds whilst not directly inhibiting the ability of the First Nations to express and benefit from their culture, also impact upon elements of the regional ecosystem inseparably involved in that expression. Land usage is a perpetual impact of the tar sands extraction projects, the sheer physical presence of extraction sites and allied processing facilities is disruptive to the regional ecosystem, and the footprint of the tailings ponds is no exception. Alterations to migratory patterns of indigenous wildlife, specifically boreal woodland caribou, as a result of damage to the boreal forest on which they as a species are dependent for their preferred food source of lichen, undoubtedly restrict the ability of the First Nations, ‘to take part in the cultural life of the community.’⁴⁹⁹ The issues with regard to land usage for tailings storage differ little from those discussed earlier in relation to this species however, and as such will not be discussed here again. The return of that land to its original form however, is worthy of note.

⁴⁹⁸ *Yakye Axa* (n31)

⁴⁹⁹ ADRD (n249) Art. XIII

The reclamation of land used to store tailings is, as has been discussed, a source of significant controversy especially in relation to the nature of the reclamation required by the licensing authorities. Current regulations require only an equal capability to that which was once present, not a direct replacement of that which has been disturbed.⁵⁰⁰ Such reclamation removes the environmental features upon which the First Nations culture is predicated, restricting as a result the ability of members of Indian bands in the regions from taking, ‘part in the cultural life of the community’⁵⁰¹ in which they live. The potential for seepage of contaminants into the water courses of the region, although the extent of this is also contentious, may result in bioaccumulation through aquatic fauna and flora. Consequentially this will impact more severely on species higher up the food web of the region, which includes the caribou. Such an eventuality would also further restrict the ability of the First Nations to express their culture. Links between the indigenous populace and the environment of the north west of Alberta on which their culture is predicated are accepted as being inextricable. The submission of the Canadian state itself relating to the admissibility of the petition of the *Hul’qumi’num Treaty Group* conceded the significance of traditional lands in this regard saying that First Nations ought to be able to, and in its opinion could, ‘secure the lands necessary to preserve their culture and their way of life.’⁵⁰² The choice of First Nations to move to areas unaffected by the tar sands projects, or struggle to preserve their culture and heritage but remain on their traditional lands over which they have constitutionally protected rights in the domestic legal sphere would fundamentally disregard this accepted connection.

⁵⁰⁰ Environmental Protection and Enhancement Act, RSA 2000, c E-12, Art. 146(b)

⁵⁰¹ ADRD (n249) Art. XIII

⁵⁰² *Hul’qumi’num Treaty Group v Canada* Report No 105/09 Petition 592-07 Admissibility (30th October 2009)

The indigenous status of the First Nations peoples is legally reliant upon their registration with a band, and a number of rights afforded by such status necessitate living on the reserves attributed thereto. Relocation would therefore also require the foregoing of legal rights and benefits as well as participation in cultural and historically significant activities. The questionable aspect of this contention as the basis for a case is whether the indirect impacts of the tailings ponds on the ability of these peoples to partake in cultural activities would be upheld as breaching Article XIII⁵⁰³ by the Inter-American Commission or domestically through interpretation of the CCRF in line with regional provisions. A number of obstacles would have to be overcome for the success of such a claim. Firstly a right within the CCRF would have to be suggested as having been breached and into which Article XIII might be interpreted. Any scientific contentions with regard to the impacts of tar sands projects upon cultural expression would have to be addressed also. Finally the arbitrary nature of decisions being made in spite of knowledge of the impacts and their consequences for the indigenous populace would have to be proven. For the construction of a case against the licensing of extraction projects, and the tailings ponds they produce, reliance upon such suggestions is undesirable, given the need to reduce or block such operations to preserve the culture and potentially very existence of the First Nations peoples in the regions exploited.

In relation to the protection of culture and the avoidance of such uncertainties, Article XV of the Declaration is of potential utility. Although the title of the right protects the, 'right to leisure time and the use thereof,'⁵⁰⁴ it is the expansive articulation accompanying this brief outline which is of significance in relation to the piece. Specifically, Article XV of the declaration suggests that the leisure time of an individual should include the, 'opportunity for

⁵⁰³ ADRD (n249) Art. XIII

⁵⁰⁴ *ibid.* Art. XV

advantageous use of his free time to his spiritual, cultural and physical benefit.’⁵⁰⁵ The application of the right in this manner is not unfounded, though rare. This is largely owing to the fact that in instances where a breach such as that suggested in relation to the tar sands is proven, the broader protection of culture afforded by Article XIII is the preferred means by which petitions are submitted to the Commission. The utility is however worthy of note, and is accepted as a premise in the *Ache Indians case* in which a potential breach of Article XV was accepted owing to the construction of a settlement to which indigenous peoples were forced to congregate and inhabit, amongst other supposedly assimilatory practices.⁵⁰⁶ The right afforded under Article XV has no direct comparator in the Canadian Charter of Rights and Freedoms,⁵⁰⁷ and instead offers a unique interpretative aspect to domestic legislation in relation to a contention that the effects of the extraction projects breach established human rights law. As has been stated previously the use of the hunting of caribou and fishing as a sole or primary source of sustenance for First Nations people is rare and ever decreasing. Thus the strength of the suggestion that inhibition of the ability undertake these activities due to environmental impacts gives rise to insufficient food sources is itself also constantly shrinking.

The practice of hunting caribou no longer represents a main source of sustenance for most Nations, but the cultural expression of the act of hunting continues unabated and as such is arguably more appropriately protected by this provision than by others pertaining to specific actions or resources. This would add again to the proposition that the cultural significance of the caribou of the province should be protected as well as its role as a provider of sustenance to the indigenous people dwelling there. Without this emphasis on the dual role of the animal in the lives of the indigenous nations of Alberta however, the basis for a

⁵⁰⁵ *ibid.* Art. XV.

⁵⁰⁶ *Ache Indians v. Paraguay* IACHR Case 1802, OEA/Ser.L/V/II.43, doc. 21, corr. 1 (1977)

⁵⁰⁷ CCRF (n174)

challenge arising from human rights law might be rebutted by the suggestion that the Government of Alberta and the companies extracting the tar sands from the earth there need only ensure adequate sustenance for these people. Article XV alleviates this potential rebuttal by recognising the role of cultural practices beyond the provision of the necessities of life for which many were often originally conceived.

Such a connection is not widely discussed in broad regional and international human rights discourse owing to the existence of binding rights specifically aimed at cultural preservation. In this context the need for an interpretative insight to this effect owing to the peculiar construction of Section 27 of the CCRF⁵⁰⁸ is afforded by Article XV and supported in statements regarding the role of leisure activities, especially in relation to the cultural development of children. Indeed the significance of passing on traditional activities and their preservation for future generations is highlighted in a General Comment of the United Nations Committee on the Rights of the Child. The Committee stated in relation to the ability of children from indigenous and minority groups that the, ‘Connection to nature through gardening, harvesting, ceremonies and peaceful contemplation is an important dimension of the arts and heritage of many cultures.’⁵⁰⁹ The significance of the role of leisure time in the preservation and perpetuation of cultures is thus acknowledged by international human rights institutions, and specifically the importance of environmental connections is mentioned, furthering the relevance of this perception in relation to the focus of the piece.

The level of scientific certainty demanded in relation to the suggestion of breaches of other rights is somewhat predicated on the assertion that practices ensure nutrition. As such

⁵⁰⁸ CCRF (n174) s. 27

⁵⁰⁹ Committee on the Rights of the Child, General Comment No. 17 The Right of the Child to Rest, Leisure, Play, Recreational Activities, Cultural Life and the Arts (Art. 31) CRC/C/GC/17 (2013) 40

avoiding the implication that access to sustenance is affected is desirable in the formulation of a case as it would lower the burden of proof expected to demonstrate a breach. This is as the onerous implications for the state, or province in this case, suggested as being in breach would be far greater, and the potential ramifications a more considerable cost. The restitution suggested in such instances of breaches often require positive restitutional and protectionist acts of inherently greater cost rather than the simple requirement to desist from a particular action. In this regard Article XV attains considerable significance. In the modern era such practices reflect an expression of culture practiced in order to preserve heritage and pass on traditional knowledge to younger generations rather than a means of accessing the ‘necessities of life.’ The right of every individual to the, ‘advantageous use of his free time to his spiritual, cultural and physical benefit,’⁵¹⁰ is reflective of the reality of the role of traditional hunting and fishing in the regions of Alberta exploited to obtain tar sands raw material, and used to store the tailings produced as a by-product. As a result it avoids procedural and scientific demands placed upon other rights which do not accurately reflect the motivations for engaging in certain traditional practices.

The recognition of the significance of culture and its representation within standalone rights under the Declaration is a key contribution of the regional mechanism to the formulation of a case against the tar sands. The domestic provision relating to culture in the CCRF⁵¹¹ amounts to a general interpretative consideration of all rights in line with preservation and enhancement of Canada’s multicultural heritage, and is arguably not binding in itself. Indeed Hogg went so far as to suggest it would act as, ‘a rhetorical flourish rather than an operative provision.’⁵¹² Instead the section requires attribution to a substantive right within the text, which presents some difficulties in relation to the aim of the piece. The

⁵¹⁰ ADRD (n249) Art. XV

⁵¹¹ CCRF (n174)

⁵¹² Hogg, P.W. *Canada Act 1982 Annotated* (Carswell, Toronto, 1982) 72

connection between traditional acts and indigenous culture highlighted by Articles XIII and XV of the Declaration⁵¹³ bears considerable weight in relation to the basis for a case against the permitting of tar sands projects. With regards to the contention at the core of this case being that environmental impacts to the specific ecosystems and features thereof to which First Nations culture is inextricably linked breach the basic human rights of those peoples as a result, their potential significance is evident. Articles XIII and XV of the Declaration represent provisions through which this suggestion can be presented succinctly and without the contentions plaguing other proposed approaches, and as such are highly significant aspects of the text in the context of the thesis.

The inextricable link between the specific ecosystems of the reserved lands and aspects thereof and the cultures of First Nations⁵¹⁴ dictates the very existence of Indian culture not only in Alberta, but across Canada. Any adverse impact to those ecosystems is therefore a threat to that culture and would undoubtedly restrict the ability of the indigenous populace of those regions affected, ‘to take part in the cultural life of the community,’⁵¹⁵ breaching the corresponding right afforded by the Declaration. The reading of these provisions into the domestic provisions of the Canadian legal system is affected by the lack of directly corresponding rights in the Charter. As such there is a need to interpret rights with a *prima facie* alternate subject matter in light of this provision, thus requiring the assertion that the subject matter of that right is key to the ability of the complainant, ‘to take part in the cultural life of the community,’⁵¹⁶ and attaining the benefits of doing so.

⁵¹³ ADRD (n249)Arts. XIII and XV.

⁵¹⁴ Specific First Nations will have distinct cultures and practices from others, even where they are in relatively close proximity geographically, as such practices are heavily linked to the ecosystems which they inhabit. Therefore a reserve close to a water course is more likely to fish as an aspect of their culture, whereas one within the depths of the boreal forest will be more reliant on the hunting of caribou to express their culture and attain the benefits gained by doing so.

⁵¹⁵ ADRD (n249)Art. XIII

⁵¹⁶ *ibid.*

In the creation of a case against the tar sands developments of north eastern Alberta therefore the lack of a mirror right in the domestic sphere relegates Articles XIII and XV to a supporting role in relation to one afforded and enforced by the Canadian courts. This would allow the significance of certain acts or practices integral to the preservation of culture to be taken into account rather than specifically protecting the culture itself. However as such an explicit stand alone right to culture is lacking, as has been discussed, this is unlikely to be upheld in any litigious action as a valid line of reasoning. Thus Articles XIII and XV become of less potential utility for the aim of the piece than rights common in some conception to the domestic Charter, unless such a connection can be convincingly presented. Following the decision in *Slaight Communications Inc. v. Davidson*,⁵¹⁷ obligations to which the Canadian state has acquiesced are to be interpreted, where possible, into domestic legislation by the judiciary. As such the provisions of Articles XIII and XV affording protections to cultural beliefs might be suggested as being fundamental to the mental well-being of the individual secured by the CCRF. Thus although limited in their direct applicability, the interpretative significance of two provisions in offering a connection specifically to the significance of culture to an individual, especially those belonging to minority cultures, is arguably inimitable in regional mechanisms applicable to Canada.

⁵¹⁷ *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at 1056-7.

4.33 Art XIV ADHR

Right to Work

Whereas the domestic legislation of Canada provides a right, ‘to pursue the gaining of a livelihood in any province’⁵¹⁸ within the CCRF, the Declaration of the Rights and Duties of Man illustrating the principles underlying the inter-American system provides the less expansive, ‘right to work.’⁵¹⁹ At first glance this provision would appear to be of far less significance to the formulation of a case against the permitting of tar sands developments based in human rights. The notion of ‘work’ conjures only the image of financial gain, and in relation to the hunting of caribou or fishing, this is relatively insignificant as despite providing a form of sustenance, the caribou hide and other components bear little economic value when compared to their historical worth and traditional fishing is decreasingly prevalent. As such their value is largely non-pecuniary and based in social, cultural and developmental significance to the Indians alone. Indeed even caribou meat is of little value outside their communities and the quantity of fish caught is too low to facilitate any commercial venture.⁵²⁰ The purpose behind the ‘work’ to which a right is given however highlights the utility of this right in the interpretation of the domestic Canadian provisions.

Whereas the use of the concept of ‘gaining of a livelihood,’ in domestic Canadian legislation ensures a non-pecuniary interpretation of the vocational right, the inter-American system provides that an individual’s right to work should, ‘assure him a standard of living suitable for himself and for his family,’⁵²¹ under Article XIV of the Declaration. The

⁵¹⁸ CCRF (n174) s.6

⁵¹⁹ ADRD (n249) Art. XIV.

⁵²⁰ This is however beneficial as traditional rights afforded under the numbered treaties are exempted from protection by the rights afforded therein if the traditional activity they protect becomes commercial in nature following the case of *Badger* (n269)

⁵²¹ ADRD (n249) Art. XIV

addition of this reasoning for the inclusion of the right to work within the declaration could provide an interpretative insight into the ‘necessities of life’ protected under the concept of a ‘livelihood’ under the domestic legislation of Canada, by adding a communal element to the right. Thus the provision ensures not only the right to an occupation to sustain oneself, but also to provide such basic amenities for one’s family.

In relation to the development of the tar sands projects within Alberta, and the resulting damage to the wildlife of the province to which the indigenous people there are inextricably linked, this inclusion of the family unit as a consequential subject of the right to work allows for the inclusion of a broader range of evidence of effects upon them. Thus the impacts of excessive water consumption, alterations to the inherent ecosystem, disturbances to flora and fauna and the seepage of tailings might all be suggested as breaching the right should their impacts be felt by the family unit as a whole, or a member thereof, and not simply the provider of the main source of income. As such this would add weight to the contention that the aforementioned effects are significant enough to constitute a breach of human rights law. Otherwise the loss of the livelihood of an individual, where no tangible health impacts were felt by them, might conceivably be outweighed on the basis of public interest given the considerable financial benefits offered by tar sands extraction. This threshold of inhibiting family life has been considered in many jurisdictions and precedents, yet has not often been overcome despite having been eluded to by numerous jurists and recognised as being a potential avenue for the expansion of human rights law in relation to the environment.⁵²²

⁵²² The European regional system has been particularly adherent to this approach holding on many occasions that environmental damage can constitute a breach of human rights law. For a discussion of the jurisprudence of the European court see: Loukis Loucaides, ‘Environmental Protection through the Jurisprudence of the European Convention on Human Rights’ (2005) 75 *British Yearbook of International Law* 249

The Inter-American institutions have however not followed the significant weight of jurisprudence emanating from the European context in this regard.⁵²³ Indeed as Lixiniski states that the Commission, ‘seems to reject the connection with private and family life, characteristic of the European system,’⁵²⁴ and its approach to cases akin to the focus of the piece.⁵²⁵ The approach of the Inter-American system instead is focused heavily upon two branches. Firstly threats to health are considered under the auspices of jurisprudence concerning the rights to life and physical integrity. Secondly the focus of broader impacts is centred on those affecting spiritual connections to the environment including cultural and religious connections. In relation to the family therefore the connection between individual subjects is generally recognised by virtue of a collective belief structure rather than familial bonds and this accounts for a lack of case law concerning the family unit in this regard. In spite of the difference more broadly in the approaches to human rights protection of critical environments, there remains a common recognition of the reliance of individuals upon others within a group and that inhibiting an environment to which they have become accustomed has effects upon the individual directly but which consequentially impact heavily upon the group to which they are connected.

This recognition of social ramifications of environmental impacts *prima facie* only affecting an individual directly connected to them by virtue of their livelihood is key. An individual right is given wider context reflective of the realities of family and communal life. Regardless of the form of connection recognised, familial or spiritual, it is this contextual

⁵²³ This will be discussed in greater depth in the chapter pertaining to the potential influence of the European system on Canadian jurisprudence in this regard.

⁵²⁴ Lixiniski, L. ‘Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law’ (2010) 21(3) *European Journal of International Law* 585, 595

⁵²⁵ Again greater discussion of this will follow, but the cases of *Communities of the Maya People (Sipakepense and Mam) of the Sipacapa and San Miguel Ixtahuacán Municipalities in the Department of San Marcos, Guatemala* IACHR PM 260-07 (2010) and *Maya Indigenous Communities* (n464) are particularly relevant and bear significant similarities in relation to the impacts felt by the First Nations of Alberta.

recognition of reliance which is fundamental to its practical application. In the Inter-American system whilst the focus of rights based environmental protection has been on the spiritual, its conception of the right to work as an interpretative aid through its recognition of the importance of work for a family unit provides similar protection.⁵²⁶ Certainly in relation to the case study at the heart of the piece the result is the same, it is the wider impact of a loss of an individual livelihood connected to a specific ecosystem which is of interpretative benefit by virtue of its addition to domestic provisions. This construction however also allows for consideration of the ability to provide rather than the protection of a single cultural belief system which can be difficult owing to the fragmented nature of such systems in the First Nations of Alberta, and Canada as a whole. Thus the connection to the smaller family unit is arguably more useful as it circumvents any potential issues with regard to the proportion of communal sustenance afforded by traditional hunting, and the variations in cultural practices and beliefs which can occur in relatively small regions.⁵²⁷ As such whilst the right was drafted to provide family protection, this construction provides an interpretative addition to the case which might avoid some of the potentially problematic idiosyncrasies of First Nations culture in the legal context whilst still protecting it as a consequential result.

The inclusion of a social aspect to the right would also connect to the right to a culture protected under Article XIII of the declaration and such an interpretation would conform with the requirement of Article 27 of the CCRF that the text, ‘shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of

⁵²⁶ See for example the consideration of the right to freedom of religion in the face of the construction of a dam in: *Mercedes Julia Huenteao Beroiza et al. v. Chile* IACHR, Report n. 30/04, Petition 4617/02, Friendly Settlement (11 Mar. 2004)

⁵²⁷ See in this regard the discussion by Bakker of the blending of cultures and languages and the sharing of reserves in this region which occurred during and following the most intense century of the fur trade: Bakker, P. *A Language of Our Own: The Genesis of Michif, the Mixed Cree-French Language of the Canadian Metis* (Oxford University Press, Oxford, 1997) 44

Canadians.’⁵²⁸ Thus *prima facie* the right to work outlined as a principle of the Inter-American system might appear to add nothing of significance to the basis for a case against the damage wrought to wildlife and consequently the indigenous peoples of Alberta as a result of tar sands developments. However, the opportunity it provides via a more expansive interpretation of the legally binding domestic rights to overtly include dependents as well as the individual, is highly significant. The introduction of the concepts of a dependent family and the suitability of their living standard to their cultural identity, including inextricable aspects thereof, to considerations of effects to the individual evidencing a breach of a right potentially allows for a non-pecuniary benefit arising from work to be read into any interpretation of the domestic legislation protecting the right to do so.

As Article XIV of the Declaration⁵²⁹ has a mirror right in the CCRF,⁵³⁰ it is of considerably greater utility in the creation of a case against the developments based in human rights law than others in the text. The near identical core subject matter of the two rights facilitates a less tenuous progression of the enforceable, yet narrower, right under the CCRF to include the broader notion iterated in the Declaration. Whilst the CCRF in Article 6(2)(b) protects the right of citizens and permanent residents of Canada, ‘to pursue the gaining of a livelihood in any province,’⁵³¹ the Declaration suggests that, ‘Every person has the right to work, under proper conditions, and ...assure him a standard of living suitable for himself and for his family.’⁵³² A suitable standard of living, proposed by the Declaration would undoubtedly include safe and clean water for the purposes of hydration and sanitation,

⁵²⁸ CCRF (n174) s. 27

⁵²⁹ ADRD (n249) Art. XIV

⁵³⁰ CCRF (n174) s.6(2)(b)

⁵³¹ *ibid.*

⁵³² ADRD (n249) Art. XIV

however, the ability of the indigenous peoples to work or gain a livelihood does not in itself afford such water.⁵³³

The lack of water in the regions affected by the tar sands development, whether through excessive consumption or contamination owing to tailings seepage, could by contrast impact upon the efficacy of continuing traditional means of pursuing the gaining of a livelihood. This impact would not merely be to the few First Nations who still rely on traditional fishing methods for a portion of their sustenance, and as an expression of their cultural heritage. The presence of the boreal woodland caribou, far more widely exploited as a source of sustenance and various aspects of cultural expression, is also heavily reliant on the preservation of the near unique ecosystem of the region, itself inextricably linked to undisturbed flow rates in its water courses.

Thus by permitting the excessive consumption of water from the natural sources in the region and the continued use of tailings ponds to store by-products, the Albertan and national governments are, it could be contested, breaching human rights provisions relating to ‘work.’ These processes are restricting the protected ability of the indigenous peoples of the province from being able, ‘to pursue the gaining of a livelihood,’⁵³⁴ capable of supporting ‘a standard of living suitable for himself and for his family.’⁵³⁵ The key addition provided by the Declaration in this regard is that of the ‘standard of living’ not present in the domestic provision concerning the same subject. As has been discussed the notion of work is often concerned primarily with the securing of remuneration in safe conditions, and indeed for the majority of peoples these are the sole concerns of such activities. Linking the concept of work

⁵³³ Though it could be argued successfully that via sufficient remuneration this could be achieved the levels of remuneration required would be substantial and beyond that which indigenous cultural professions are capable of producing.

⁵³⁴ CCRF (n174) s.6(2)(b)

⁵³⁵ ADRD (n249)Art. XIV

with that of the attainment of a standard of living allows for the consideration of the standard of living relevant to the individual in question, and dependents thereof, beyond a simple assessment of pecuniary requirements. In the instance of the indigenous peoples of Alberta, a key aspect of the standard of living sought, and therefore reflected in the work they choose to undertake is the expression and preservation of their culture. The breadth afforded to the domestic provisions of Canada with regard to work through interpretation in line with the principles established in the ADHR therefore would add significantly to the utility of the domestic right in relation to a case against the adverse impacts to the indigenous populace of tar sands developments in Alberta.

4.4 Protections Afforded by the European Context

4.41 Right to Private and Family Life

Environmental issues have been the subject of a number of seminal hearings in the Inter-American regional system, both in the Court and the Commission. Whilst as in its European counterpart there is strictly speaking no precedent created by such cases as they are only binding upon the States party to them, and in the case of the Commission have no binding effect, it is rare petitions concerning the same or highly similar subject matter are not dealt with in the same manner.⁵³⁶ Thus the decisions of both the Inter-American Commission and Court can be taken as viable interpretative tools in establishing a right to particular environmental features arising from established human rights and applicable to the damage being wrought by the tar sands development projects in Alberta. The breadth of interpretative

⁵³⁶ Petkova, B. *Three Levels of Dialogue in Precedent Formation at the CJEU and ECtHR* in Dzehtsiarou, K. Konstaninides, T. Lock, T. and O'Meara, N. (eds.) *Human Rights Law in Europe: The Influence, Overlaps and Contradictions of the EU and the ECHR* (Routledge, Oxon 2014) 75

inspiration utilised by the Canadian Supreme Court⁵³⁷ does not however end with the Inter-American system and international human rights provisions which the Executive of the State has signed.

The Supreme Court has cited the decisions of the European Court of Human Rights in its interpretation of the provisions of the sister text⁵³⁸ to the American Convention on Human Rights⁵³⁹ applicable to that geographical region. The dissenting opinion of Belzil, L.J. in the case of *R v Big M Drug Mart*,⁵⁴⁰ cited as the embodiment of this approach, states;

‘the Canadian Charter was not conceived and born in isolation... It is part of the universal human rights movement. It guarantees that the power of government in Canada shall not be used to abridge or abrogate the fundamental rights to which every Canadian, as well as every other human being in the world, is entitled by birth.’⁵⁴¹

The opinion of Belzil concerned the interpretative influence of the ICCPR, and the further expansion of the approach to the European Convention on Human Rights⁵⁴² came in the case of *R v Rahey*.⁵⁴³ The case considered the European jurisdiction particularly in this case owing to the shared bilingual nature of the texts at the core of human rights protection in their jurisdiction. In considering whether a delay in the time taken for a trial to reach its conclusion justified a staying of the conviction in its entirety the French variant of the domestic right to a fair trial was considered. In order to justify this interpretative approach, and in line with the

⁵³⁷ CCRF (n174)

⁵³⁸ Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5; 213 UNTS 221 (ECHR)

⁵³⁹ ACHR (n187)

⁵⁴⁰ *Big M Drug Mart Ltd.* (n212)

⁵⁴¹ *ibid.* 655

⁵⁴² ECHR (n538)

⁵⁴³ *R v. Rahey* [1987] 1 S.C.R. 588, 78 N.S.R. (2d) 183.

‘living tree doctrine’ established in *R v Big M Drug Mart*,⁵⁴⁴ Justice La Forest turned to the case of *Wernhoff*⁵⁴⁵ in the European court, and as such established specifically the utilisation of this jurisdiction under the auspices of the doctrine.

Where there is such a lack of clarity in the provisions of the CCRF, this approach is particularly favoured and is of great significance as highlighted in the case of *Re Mitchell and the Queen*.⁵⁴⁶ These regional jurisdictions, considered sources of influence on Canadian law by the Supreme Court, offer a greater breadth of case law and judicial interpretation than that available domestically. As a result, the ability to build a case against the tar sands is considerably improved as established legal principles from other jurisdictions can be used rather than merely suggesting novel interpretative approaches to domestic legal provisions.

The European human rights system is arguably ‘the most developed judicial international human right protection system’⁵⁴⁷ in terms of longevity, case law, and enforcement. The focus of the majority of cases brought against States concerning environmental impacts in the European regional system, has been on Article 8 of the European Convention on Human Rights, the right to private and family life.⁵⁴⁸ Also the familial elements of a number of domestic rights might be utilised in opposition to adverse environmental impacts akin to the application of Article 8 of the ECHR in the European regional system. The lack of directly comparable rights in the European Convention⁵⁴⁹ and Canadian Charter⁵⁵⁰ in some instances restricts the utility of the case law from within that jurisdiction as an interpretative aid.

⁵⁴⁴ *Big M Drug Mart Ltd.* (n212)

⁵⁴⁵ *Wernhoff v Germany* (1979) 1 EHRR 55.

⁵⁴⁶ *Re. Mitchell and the Queen* (1983), 150 D.L.R. (3d) 449.

⁵⁴⁷ Brems, E. *The Margin of Appreciation Doctrine of the European Court of Human Rights: Accommodating Diversity Within Europe* in Forsythe, D.P. McMahon, P.C. (eds.) *Human Rights and Diversity: Area Studies Revisited* (University of Nebraska Press, Lincoln, 2003) 81

⁵⁴⁸ ECHR (n538) Art. 8.

⁵⁴⁹ ECHR (n538)

⁵⁵⁰ CCRF (n174)

Article 8 of the European text is one such *prima facie* omission from the Canadian Charter, providing as it does the individual with the, ‘right to respect for his private and family life.’⁵⁵¹ This having been said the, ‘right to life, liberty and security of the person,’⁵⁵² the closest comparator within the domestic Canadian instrument, has been interpreted as including limited rights in respect of the family of an individual, especially in relation to children, as a result of the case of *B.(R.) v Children’s Aid Society of Metropolitan Toronto*.⁵⁵³ This acceptance of a familial element to the domestic right is crucial in its provision of an avenue through which the interpretative influence of the more explicit European right and case law discussing its breadth can be applied.

Should the impacts of the tar sands extraction projects be deemed to have the potential to force the relocation of the indigenous peoples of the region to another area, and at a significant financial cost as they do not own their own land *per se*, the case of *Dubetska and Others v. Ukraine*⁵⁵⁴ would be of particular relevance. Here the Ukrainian government was ordered to pay damages to two families impacted upon by the ‘spoil heap’⁵⁵⁵ of a coal mine in the proximity of their homes. The court deemed the government to have, ‘failed either to facilitate the applicants’ relocation or to put in place a functioning policy to protect them from environmental risks associated with continuing to live within their immediate proximity.’⁵⁵⁶ Clear parallels to this case can be drawn in relation to the adverse impacts of the situation in Alberta and focus of the work generally.

⁵⁵¹ ECHR (n538)Art. 8

⁵⁵² CCRF (n174) s. 7

⁵⁵³ *B.(R.) v Children’s Aid Society of Metropolitan Toronto* [1995] 1 S.C.R. 315

⁵⁵⁴ *Dubetska and Others v Ukraine* Application no. 30499/03 (ECHR, 2011.02.10)

⁵⁵⁵ A collection of the waste product from the extraction and refining processes.

⁵⁵⁶ *Dubetska* (n554) 154

Similarly in the case of *Ivan Atanasov v Bulgaria*,⁵⁵⁷ the land of a farmer was heavily polluted by leaks and run off from tailings ponds containing the waste products of a copper-ore mine. Despite losing his case, owing to his failure to provide evidence that the land had been devalued, the principle found in the *Dubetska* case⁵⁵⁸ was affirmed. The government was expected to have avoided or mitigated to the greatest possible extent the clear and often foreseeable damage caused, and thus had to compensate for it retrospectively. In both cases however the damage to the land was measured in pecuniary terms, assessing the extent of said damage by its decrease in market value. Following this any claims for non-pecuniary damage assessed on a subjective basis relative to the case at hand.⁵⁵⁹ The *Dubetska* case⁵⁶⁰ also saw the court rule that in spite of measures on the part of the government to attempt to mitigate the damage done, the failure of those measures to achieve any tangible reduction in impact equally failed to lift the duty of care for citizens placed upon them owing to their position of authority. The principles established in the two cases offer a key element to the basis for a case against the licensing of such projects under human rights law when read alongside domestic Canadian human rights provisions, the impacts of the tar sands developments and attempts to mitigate them.

The European court required that where the home of an individual or group is damaged or they are forced to relocate entirely by the impacts of a state approved industrial project that they ought to be compensated if they remain in danger, or all reasonable measures be taken to cease the damage where this is appropriate or achievable. For the First Nations impacted upon by the tar sands developments the *Dubetska*⁵⁶¹ ruling, especially comments concerning the inadequacy of the provision of clean water in mitigation, offers a

⁵⁵⁷ *Ivan Atanasov v Bulgaria* Application no. 12853/03 (ECHR, 2010.12.02)

⁵⁵⁸ *Dubetska* (n554)

⁵⁵⁹ Similar award structures are seen in a number of other ECHR cases concerning environmental damage.

⁵⁶⁰ *Dubetska* (n554)

⁵⁶¹ *ibid.*

potential to demand the cession of developments in critical areas. Ownership of the land is not however analogous to the principles of the cases in the European system which Canadian domestic law could be interpreted in light of. The reserved lands under the numbered treaties⁵⁶² are the property of the Crown, and administered by the Canadian government. Thus the loss of market value is irrelevant to the First Nations inhabiting the land, as they cannot access that value and could in no way benefit from it.⁵⁶³ Instead emphasis would have to be placed on the cultural value of the land and the links between the heritage of the First Nations and the specific reserves they were granted over a century ago.

Whilst this would require another interpretative leap on the part of the Canadian judiciary, this notion would appear to come well within the bounds of interpreting all provisions of the CCRF in pursuit of the preservation of the multicultural heritage of Canada, as stipulated in section 27 of the Charter. Arguably the recognition of cultural value achieved by this would further rebut any suggestion of full pecuniary compensation being achievable owing to the inimitable and irreplaceable links to the specific lands and ecosystems damaged. Thus the consideration of established principles with regards to the environment from the European system supports the notion that the very existence of the indigenous cultures of Alberta which is inextricably linked to the specific ecosystems threatened by the tar sands extraction projects should be preserved.

⁵⁶² Treaties 6 and 8 (n68)

⁵⁶³ Note should be made that the First Nations can opt under the numbered treaties to 'sell' the rights to their land and secure conventional title thereto on an individual basis. However this is not of concern to the thesis as avenues to compensation in such instances could be achieved using established principles of environmental law and tort law in Canadian law, and would not need to concern themselves with the cultural inimitability of the peoples affected.

The cultural links of the First Nations peoples of Alberta to the specific ecosystems of the boreal forest and the lands granted to them under the numbered treaties⁵⁶⁴ deter, if not prevents, relocation to avoid the adverse effects of the tailings ponds. The visual impacts of the tailings ponds, and their deterrent effect upon wildlife however may not be sufficient to breach the limitations permitted by Article 8 of the European text,⁵⁶⁵ which are mirrored in the Canadian domestic provisions and case law,⁵⁶⁶ as illustrated in the case of *Kyrtatos v. Greece*.⁵⁶⁷ The case concerned a construction projects on the island of Tinos, a popular tourist location, and it was contended that the development reduced the scenic beauty of the area, and the levels of wildlife present, including protected species. The court decided against the applicants, stating that they had failed to prove a direct link of sufficient gravity between the effects of the project and their own wellbeing as protected under the convention.⁵⁶⁸

In relation to the First Nations peoples of Alberta therefore, the contention that the rights afforded to them under the domestic Charter⁵⁶⁹ are breached by the visual deterrent to culturally key species for those peoples is burdened by needing to be based upon a direct impact to themselves, and their wellbeing. The key issue here is therefore whether the ability to partake in culturally significant activities, such as fishing or the hunting of boreal woodland caribou constitutes an aspect of their wellbeing. Precedent would suggest in the European courts that the concept of wellbeing is heavily focused upon physical health, the majority of cases akin to that of *Kyrtatos*, *Lopez Ostra* and *Dubetska*⁵⁷⁰ having succeeded on

⁵⁶⁴ Treaties 6 and 8 (n68)

⁵⁶⁵ ECHR (n538) Art. 8 (2)

⁵⁶⁶ The right to life, liberty and security afforded in CCRF (n174) s. 7 was held as applying to the family unit in *Children's Aid Society* (n553)

⁵⁶⁷ *Kyrtatos v. Greece* [2003] ECHR 242

⁵⁶⁸ *Kyrtatos v. Greece* [2003] ECHR 242, para. 53

⁵⁶⁹ CCRF (n174)

⁵⁷⁰ *Kyrtatos v. Greece* [2003] ECHR 242, and *Dubetska* (n554)

this basis, with other impacts being outweighed by political or economic considerations as in *Hatton*.⁵⁷¹

The successful breach of this burden of proof through high reliance upon environmental features in the manner in which the First Nations people are is unprecedented in the European context. This is owing largely to said reliance not being based upon an easily quantifiable or illustrated basis, that of cultural expression. The case of *G and E v. Norway*⁵⁷² is crucial in this regard, as it was the first instance in which the European court held that the Article 8 right included traditional practices within its auspices. However, in the case, which concerned the flooding of lands of the indigenous Sami people for the construction of a hydroelectric project, the impact was deemed as not of requisite scale and severity to constitute to breach the right protected.⁵⁷³ In relation to the construction of a case against the tar sands projects therefore the lack of certainty arising from a lack of a successful precedent on such a basis would understandably make such a suggestion an unattractive proposition.

Whilst the setting of a precedent of respect for culture as an aspect of human wellbeing by the courts in Canada and internationally is highly desirable, this case has tangible implications. As a result the desire on the part of the First Nations as applicants would be to base their arguments upon contentions with a realistic and, where possible, predictable likelihood of success. The contention that cultural life is an aspect of the right to private and family life under the European human rights system has been upheld in theory in

⁵⁷¹ *Hatton* (n186). Here the economic value of night time flights into and out of Heathrow airport was deemed to outweigh the impacts to house prices and auditory disturbances they inevitably caused.

⁵⁷² *G and E v. Norway* (1983) 35 DR 30

⁵⁷³ This case would also act to circumvent the issue of First Nations with reserves not owning the reserve lands, but instead having a fiduciary relationship with the state giving them a caveated *ius fructus* over it, as the Sami had a similar arrangement with the Norwegian state.

the *G and E* case.⁵⁷⁴ However, the suggestion that this is reflected in the Canadian context via a right implicitly affording the same protection, given the lack of a directly comparable right, is an untested and as such excessively precarious one on which to base a case of such magnitude.

Arguably the most seminal case concerning the notion of environmental protection afforded by human rights law in the European system,⁵⁷⁵ is the case of *Lopez Ostra v Spain*.⁵⁷⁶ The case concerned the human health impacts of a waste treatment plant, and considered the contention by the State that the economic benefit of the plant outweighed any obligations that might be construed as extending from Article 8.⁵⁷⁷ Having considered the contention the Court held in favour of the applicants stating that;

‘the State did not succeed in striking a fair balance between the interest of the town’s economic well-being - that of having a waste-treatment plant - and the applicant’s effective enjoyment of her right to respect for her home and her private and family life.’⁵⁷⁸

Had the waste being treated been of a nature crucial to human sanitation and therefore life, such as a drinking water treatment plant, or human waste treatment plant,⁵⁷⁹ it has been contested that the decision may not have been made in the manner that it was.⁵⁸⁰ This is as

⁵⁷⁴ *G and E v. Norway* (1983) 35 DR 30

⁵⁷⁵ The case is suggested as being of this stature in a elaborative footnote regarding environmental protection under the auspices of human rights law in various jurisdictions in The Oxford Handbook on International Adjudication. See: Dupuy, P-M. and Vinuales, J.E. *The Challenge of ‘Proliferation’: An Anatomy of the Debate* in Romano, C.P.R. Alter, K.J. and Shany, Y (eds) *The Oxford Handbook of International Adjudication* (Oxford University Press, Oxford, 2013) 150

⁵⁷⁶ *Lopez Ostra* (n186)

⁵⁷⁷ ECHR (n538) Art. 8

⁵⁷⁸ *Lopez Ostra* (n186) at para. 58

⁵⁷⁹ The plant in question treated industrial waste water from leather treatment plants for re-use in other industrial processes.

⁵⁸⁰ See the discussion of the necessity of the plant to solve an existing issue of pollution from tanneries and actions taken to mitigate harm caused: *Lopez Ostra* (n186) paras. 50-58

the benefit would have extended beyond the monetary to one of the health and well-being of the populace of the State, also enshrined as a potential limitation to the Article 8 right under sub-section (2),⁵⁸¹ and a benefit afforded far greater weight in the balancing of the environmental impacts with the social and economic rewards of an industrial project by the Court.

The significance of the case was however in its status as the first occasion on which the severity of impact had been held by the Court to have outweighed a considerable economic benefit to the general public of a State or region.⁵⁸² In relation to the construction of a case against the adverse health and environmental impacts of the tar sands extraction projects, and specifically of direct impacts such as tailings ponds and water consumption, this case represents a respected interpretative source for the Canadian courts.⁵⁸³ The case also is comparable to that forming the focus of the piece in that it considers the balancing of a considerably economically beneficial industrial project with impacts to human health. A caveat to the influence of this case would however be the recognised and proven direct causal link between the illness of the daughter of the applicant and the operations of the waste treatment plant. This was a significant factor in the decision and one which a number of similar cases in the European court have fallen foul of.⁵⁸⁴ Similarly it is a continually contested suggestion in relation to the effects of extraction projects in Alberta.

⁵⁸¹ ECHR (n538) Art. 8 (2)

⁵⁸² *Hatton* (n186)

⁵⁸³ See in this regard the comment of Anna Riddell on the significance of the case: Riddell, A. *New Perspectives on Connecting Human Rights and International Environmental Law* in Sancin, V. *International Environmental Law: Contemporary Concerns and Challenges* (GV Založba, Ljubljana, 2012) 135

⁵⁸⁴ The case of *Tatar* (n31) para 88 was originally brought on the basis of an Article 2 (right to life) claim which failed owing to the lack of a causal link between the tailing produced by a gold mine and adverse health effects felt by the applicants. The case was however eventually decided in their favour on the basis of an Article 8 breach.

Thus whilst the utility of the *Lopez Ostra* case⁵⁸⁵ as an interpretative aid in the construction of a case against the tar sands is potentially massive, a clear and severe disruption to the, ‘private and family life,’ of the applicants must be proven. The demand that this be of sufficient gravity to outweigh any limitation which might be deemed, ‘necessary in a democratic society in the interest of national security’ or crucially in this instance, ‘the economic well-being of the country,’⁵⁸⁶ is a significant hurdle, given the immense capacity for generating financial wealth that the tar sands affords both Alberta and Canada as a whole. As such the interpretative expansion afforded by the case is something of the proverbial ‘double edged sword,’ providing potential for both the outweighing of economic benefits by human health impacts, and the exact opposite. In such a situation the considerable benefits of the project at hand would likely allow its continuation within certain restrictions to limit the adverse effects felt.⁵⁸⁷ In the context of the indigenous peoples of Alberta, such a result would be devastating as extraction projects having adverse impacts upon culturally significant ecosystems would continue in all but the most extreme cases of unavoidable harms to human health.⁵⁸⁸

The protection afforded under Article 8 of the European Convention is not directly mirrored in the CCRF. However, a number of aspects to which courts have applied the convention would be considered actionable under the auspices of provisions of the domestic text. One such instance is the issuing of permits by the Canadian and Albertan authorities to new oil sands projects and the expansion of established installations. The human rights implications of the permitting of various projects and events have been considered on various

⁵⁸⁵ *Lopez Ostra* (n186)

⁵⁸⁶ ECHR (n538) Art. 8 (2)

⁵⁸⁷ As was the case in *Hatton* (n186)

⁵⁸⁸ This would follow the judgement in *Tatar* (n31) in which a connection of fumes to asthma in the son of the applicants was not evidenced sufficiently to be upheld by the court as being the reason for a breach of the rights of the Convention.

occasions by the European court, with similarly varied outcomes. The cases of *Taskin and Others v. Turkey*⁵⁸⁹ and *Zammit Maempel and Others v. Malta*⁵⁹⁰ provide opposing poles of the potential applicability of European human rights law in this regard. Both cases concern a suggested breach of Article 8 of the Convention affording the right to private and family life, and yet resulted in vastly differing outcomes.

The claim of *Taskin*⁵⁹¹ concerned the permitting of a mining project which polluted local aquifers and the ecosystem locally as a result. The appellant successfully contested the lack of enforcement of the end of the permit, and also the lack of warning and information provided to mitigate any potential damage of the risks at this juncture. Contentions against the noise resulting from the fireworks displays permitted by the Maltese authorities in the *Zammit Maempel*⁵⁹² case were by contrast unsuccessful on the grounds that they had not shown any damage to personal integrity and that reasonable measures had been taken by the authorities to protect private property. Thus a balancing act is apparent in the rulings of the European court in relation to permitting. Resultant limitations and an acceptable and unavoidable degree of impact will not be held as breaching the rights afforded under Article 8. However, where human health is impacted upon, or property affected to the extent that ordinary family life is prohibited by a permitted activity, a breach will be upheld.

Permits issued by the Albertan authorities to continue with open pit tar sands extraction projects will inevitably result in the construction of tailings ponds, and impacts to human health or restrictions on traditional practices of a sufficient degree to be held as breaching this right. The lack of direct comparator right in the Canadian context is again

⁵⁸⁹ *Taskin v. Turkey*, 42 EHRR (2006) 50

⁵⁹⁰ *Zammit Maempel and Others v. Malta* [2011] ECHR 1964

⁵⁹¹ *Taskin v. Turkey*, 42 EHRR (2006) 50

⁵⁹² *Zammit Maempel and Others v. Malta* [2011] ECHR 1964

however an issue, as applying the precedent of the European courts within the domestic context of Canada would require such a link through which such interpretative influence might flow.⁵⁹³ Only a feeble assertion of a breach of the rights to ‘remain’⁵⁹⁴ and ‘liberty of the person’⁵⁹⁵ could be suggested. The right to remain does not include specific conditions beyond the decision to relocate being arbitrary. The only instance outside direct administrative decisions this might be likely to be upheld against is if impacts were, not being severe enough to harm human health, breached the more accessible right to life liberty and security of the person.⁵⁹⁶ Remembering the all-encompassing provision of Article 27 of the CCRF⁵⁹⁷ requires interpretations of the Charter to be made in line with preservation of multicultural heritage, the right to the liberty of the person,⁵⁹⁸ including their family unit,⁵⁹⁹ would appear the most appropriate avenue for a case utilizing the precedents of the European system.

For such a case to be successful, the various impacts of extraction projects would have to be shown to inhibit the ability of the First Nations peoples to partake in traditional activities to such a degree as to be unavoidable. This would also have to overcome any suggestion of a reasonable limitation to the rights based upon the economic benefit of the projects and the sufficiency of measures to mitigate damage and inhibitions. This interpretative influence upon the Canadian domestic provisions is arguably one of the most useful for it allows for adverse effects to non-human factors to be taken into account. Impacts to human health are predicated by an understandably high burden of proof, and are subject to

⁵⁹³ In the seminal case of *R v. Rahey* [1987] 1 S.C.R. 588, 78 N.S.R. (2d) 183. in this regard, this took the form of an approach to interpreting language within the texts of the core instruments utilising the French variant of the right in question.

⁵⁹⁴ CCRF (n174) s. 6 (1)

⁵⁹⁵ *ibid.* at s. 7

⁵⁹⁶ *ibid.* at s. 7

⁵⁹⁷ *ibid.* at s. 27

⁵⁹⁸ *ibid.* at s. 7

⁵⁹⁹ *Children's Aid Society* (n553)

considerable scientific rigor. However, the suggestion that the operations affect wildlife in the region is supported by evidence which is plain to see, from the physical impact to the landscape to the well-documented instances of tailings seepage and bird deaths.⁶⁰⁰ Similarly the protection of the right to hunt, trap and fish on the lands granted under the numbered treaties,⁶⁰¹ afforded constitutional protection⁶⁰² adds great weight to the suggestion that an inhibition thereof is a breach of this right to individual liberty.

The impacts caused to native wildlife species upon which the indigenous culture of First Nations is predicated are not a viable basis for a case suggesting either forced relocation or the abandonment of culture in the European context. Firstly these impacts are not direct and as was considered in the *Zammit Maepel*⁶⁰³ and *Kyrtatos*⁶⁰⁴ cases, such impacts are not likely to be held as outweighing the economic benefits of tar sands extraction. Added to this lack of direct effects to the human populace is the nature of the primary species unique to the boreal woodland forest, caribou.⁶⁰⁵ The sub-species is inherently migratory. As such contending that relocation was forced by the removal of a supporting ecosystem would be faced with an opposing contention that their migratory existence already necessitated considerable movement within traditional territories. Thus without the loss of an ecosystem in its entirety or the necessitating of a relocation across provincial borders, which would result in a loss of other legal rights,⁶⁰⁶ such a contention would be highly unlikely to be upheld by the courts.⁶⁰⁷

⁶⁰⁰ Timoney, K.P. and Ronconi, R.A. (n75). Images are also provided in Annex 8.

⁶⁰¹ Treaties 6 and 8 (n68)

⁶⁰² Constitution Act (n200) s.35

⁶⁰³ *Zammit Maepel and Others v. Malta* [2011] ECHR 1964

⁶⁰⁴ *Kyrtatos v. Greece* [2003] ECHR 242

⁶⁰⁵ In particular the boreal woodland caribou sub-species.

⁶⁰⁶ Though this is highly unlikely to take the form of any variance in legal rights which would support such a contention, the variance in the rights afforded under the numbered treaties, such as in the provision of healthcare, could be suggested as being a burden of proportions onerous enough to breach established rights.

⁶⁰⁷ This is supported by the decision in *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157 [CAN] in which it was stated that relocation to another province avoid a disadvantage brought about by

The potential uses of the precedents and provisions of the European jurisdiction in the context of the thesis are numerous. This is primarily as the Canadian courts have suggested a philosophical and jurisprudential affinity with the system,⁶⁰⁸ greater arguably than that shared with the Inter-American system for both historical and pragmatic reasons.⁶⁰⁹ The most considerable benefit they grant is an interpretative approach which circumvents the demand for direct human impacts to form the basis for breaches of human rights, which is firmly established within Canadian precedents.⁶¹⁰ This has also been the basis of contention of supporters of tar sands extraction projects that their non-human impacts are outweighed by their considerable benefits.⁶¹¹

Whilst human health impacts will inevitably be the primary concern of human rights law when used to protect fundamental aspects of the environment for individuals,⁶¹² to halt at this juncture would be lackadaisical on the part of jurists. This attitude is reflected in the case law of the European court, and whilst a high threshold both in terms of evidence and severity has been set, its existence and potential application is undeniable. Domestic Canadian precedents would suggest a restrictive approach of the application of human rights to protect

legislation in another could be held as discriminatory and a breach of section 6 of the CCRF, but that relocation within a province may not.

⁶⁰⁸ See the comments of Justice Belzil in relation to Canadian society and the influences thereon: *Big M Drug Mart Ltd.* (n212), 30

⁶⁰⁹ Until the latter half of the 20th Century, the Canadian legal system was regarded by many as subservient to that of its colonial origins in English common law. Bushnell traces the historical development of the Canadian legal system into an independent body of law, which whilst now no longer bound by English legal principles, continues to bear its hallmarks: Bushnell, I. *Captive Court: A Study of the Supreme Court of Canada* (Mc-Gill Queen's Press, Montreal, 1992) 291-295.

⁶¹⁰ See for example the decision to allow the consideration of the arguments in *Tatar* under Article 8 as no direct link between fumes and asthma could be proven to construct a viable claim under Article 2: *Tatar* (n31)

⁶¹¹ This is one of the major points made by Ezra Levant, prolific media commentator on the tar sands and the benefits of Canadian oil to the economy as well as its ethical superiority over alternative sources of the resource: Levant (n25)

⁶¹² Taylor discusses the merits and dilemmas presented by an anthropocentric approach to environmental protection under the auspices of human rights, but concedes that a focus predicated first and foremost upon ensuring human health is an unavoidable reality: Taylor, P. *Ecological Approach to International Law: Responding to the Challenges of Climate Change* (Routledge, London, 1998) 232-236

against pollution affecting individuals directly in terms of their health, or indirectly by affecting factors integral to their private, social and cultural life. The burden of severity on these non-biological impacts is understandably high, and their ability to restrict or cease industrial operations is acceptably weighed against the wider public interest in their continuation. However, the mere acceptance of the ability for such factors to potentially outweigh those public interests by the European court is of inimitable benefit to the aim of the piece.

Without this interpretative influence the case would have to be predominantly based on scientific evidence of a widely accepted nature of human health impacts directly resultant from the tailings ponds, and seepage therefrom or water consumption and contamination. Given the political fervor surrounding the tar sands with both sides of the debate firmly entrenched, and the economic benefit constantly weighed against the environmental impacts, the likelihood of such evidence being uncontested or not contradicted by a study illustrating an opposing result is miniscule. Thus, should direct human health impacts of the tailings ponds remain the only basis for litigious action against the projects, the prospect of success would be greatly reduced if not non-existent, and it is in this regard that the potential influence of the regional human rights mechanisms of Europe on Canadian judicial interpretation is unparalleled.

4.42 Access to Information

In order to facilitate a case against the projects licensed by the governmental authorities, a plethora of evidence would be required to overcome the aforementioned considerable burdens of proof required to suggest rights breaches. A number of issues

however make discussion of the right to access to such information in Canada and Alberta particularly complex. Firstly the federal nature of Canada requires two pieces of legislation governing the right, the federal text preserving the right in relation to federal institutions, information and decisions, and the provincial text concerning the same issues in relation to Alberta. These texts are entitled, the Access to Information Act⁶¹³ and the Freedom of Information and Protection of Privacy Act⁶¹⁴ respectively. Both texts consider a ‘right of access’⁶¹⁵ and place great weight on the disclosure of information relating to ‘a risk of significant harm to the environment or to the health or safety of the public, of the affected group of people, of the person or of the applicant.’⁶¹⁶ The jurisprudence of the European Court of Human Rights is of particular relevance to access to federal information, as the federal Act⁶¹⁷ does not oblige the federal government to disclose information of potential risk to the public automatically as the provincial text does.⁶¹⁸ Also the rulings of the Court in Strasbourg afford interpretative expansions of particular relevance to the construction of a case against the tar sands extraction projects, and the permitting thereof.⁶¹⁹

The case of *Guerra and others v. Italy*⁶²⁰ before the European court is the seminal case in this regard, and concerned an alleged breach of the right afforded under Article 10 of the European Convention, ‘to freedom of expression...freedom to hold opinions and to

⁶¹³ Access to Information Act, RSC 1985, c A-1,

⁶¹⁴ Freedom of Information and Protection of Privacy Act, RSA 2000, c F-25

⁶¹⁵ Access to Information Act (n588) Art. 4 (1) and Freedom of Information and Protection of Privacy Act (n589) Art. 6 (1)

⁶¹⁶ Freedom of Information and Protection of Privacy Act, (n589) Art. 32 (1)

⁶¹⁷ Access to Information Act (n588)

⁶¹⁸ Freedom of Information and Protection of Privacy Act, (n589) Art. 32 (1)

⁶¹⁹ Note should taken that lands reserved under the numbered treaties are a federal concern, and whilst laws of the province in which they are situated can apply within them (*R v. Hill* (1907) 15 O.L.R. 406 (C.A.) where it does not affect the purpose for which it was reserved (*R. v. Isaac* (1975) 13 N.S.R. (2d) 460, 9 A.P.R. 460 (N.S. C.A.)), their governance is generally within the competence of the federal legislature. This is something of a simplification of the relationship between provincial legislation and reserve lands, though this relationship is of no consequence to the suggestions made herein.

⁶²⁰ *Guerra v Italy*, (1998) 26 EHRR 357

receive and impart information...without interference by public authority.’⁶²¹ *Guerra* and her fellow applicants successfully claimed that the failure of the government to inform them of the risks presented by a chemical factory operating in proximity to their homes, and to advise any suggested action in the event of an incident at the factory breached their rights under Article 10.⁶²² In their judgement the Grand Chamber of the Court stipulated that;

‘Article 10 imposed on States not just a duty to make available information to the public on environmental matters, ... but also a positive obligation to collect, process and disseminate such information, which by its nature could not otherwise come to the knowledge of the public. The protection afforded by Article 10 therefore had a preventive function with respect to potential violations of the Convention in the event of serious damage to the environment and Article 10 came into play even before any direct infringement of other fundamental rights, such as the right to life or to respect for private and family life, occurred.’⁶²³

This decision affords a crucial interpretative expansion when read in conjunction with the domestic Canadian provisions by which the federal and provincial governments are bound in this regard. The ruling proposes that the right to access to information in circumstances where human health is potentially at risk obliges those authorities in possession of that information to issue a warning to those subject to that risk.

In relation to the potential impact of extraction projects and their tailings ponds, where evidence suggests a risk to human health is possible, Albertans who might be affected

⁶²¹ ECHR (n538) Art. 10 (1)

⁶²² *ibid.*

⁶²³ *Guerra* (n620) at 349 per Judge Rudolf Bernhardt, President of the European Court of Human Rights (at the time of the case)

ought to be warned. The application of the principle espoused in *Guerra*⁶²⁴ to domestic provisions would also therefore prohibit the concealment of any such. Thus the provisions of the European Convention⁶²⁵ elaborated upon by the case of *Guerra*⁶²⁶ outline an interpretation of great use to the aim of the piece. The significance of the potential application of this interpretative approach is that Albertans, indigenous and non-indigenous alike, would have the right to have information in relation to any threat to their health resulting from environmental damage caused by tar sands extraction activities divulged to them as a matter of course.

Such information would be crucial in the construction of a case against said projects and the licensing thereof. The disseminated information would considerably improve the likelihood of overcoming evidentiary requirements in any case seeking the cession or restriction of extraction in certain regions and not merely compensation for the original failure to disseminate information.⁶²⁷ Thus in the construction of a case against the impacts of the tar sands extraction projects on constitutionally protected lands reserved under Treaty 6 and Treaty 8, the interpretation of the federal Access to Information Act⁶²⁸ in line with the precedent set in the European jurisdiction by the *Guerra* case⁶²⁹ would likely be crucial.

Thus the *Guerra*⁶³⁰ case would require the dissemination of information as to the proven risks of industrial activities, and the *Tatar*⁶³¹ case adds the requirement for a

⁶²⁴ *Guerra* (n620)

⁶²⁵ ECHR (n538)

⁶²⁶ *Guerra* (n620)

⁶²⁷ The result of this suggestion being successful would be the granting of access to all scientific reports submitted during the licensing process.

⁶²⁸ Access to Information Act (n588) Company reports and other technical information might be afforded protection outside this forum on the basis of exemptions afforded under s.18 and at present is not required to be released publicly.

⁶²⁹ *Guerra* (n620)

⁶³⁰ *Guerra* (n620)

⁶³¹ *Tatar* (n31) para 88

precautionary approach underpinning said dissemination. Under this system, where the severity or existence of risk is unsure there is equally as strong a requirement to provide information to those potentially at risk, including how to mitigate it where possible. For the indigenous peoples occupying land in proximity to the tailings ponds however, the result of a breach would still be unsatisfactory, providing as it would only damages unless actual impacts were felt and proven to the standards described above. Similarly in specific instances of excessive water consumption the provision of information *ex post facto* would do little to mitigate harms done and likely to perpetuate within the wider ecosystem by virtue of the integral role of water therein. The provision of such information would however facilitate the construction of a stronger case against the extraction projects which could potentially result in the cession of said activities in part, or in their entirety, in and around culturally significant ecosystems.

4.5 Concluding Remarks

The regional sphere has again highlighted the pitfalls of utilizing rights affording protection from harms against the person in the context of the work. In particular the challenges of establishing sufficient proof of such harms curb their utility considerably. This is highly reflective of the position already seen in the domestic jurisdiction. In relation to the suppression of abilities as a result of the tar sands extraction projects however, three considerable additions to any action akin to that proposed as possible by the piece are evident. Firstly the explicit recognition of work as providing a standard of living rather than pecuniary reward is integral to suggestions of human rights affording protections to the ability to hunt and fish using traditional methods. Beyond this the purpose of work is also further expanded in the regional sphere to explicitly include benefits to the family, as contrasted to the

domestic context where this was added by judicial interpretation. Similarly the social benefit of work is also recognized in the provisions of the IACHR. These additions, whilst not directly enforceable against Canadian governmental authorities, are essential to supporting the central proposal of the piece that culturally relevant applications of other established rights offer protections from the impacts of the tar sands projects. This is especially true in relation to the ECtHR which the Canadian judiciary has cited directly as offering interpretative value to domestic provisions.

Separate to this assertion, it should be noted that the consistent application of the obligation to afford information, and access thereto, to those potentially harmed directly by any industrial action or its impacts upon the environment by the ECtHR is also of significance. Whilst rights to access to information are present in other human rights instruments globally, the pre-emptory element introduced by the European court is of considerable utility in the context of the piece. The obligation to afford data on suspected risks would not directly prevent the impacts upon indigenous culture, but said information might add significant weight to the other contentions made within the piece should an action akin to that suggested be brought.

and the right to life, liberty and security of person. The Commission has found that the government's actions in the oil sands region have violated these rights. The Commission has also found that the government has failed to provide adequate compensation and benefits to the affected communities. The Commission has recommended that the government take steps to address these violations and provide adequate compensation and benefits to the affected communities.

Chapter 5

International Human Rights Law and the Tar Sands

The Commission has found that the government's actions in the oil sands region have violated international human rights law. The Commission has found that the government has failed to provide adequate compensation and benefits to the affected communities. The Commission has also found that the government has failed to take steps to address the environmental damage caused by the oil sands. The Commission has recommended that the government take steps to address these violations and provide adequate compensation and benefits to the affected communities. The Commission has also recommended that the government take steps to address the environmental damage caused by the oil sands.

5.1 Introduction

Having considered the potential utility of provisions from the regional sphere, the piece will now focus upon international human rights instruments. A plethora of binding and non-binding texts might be considered in this regard, however three have been chosen to formulate the discussion herein. Firstly the twin covenants of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR) will be analysed. Finally the Declaration on the Right of Indigenous Peoples will be considered owing to the specificity of its provisions to the context at hand within the piece. All rights discussed will be assessed both in terms of their direct application by the indigenous populace and any interpretative value they might add to assertions made under the auspices of other rights discussed in the piece. The utility of the texts as a whole in procedural terms will also be discussed owing to the inherently voluntary nature of jurisdiction within the international context.

As a recognised state, Canada has also signed and ratified a number of binding international legal documents through which it has acquiesced to obligations to preserve and defend certain fundamental rights of its citizens. Similar agreements without legally binding effect have also been signed by the Canadian executive, as a representative of the Head of State.⁶³² Although these do not create enforceable legal obligations, they provide useful indications as to the purpose and intention of the Canadian state and its organs in relation to the aforementioned binding obligations as well as domestic provisions, and as such are valuable interpretative tools for judicial bodies. The Supreme Court of Canada has made their position on the application of binding international human rights instruments in Canadian law

⁶³² Queen Elizabeth II remains the Head of State of Canada, though this role is largely ceremonial, and the ability to sign treaties on behalf of the state is afforded to government ministers by the Governor General in her place.

abundantly clear. In the case of *Reference Re Public Service Employee Relations Act (Alta.)* the court stated that the domestic Charter should be interpreted in a manner as a minimum affording the same protection afforded in international instruments to which Canada has ratified.⁶³³ This decision was reiterated in *Slaight Communications Inc. v. Davidson*,⁶³⁴ and established such instruments as a *de facto* minimum standard for human rights within Canadian law. The interpretation of said law in line with the provisions of such instruments is therefore assured by domestic precedent, regardless of their own progress with regard to direct applicability via transformation by the legislature. International law provisions and non-binding declarations therefore present another supranational avenue for a potential case to be made against the Canadian state regarding damage caused to the indigenous population of the province of Alberta by the continued development and extraction of the tar sands.

In order to achieve such an interpretation of domestic provisions a comparable right, sharing common objectives and concepts, in the Canadian law is required as has been discussed in relation to regional provisions. As such the potential for such an interpretation will also be measured according to the availability of such a comparator right. The lack of such a right is not to suggest that Canada does not still have obligations within the international legal sphere in relation to any rights without domestic comparators which might be enforceable therein. The suggestion is merely that the possibility of the interpretation of domestic provisions in line with them is significantly reduced.

Various treaties specifically concerning human rights have been developed and entered into force in the international legal sphere. As with the majority of international law agreements, these are most commonly constructed under the auspices of and, once in force,

⁶³³ *Reference Re Public Service Employee Relations Act (Alta.)* [1987] 1 S.C.R. 313., 349

⁶³⁴ *Slaight* (n517) 1056-7

governed by, the United Nations and its subsidiary bodies. The ability of such bodies to enforce the measures to which the states have acquiesced has often been questioned, indeed enforcement mechanisms, and the requirement therefore for states to act with good faith in regard to their commitments has been a common criticism of international law as a whole since its inception. Before the modern bodies of international law were even conceived, Sir Henry Maine highlighted criticisms which continue to be levelled at the field of law to this day. Firstly Maine raised his concern that, ‘International Law was not declared by a Legislature, and it still suffers from want of a regular Legislature to improve and develop it,’ before going on to state, ‘International Law also suffers from the absence of any method of authoritatively declaring its tenor on some of its branches, and above all from the absence of any method of enforcing its rules, short of war or fear of war.’⁶³⁵ Such criticisms are echoed by contemporary jurists, whether academics or advocates, in legal systems the world over. As Steiner, Alston and Goodman elucidate, ‘international protection is weak in comparison with the ordinary sanctions of national legal-political systems.’⁶³⁶

International law is in spite of this however, agreed to embody a common ground among the peoples making up the international community, which has endured the test of time and remains to this day, namely, ‘a strong repugnance to the neglect or breach of certain rules regulating the relations and actions of states.’⁶³⁷ International human rights law is perhaps the most clear example of the need for protection in spite of the questionable efficacy of the system, and recognition of the desire to ensure such significant principles is all but universal. This is reflected in the unusually high number of ratified parties to the seminal binding human rights treaties of the International Covenant on Civil and Political Rights⁶³⁸

⁶³⁵ Maine, H. *International Law* (John Murray, London. 1888) 53

⁶³⁶ Alston, Steiner, Goodman (n175) 673

⁶³⁷ Maine, H. *International Law* (John Murray, London. 1888) 51

⁶³⁸ ICCPR. (n176)

and the International Covenant on Economic Social and Cultural Rights,⁶³⁹ a number which includes the state of Canada.⁶⁴⁰ The provisions of both texts afford a number of potential claims for breaches of the fundamental human rights enshrined within the text as a result of the damage wrought by the tar sands developments in the province of Alberta.

In contrast to the ICCPR, the International Covenant on Economic Social and Cultural Rights (ICESCR) is both less highly regarded and less widely ratified.⁶⁴¹ Protecting the so-called 'second generation rights,'⁶⁴² the ICESCR has been acquiesced to by fewer nations, but is ratified by Canada and as such can provide both interpretative and litigious alternatives for an action concerning breaches of human rights resulting from the effects of the tar sands developments in north eastern Alberta. Second generation rights have generally received both less media and juridical attention considering their shared birth with the more widely acknowledged, publicised and enforced civil and political, or 'first generation rights' protected within the ICCPR. Indeed this bifurcation is evident in legislation concerning human rights the world over. In spite of this however they encompass a number of issues which might otherwise require highly expansive interpretations of established civil and political rights. Such interpretations often result in high thresholds for breaches of rights which would be more easily accessible and utilisable were economic, social and cultural rights enforced more effectively.⁶⁴³

⁶³⁹ ICESCR (n254)

⁶⁴⁰ The Canadian government declared its accession to both covenants on 19th May 1976.

⁶⁴¹ Contrast states party to and signatories of the ICCPR in the United Nations Treaty Collection: <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en> (Accessed 30th July 2014) and those of the ICESCR:

<https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en> (Accessed 30th July 2014).

⁶⁴² A term attributed in the first instance to Karel Vasak. See: Vasak, K. *Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of law to the Universal Declaration of Human Rights*. UNESCO Courier 30:11, November 1977.

⁶⁴³ This is certainly true of the European regional context where the ECHR (n538) which embodies largely civil and political rights as we have seen in the previous chapter has had to be expansively interpreted to allow for considerations of environmental impacts.

Although these burdens of proof are not unwarranted, given the nature of the rights, the level of damage being demanded to uphold a breach highlights a concerning lack of less burdensome provisions with regard to the protection of fundamental aspects of life inextricably connected to the environment. For example food, accommodation, sanitation, water and cultural development, where restricted or not provided clearly result in damage to individuals but are not immediately life threatening. Thus, where civil and political rights breaches would often require severe and potentially irreversible damage to be wrought to the environment or a specific ecosystem and those reliant upon it, economic, social and cultural rights offer a more relevant, tailored and thus effective alternative approach.

A number of non-binding provisions regarding economic, social and cultural, even specifically environmental issues and rights, exist within the international legal sphere. However, the established nature of both juridical discussion and writing regarding the ICESCR, and the mechanisms and organisations governing it, set it apart from such provisions and other more issue-focused binding instruments. The implementation and monitoring procedures for the ICESCR in place under the auspices of the United Nations, and the Committee on Economic, Social and Cultural Rights⁶⁴⁴ provide a degree of implementation and arguably enforcement procedures not present in or available to instruments, binding or otherwise, concerning the same broad category of ‘second generation rights.’⁶⁴⁵ Thus the ICESCR provides not only provisions specifically drafted to consider the issues faced by the indigenous peoples of Alberta, but also allows access to an organisational

⁶⁴⁴ Established under: Optional Protocol to the International Covenant on Economic, Social and Cultural Rights GA Res. 832, UN GAOR, 63rd Session, UN Doc A/RES/63/117 (2008). (OP-ICESCR). Though it should be noted that Canada has not acquiesced to its jurisdiction to date.

⁶⁴⁵ The exception to this is arguably the Inter-American Court of Human Rights though as has been discussed Canada is not subject to its jurisdiction, and the purview of the Inter-American Commission is primarily civil and political and its decisions non-binding.

and reporting structure, the United Nations, which would not be available through other provisions, or the domestic or regional legal mechanisms previously considered.

For a case against the tar sands based in human rights law to be successful in any legal sphere, but especially in the domestic courts of Canada itself, the expansive interpretation offered by the broader international provisions concerning the same subject matter, and expanding upon it, would have to be applied as if it were the intended effect of the original drafters of the more narrow provisions of the domestic law. In this regard the willingness of the domestic judiciary to apply such an interpretative approach to Canadian constitutional provisions shown by their commitment to the living tree doctrine⁶⁴⁶ is integral. Although not unprecedented within the Canadian legal system,⁶⁴⁷ such interpretation requires either a manifest injustice to be assured should broad interpretation not be applied, or for the provisions from sources external to the domestic legal system to be utilised for the purpose of realising the intention of the original drafters.

In the case of the tar sands developments, many of the rights considered here as pertinent to a potential case against the damage wrought to the environment of Alberta and the consequential effects to the indigenous population of the province are all derogable in nature under the auspices of Articles 4 of both covenants.⁶⁴⁸ As such the executive can choose to not uphold their obligations arising from these rights in limited, extreme circumstances. Although these circumstances do not include economic considerations on a

⁶⁴⁶ *Edwards* (n196), 136

⁶⁴⁷ The seminal examples of this being *Re Powers to Levy Rates on Foreign Legations* [1943] S.C.R. 208 which considered the interpretation of international law into domestic legislation generally, and the case of *R v Brydges* [1990] 1 S.C.R. 190 at 214 which dealt specifically with the ICCPR.

⁶⁴⁸ ICCPR (n176) Art. 4 and ICESCR (n254) Art 4.

restrictive consideration of the drafting, certainly not in the case of the ICCPR,⁶⁴⁹ the Canadian judiciary has held, in the case of *Singh v. Minister of Employment and Immigration*⁶⁵⁰ that such factors may be taken into account. In relation to the tar sands this interpretation of the ‘reasonable limitations’⁶⁵¹ to the rights protected under the CCRF is potentially crucial.

The value of the tar sands developments is measured in trillions of Canadian dollars, and as such the allowance of some leniency in relation to their obligations would be unlikely to be held as an unreasonable expectation of the executive by the courts. Thus the damage to the wildlife of the region must be shown to be so considerable as to either outweigh the potential economic benefits, or give rise to a situation or possible outcome so unjust that it would be unthinkable for the judiciary to allow it to continue. The comparatively greater breadth and additional elements to the rights outlined, which the inter-American and international regimes afford in this regard, and the interpretation of kindred domestic provisions in light of them, is therefore fundamental. The additional breadth afforded reduces the potential for rebuttal of contentions in the face of the considerable economic benefits to extraction. Without these provisions therefore, the likelihood of success of any potential case against the licensing of tar sands developments based on the harm caused to environmental features in the aforementioned regions of Alberta and the suggested resulting human rights breaches to the indigenous people of the province would be significantly reduced.

⁶⁴⁹ The narrowly interpreted provisions of Article 18(3) of the ICCPR state that the rights contained therein may only be restricted, for the respect of the rights or reputations of others or for the protection of national security or of public order, or of public health or morals.

⁶⁵⁰ *Singh* (n217)

⁶⁵¹ CCRF (n174) s.1.

5.2 Harms Against the Person Prohibited by the International Covenant on Civil and Political Rights

5.21 Articles 6 and 7

Life and Freedom from Cruel Inhuman and Degrading Treatment

The provisions of common Article 1(2)⁶⁵² of the covenants are of little use in relation to the aim of the piece as existing jurisprudence of the Human Rights Committee indicates a lack of willingness on the part of the body to deliver Views based upon alleged breaches of this provision.⁶⁵³ The provisions of Article 6⁶⁵⁴ and 7⁶⁵⁵ of the ICCPR although not plagued by the same admissibility issues, are seemingly condemned to a similar fate in that any case brought based upon them is easily invalidated. The articles declare that, ‘Every human being has the inherent right to life,’⁶⁵⁶ and, ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment.’⁶⁵⁷ Their provisions almost mirror provisions afforded in Canada at the domestic level within the CCRF.⁶⁵⁸ A significant number of potential breaches arising from extraction projects and their by-products might be rebutted by the provision of water through pipelines or similar non-natural methods to avoid any threat to the nutrition and sanitation of individuals and thus their life. In a similar vein the debated issue of whether the knowing allowing of extreme thirst for its populace constitutes ‘inhuman and degrading treatment,’⁶⁵⁹ would be avoided with consummate ease.

⁶⁵² *ibid.* Art 1(2)

⁶⁵³ See for example the case of *Poma Poma* (n271) where the Committee heard the communication under Art.27 having refused to do so under Art. 1(2).

⁶⁵⁴ ICCPR (n176) Art. 6.

⁶⁵⁵ *ibid.* at Art 7

⁶⁵⁶ *ibid.* at Art 6

⁶⁵⁷ *ibid.* at Art 7

⁶⁵⁸ CCRF (n174) ss. 7 and 12

⁶⁵⁹ ICCPR (n176). Art. 7

The availability and potential for provision of alternate food sources would have a similar effect in relation to contentions based on these rights concerning the reduction in prevalence of traditional food sources. This would concur with other Views of the Human Rights Committee which would suggest that the obligations placed upon States to protect life are merely that deemed appropriate and adequate.⁶⁶⁰ Whilst the only considerations of the article have generally been in the context of prisoners, the emphasis is clearly on the basic provision of the necessities of life where a danger to said life is apparent or should have been.⁶⁶¹ Similarly successful views issued in relation to cruel, inhuman and degrading treatment have dealt with specific instances and prior knowledge of the actual or potential impact of authorised State actions. Such actions are also primarily concerned with detainees of the State, whether held lawfully or otherwise.⁶⁶² Thus in the construction of the case outlined as the aim of both this chapter and the work as a whole, Articles 6 and 7 of the ICCPR⁶⁶³ appear to offer nothing beyond that already available and directly enforceable in the domestic Canadian legal system. Certainly any indirect impacts caused by effects to wildlife, water courses or features of cultural significance would not be of evidentiary utility owing to the apparent lack of relativity in the application of the rights to life and freedom from poor treatment.⁶⁶⁴

⁶⁶⁰ *Ms. Yekaterina Pavlovna Lantsova v. The Russian Federation*, Communication No. 763/1997, U.N. Doc. CCPR/C/74/D/763/1997 (2002).

⁶⁶¹ The communication of *E. H. P. v. Canada*, Communication No. 67/1980, U.N. Doc. CCPR/C/OP/1 at 20 (1984) suggested a breach of the right to life arising from radioactive waste disposal which the Committee was willing to hear though declared the communication inadmissible on the basis of non-exhaustion of domestic remedies.

⁶⁶² See for example: *Moriana Hernandez Valentini de Bazzano v. Uruguay*, Communication No. 5/1977, U.N. Doc. CCPR/C/OP/1 at 40 (1984).

⁶⁶³ ICCPR (n176) Arts. 6 and 7

⁶⁶⁴ As has been discussed the right to life is upheld as being a simple prohibition on the arbitrary or knowing cause of severe harms to health threatening life or death, yet provides no right to a particular lifestyle. As Schabas notes the right is, 'intangible in scope, and vexingly difficult to define with precision.' Schabas, W. *The Abolition of the Death Penalty in International Law* (3rd Edition, Cambridge University Press, Cambridge, 2002)

In both instances direct and unavoidable impacts to human health would be the only effects which might conceivably be deemed to breach the rights.⁶⁶⁵ This is in contrast to the lack of provision of the necessities of life, and immediately eliminates all but contaminant and pollution based impacts in relation to those rights. As a result the focus of discussion concerning these articles is restricted to the unsafe storage of tailings material. Such impacts would be highly difficult to prove given the issues of scientific evidence already discussed. The suggested remedy, should such an impact be illustrated however, could be cession of the action causing said damage for an indefinite period. The minimum duration being the time taken for a new approach to be adopted with reduced or no known adverse impacts, or a mechanism to be put in place to avoid such harm. The economic and social cost to the province of Alberta, and indeed Canada as a whole, resulting from an unfavourable 'View' issued in relation to breaches of these rights by the UNHRC could therefore be immense.

As has been discussed however, the burden of proof which would be required for a breach of rights of such severity to be upheld by the committee resulting in the imposition of a permanent cession of extraction would be a significant one.⁶⁶⁶ Almost indisputable evidence of direct human health impacts would be required in order for such a breach to be upheld at all. Given the purely documental nature of the proceedings before the Committee, such evidence would potentially have to be even more persuasive, and as has been discussed, neither side of the debate is able to provide such data at present.⁶⁶⁷ Thus the likelihood of achieving a beneficial and enforceable result, and within a timeframe which would be of use to those individuals and groups suffering the adverse impacts of the extraction projects is small.

⁶⁶⁵ See for example the consideration of the remoteness of harm in *Mrs. Vaihere Bordes and Mr. John Temeharo v. France*, Communication No. 645/1995, U.N. Doc. CCPR/C/57/D/645/1995 (1996).

⁶⁶⁶ Indeed the committee does not have such an ability in terms of enforcing such an action.

⁶⁶⁷ As illustrated by the statement of the provincial government relating to fish stocks impacted upon by water consumption in the tar sands industry. See: WMSLAR (n278)

The application of the right to life and freedom from inhuman treatment in the international forum is highly similar to that seen in the European regional context. Only direct and severe harms to the individual are seen as breaches of such rights. The inability to prove a strong enough connection between industrial fumes and asthma in a child in the case of *Tatar v. Romania*⁶⁶⁸ excluded the use of the right to life in the opinion of the European Court. From the *obiter dicta* in the cases of *Oneriyildiz*⁶⁶⁹ and *Budayeva*⁶⁷⁰ it would seem that, as discussed only where an actual loss of life has occurred will a breach of the right to life be upheld by the ECtHR, though the case of *Guerra*⁶⁷¹ suggests serious and foreseen risk may in extreme circumstances do so also. The two European regional and international fora can certainly be distinguished from that of the Inter-American jurisdiction in which these rights have been afforded to groups and given rise to demanded necessary precaution on the part of the state before undertaking potentially harmful action. This is clearly seen in the communication concerning the *Yanomami*⁶⁷² people of Brazil, and is starkly contrasted to decisions at the European and international levels of enforcement.

The well documented length of time taken to consider a case owing to the workload of the committee, coupled with the nature of the ‘Views’ issued being non-legally binding, further reduces the utility of this mechanism almost to the point of total inefficacy with regards to the aim of the piece owing to the need for urgent action to halt the impacts being sustained.⁶⁷³ The number of States who have refused or failed in absolute terms to act in the face of an unfavourable view is small, however the fact remains that any response to such

⁶⁶⁸ *Tatar* (n31)

⁶⁶⁹ *Oneriyildiz v. Turkey*, Application No. 48939/99 (ECHR 657, 30th November 2004)

⁶⁷⁰ *Budayeva and Others v. Russia*, Application No. 15339/02 (ECHR 20th March 2008)

⁶⁷¹ *Guerra* (n620)

⁶⁷² *Yanomami* (n436)

⁶⁷³ See in this regard the comments of Donnelly on the weaknesses of the UNHRC: Donnelly, J. *Universal Human Rights in Theory and Practice* (2nd Edition, Cornell University Press, New York, 2003) 133-135

proclamations is ultimately consensual.⁶⁷⁴ Similarly the degree of compliance, as rarely is a remedy a singular act, is also subject to the whim of the State in question. Thus it is the gravitas alone of a favourable ‘View’ from the Human Rights Committee with regards to a breach of the Articles 6 and 7 arising from the effects of the tailings ponds upon First Nations peoples which would be pursued as a great step towards the end of said impacts.

The similarity in terms of drafting of a number of articles of the ICCPR to those found within the Canadian Charter of Rights and Freedoms⁶⁷⁵ in the domestic jurisdiction context also considerably reduces their efficacy as bases for a litigious action of the type outlined in that forum. The identical drafting or common integral features eliminates the interpretative value of the provisions in relation to the domestic law, except where jurisprudence concerning the provisions suggest a broader approach to the application of the principles enshrined within the text than that found at the domestic level. Under the Committee there is in theory no regard given to previous judicial decisions at other levels of enforcement.⁶⁷⁶ In practice however, the prospect of a successful outcome is not great in the face of a weight of domestic and regional precedents to the contrary, or existing awards and measures to mitigate any harms. Where such decisions are validly based on evidence, or the lack thereof this is especially true, as exhaustion and adequacy of domestic remedies is a primary concern of the Committee.⁶⁷⁷

Thus rights afforded under the Covenant with exactly mirrored or highly similar provisions in the domestic, and regional context are immediately of reduced utility in relation

⁶⁷⁴ *ibid.* 133-135

⁶⁷⁵ CCRF (n174)

⁶⁷⁶ Whether regional, domestic or indeed other international tribunals.

⁶⁷⁷ See for example: *Moriana Hernandez Valentini de Bazzano v. Uruguay*, Communication No. 5/1977, U.N. Doc. CCPR/C/OP/1 at 40 (1984).

to the aim of the piece. As such rights such as Articles 6 & 7,⁶⁷⁸ which have provisions clearly designed to impose the same obligations, are of restricted utility for the purposes of the piece. By contrast Articles which offer novel or expanded interpretative approaches to established domestic rights provide alternative bases for a case against the tar sands projects. This is especially pertinent where impacts are incurred as a result of the lackadaisical storage of tailings material in unsecure ponds which might have the necessary direct impact to human health, but this is difficult to prove to a satisfactory standard.

5.3 Suppressions of Abilities Protected by the International Covenant on Civil and Political Rights

5.31 Article 17

Private and Family Life

The precedents of the European regional system in relation to the notion of environmental damage giving rise to breaches of fundamental human rights concern mainly Article 8 of the European Convention. The sheer weight, and in a number of instances similar facts of cases originating from that jurisdiction is of particularly significant utility with regards to the construction of a case against the adverse effects outlined above. This is true whether there are direct human health impacts or those to resources or abilities which would be considered part of, ‘private and family life.’⁶⁷⁹ The ‘right to respect for his private and family life,’⁶⁸⁰ however bears no direct comparator in Canadian or provincial Albertan domestic law. The Canadian Supreme Court has afforded the precedents of the European

⁶⁷⁸ ICCPR (n176)Arts. 6 and 7

⁶⁷⁹ *ibid.* Art 17

⁶⁸⁰ ECHR (n538) Art. 8

courts status as a source of valid interpretative aids to Canadian law,⁶⁸¹ and has established that the liberty and security of a family is also to be protected under the provisions of Article 7 of the Charter.⁶⁸² Despite this, the presence of an almost identical right in the International Covenant⁶⁸³ adds considerable weight to the contention that it is applicable via interpretation in Canada itself and creates obligations with regards to the tar sands industrial projects and the licensing thereof.

The text of the ICCPR has not been incorporated into the domestic law of Canada. However, the judiciary has on numerous occasions stipulated and reinforced its commitment to, ‘Canada’s obligations as a signatory of international treaties and as a member of the international community.’⁶⁸⁴ Specifically, there is clear precedent, ‘that the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.’⁶⁸⁵ As such in relation to the precedents established under the European system, the presence of this identically drafted provision in the ICCPR ensures that the precedents of that system can be more persuasively read into domestic law with the same subject matter. Article 17 of the Covenant⁶⁸⁶ itself has limited precedents elaborating upon its drafting to be considered as a viable basis for a case against the permitting of tar sands extraction projects alone. However, the access this right to non-interference with family life grants to precedents both in terms of judicial decisions and interpretation concerning the impacts to dependents of individuals is invaluable.

⁶⁸¹ Following the case of *R v. Rahey* [1987] 1 S.C.R. 588, 78 N.S.R. (2d) 183.

⁶⁸² In the case of *Children’s Aid Society* (n553) and expanding upon the CCRF (n174) s. 7

⁶⁸³ ICCPR (n176)Art. 17 (1)

⁶⁸⁴ *R v. Hape* [2007] 2 S.C.R. 292, 2007 SCC 26 at 53

⁶⁸⁵ *Slaight* (n517) 1056-7 quoting *Reference Re Public Service Employee Relations Act (Alta.)* [1987] 1 S.C.R.

313., 349

⁶⁸⁶ ICCPR (n176)Art. 17 (1)

Interpretations in respect of the family unit have however been specifically raised by the Canadian courts. In the case of *B.(R.) v Children's Aid Society of Metropolitan Toronto*,⁶⁸⁷ the Canadian Supreme Court ruled that section 7 of the CCRF⁶⁸⁸ providing, 'the right to life, liberty and security of the person'⁶⁸⁹ should be, 'given a broad interpretation to the concept of "liberty" and elevated the concept of the "integrity of the family unit."⁶⁹⁰ The court went on to affirm that this included the, 'right to bring up and educate children in accordance with their conscientious beliefs.'⁶⁹¹ This judgement was heavily influenced by the case law of the United States of America, and indeed Lamer C.J. refers to, 'the American experience'⁶⁹² in his judgement. Seeking numerous authorities to secure this principle as one of constitutional weight, the Court also referred to the regional instruments of Africa,⁶⁹³ America⁶⁹⁴ and Europe⁶⁹⁵ in reaching its decision to apply this broad interpretation of the CCRF.

The ICCPR is itself referred to with Lamer C.J. suggesting that, 'The approach that I am adopting also appears to me to be supported by the international human rights instruments on which the framers of our *Charter* drew extensively.'⁶⁹⁶ This connection is attributed to the expansive element of section 7 of the CCRF. The provision states that liberty should only be deprived, 'in accordance with the principles of fundamental justice,'⁶⁹⁷ a threshold which the justification for deprivation in the case in *B.(R.) v Children's Aid Society of Metropolitan*

⁶⁸⁷ *Children's Aid Society* (n553)

⁶⁸⁸ CCRF (n174) s. 7

⁶⁸⁹ *ibid.*

⁶⁹⁰ *Children's Aid Society* (n553) para. 11

⁶⁹¹ *ibid.* Here Lamer C.J. referred to the cases of *R. v. Jones*, [1986] 2 S.C.R. 284 and *Morgentaler* (n257) in which this notion had been conceived (*Jones*) and expanded (*Morgentaler*) to the formulation he applies.

⁶⁹² *Children's Aid Society* (n553) para. 11

⁶⁹³ African [Banjul] Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5; 1520 UNTS 217; 21 ILM 58 (1982)

⁶⁹⁴ ADRD (n249)

⁶⁹⁵ ECHR (n538)

⁶⁹⁶ *Children's Aid Society* (n553) para. 38

⁶⁹⁷ CCRF (n174) s. 7

*Toronto*⁶⁹⁸ was deemed as not meeting. Thus from the precedent laid down in this judgement the Canadian domestic system has recognised that, ‘Family connections, in particular, give rise to special protections under the principles of fundamental justice, enshrined in the *Charter*, and under international human rights treaties, to which Canada is a Party.’⁶⁹⁹ The decision thus opens the possibility for the provisions of Article 17 of the ICCPR to be interpreted into domestic Canadian law as well as utilised under the individual complaints procedure established under the First Optional Protocol to the ICCPR,⁷⁰⁰ which Canada ratified in 1976.⁷⁰¹

Note should be made that the Human Rights Committee has in similar cases considered the complaints made under Article 17 (amongst others) collectively under the auspices of Article 27 concerning culture, an example being the view in relation to *Poma Poma v Peru*.⁷⁰² This though does not preclude the validity of the contention in the case of the First Nations of Alberta. Numerous sub-divisions of culture are present in the province and as such protection of a single culture, as heterogeneous members of the Committee might perceive it, would not be possible. This therefore arguably necessitates the consideration of the issues under Article 17.⁷⁰³ As a potential basis for the case against the extraction projects therefore, the right to, ‘privacy, family, or correspondence’ within the ICCPR⁷⁰⁴ and similar

⁶⁹⁸ *Children’s Aid Society* (n553)

⁶⁹⁹ Bassan, D. ‘The Canadian Charter and Public International Law: Redefining the State’s Power to Deport Aliens’ (Fall 1996) 34(3) *Osgoode Hall Law Journal* 583, 624

⁷⁰⁰ OP-ICCPR (n255) Art. 2

⁷⁰¹ Accession of Canada to the protocol is recorded as 19th May 1976 in the United Nations Treaty Collection Database. See: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en Accessed 30th July 2014.

⁷⁰² *Poma Poma* (n271)

⁷⁰³ This contention is reliant upon the notion that the alternative to an action brought by one individual representing all First Nations impacted would be a considerable number of separate claims from numerous Chiefs of a variety of tribes raising the same issues on behalf of their respective Nations. This was the case in the *Lubicon Lake Cree v Canada* (n729) view of the Committee where Bernard Ominayak represented his Cree, though to say this band practised the same culture as the Beaver Lake Cree despite similarities would be remiss.

⁷⁰⁴ ICCPR (n176) Art. 17 (1)

provisions within the European convention, discussed above,⁷⁰⁵ are raised from being merely an interpretative aid to other established rights to a breached provision in its own right. Such a complaint would however be subject to the exhaustion of domestic remedies concerning the same or similar right, and likely only be pursued in the event of a failure to do so. Similarly it would face the same jurisprudential contentions outlined above concerning whether a breach of the ability of an individual to provide for their family could be interpreted as incorporating the requisite degree of cultural relativity which is afforded explicitly in other rights. As such the discussion of the notion of an action in this legal forum separately is not necessary.

In relation to the indigenous peoples of Alberta in the regions impacted upon by the tar sands extraction projects, the recognition of the family unit when considering rights drafted originally for application only to individuals allows for the consideration of resultant breaches thereof against a dependent family unit. Thus, as in the case of *B.(R.) v Children's Aid Society of Metropolitan Toronto*,⁷⁰⁶ a breach of section 7 of the CCRF⁷⁰⁷ in relation to one member of a family might be considered greater should the impact also be felt by other members of that unit, and allows another member to enforce the obligations of the State on their behalf. The inability of an individual to pass on the knowledge of his ancestors to his own descendants, dwell on traditional lands or practice traditional techniques to provide for his family, owing to the destruction of factors essential in that endeavour might thus be deemed a breach of his, and their, rights.

The domestic Canadian human rights provisions embodied by the CCRF reflect this reality to an extent by declaring that all interpretations of the rights afforded in the Charter

⁷⁰⁵ ECHR (n538) Art. 8

⁷⁰⁶ *Children's Aid Society* (n553)

⁷⁰⁷ CCRF (n174) s. 7

should be conducive to the preservation of the multicultural heritage of the nation.⁷⁰⁸ However, no defined positive action is required, and as such elements of cultures to be protected must still be aligned to particular rights. In this regard the provisions of Article 17 of the ICCPR⁷⁰⁹ are of potential utility in relation to the aim of the work. The article emphasises the significance of family, a concept absent in the rights provided under the CCRF,⁷¹⁰ yet integral to the culture of First Nations Indians present in the regions affected by the tar sands extraction projects.⁷¹¹ The difficulty in relation to the expansive approach offered by Article 17 is found ironically in the very reason it is potentially so useful, its absence from the CCRF. This is however remedied by the approach adopted in the *Children's Aid Society* case⁷¹² where impacts to the livelihood of the primary provider for a group of dependents were deemed as breaches of their rights also.

In the case of the tar sands extraction projects, the negative impact upon the availability or contamination of water from natural sources in the northeast of Alberta and resultant impacts to wildlife might conceivably restrict all of these culturally specific practices. Whilst the impact to family groups in general would undoubtedly add weight to any case brought against the tar sands developments, this is not the most promising avenue Article 17 provides. The recognition of the family in this context allows for it to be argued that the individual's liberty is infringed by his inability to raise and provide for his family in the manner to which he has become accustomed.⁷¹³ In the case at hand this would be

⁷⁰⁸ CCRF (n174) s. 27

⁷⁰⁹ ICCPR (n176) Art. 17

⁷¹⁰ Indeed the word 'family' is conspicuously absent from the entirety of the CCRF and rights afforded under it, though the significance of family has been raised by precedent founded in cases concerning those rights.

⁷¹¹ Carter and Hildebrandt present the significance of 'kinship' in Native American culture and highlight how it was manipulated by European settlers, and in particular during the negotiations of the numbered treaties: Carter, S and Hildebrandt, W. *A Better Life With Honour* in Cavanaugh, Payne, Wetherell. (n135) 255-256

⁷¹² *Children's Aid Society* (n553)

⁷¹³ Such an impact might be argued to, 'outrage standards of decency' as prescribed in *Miller et al. v. The Queen*, [1977] 2 SCR 680, 681 in relation to the standard necessary to breach the freedom from ill-treatment of

according to the traditional practices of the First Nations tribe to which he, and his family, belong. As such the interpretative elaboration afforded expands upon the domestic provisions most difficult for the Canadian government to justify derogation from, those protecting life and liberty. As a result the provisions potentially include recognition of the detrimental impact to indigenous families of the inability to express their culture and pass on their traditional knowledge. In the pursuit of the basis for a case constructed in human rights law aimed at the cession or restriction of the permitting of tar sands developments in regions of cultural significance to the indigenous peoples of Alberta, it is this link between their culture and the land they inhabit which must be established. Article 17 of the Covenant⁷¹⁴ arguably adds such an interpretative progression to the domestic provisions of Canada under the CCRF.⁷¹⁵

5.32 Article 27

Enjoyment of Culture

Article 27 of the Covenant by contrast goes beyond the more traditional and widespread conception of the right to freedom of religion and belief. The article protects not only the right to be a part of a community, or to manifest and practice ones culture, but creates a link between, and as such enforces both of these fundamental rights as part of the same whole. The unique nature⁷¹⁶ of Article 27 provides a broader approach than the domestic and regional texts discussed with regards to the concepts of community and culture, protecting, ‘the right, in community with the other members of their group, to enjoy their own

section 12 of the CCRF, but also with the similar approach to the application of section 7 adopted in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519.

⁷¹⁴ ICCPR (n176). Art. 17

⁷¹⁵ CCRF (n174)

⁷¹⁶ Note should be made here that there is a lack of a specific right concerning culture afforded in the European context.

culture.’⁷¹⁷ There is recognition in this drafting of not only a collective element to the right, but also, in the instances of, ‘ethnic, religious or linguistic minorities,’⁷¹⁸ of the inextricable link between those groups and the culture they embody and practice.

The lack of a direct comparator right in relation to an explicit right to culture limits the applicability of Article 27 as discussed in relation Articles XIII and XV of the ADHR. However, the significance of communications before the Human Rights Committee concerning this right and the interpretative breadth they add to these highly similar provisions warrants the discussion of the article separately. In particular the strength of connection to particular environmental features which will be discussed, as opposed to with particular tracts of land accepted as belonging to a peoples in law is of great significance. The Inter-American system, as discussed, has focused on rights to ancestral lands in many decisions. However in relation to some First Nations the title to such lands is another legal dispute in itself. As such to rely upon such applications of these common rights would be to potentially introduce another jurisprudential hurdle to overcome for the litigation suggested as possible by the piece.

The link between environmental features and indigenous groups presented, or its interpretation into the domestic or regional provisions to which the Canadian state is subject, would be an integral element of the foundation of any action suggested by the piece. This is especially true where in such an instance, the damage wrought by said developments upon wildlife in the regions affected was argued to have such dire consequences for the indigenous peoples of that region that it would constitute a breach of binding human rights law. This was

⁷¹⁷ ICCPR (n176)Art.27

⁷¹⁸ *ibid.* Art. 27

held to be the case in *Poma Poma v Peru*,⁷¹⁹ although the View raised the issue of free, prior and informed consent, the Committee did not apply the standard.⁷²⁰ Free, prior and informed consent, suggests the affording of a veto to indigenous peoples whose traditional lands are at risk owing to commercial developments. This is offered once the details of projects and their impacts are presented to such peoples. Whilst this concept is potentially applicable to the context considered in the piece, and would undoubtedly solve many of the issues discussed herein if upheld, its applicability in practice is questionable.⁷²¹ Huseman and Short go further in this assertion in relation to the context of the piece, stating that, ‘To date there is no legal framework within the Constitution of Canada that recognises the international principle of Free, Prior and Informed Consent.’⁷²² As such it would add another element of uncertainty to any potential action based upon the suggestions of the piece, especially as its full application in practice is largely unprecedented.⁷²³ As well as highlighting this principle however, the indigenous peoples of the region were said in the View issued by the Committee to have had their ability to partake in traditional activity inhibited by the State to the extent that the existence of their culture was also potentially placed in jeopardy.⁷²⁴ As such whilst not providing the most rigorous, enforceable or adhered to right for the basis of any attempt to demand the cession of tar sands developments, Article 27 provides a potentially crucial expansion upon the more narrowly drafted, yet more easily enforced, provisions found in the domestic and regional legal systems to which the Canadian state is bound.

⁷¹⁹ *Poma Poma* (n271)

⁷²⁰ See in this regard: Goecke, K. ‘The Case of *Angela Poma Poma v. Peru* before the Human Rights Committee: The Concept of Free, Prior and Informed Consent and the Application of the International Covenant on Civil and Political Rights to the Protection and Promotion of Indigenous Peoples’ Rights (2010) 14 Max Planck Yearbook of International Law 337

⁷²¹ Anton, D.K. and Shelton, D.L. *Environmental Protection and Human Rights* (Cambridge University Press, Cambridge, 2011) 431

⁷²² Huseman, J. and Short, D. (n17), 228

⁷²³ Ward, T. ‘The Right to Free, Prior and Informed Consent: Indigenous Peoples’ Participation Rights in International Law’ (2011) 10(2) *Northwestern Journal of International Human Rights* 54

⁷²⁴ The case however focused on traditional ‘economic’ activity, which owing to the decision in *Badger* (n269) is not able to be protected under domestic Canadian law, the focus of protection instead being upon the use of fauna as a source of food.

In relation to the construction of a case based in human rights law challenging the impacts of industrial projects on the traditional and reserved lands of the indigenous peoples of Alberta, the collective element of the right afforded is also of considerable significance. First Nations tribes express their culture collectively, sharing in traditional activities, with hunters sharing their spoils amongst the community and teaching children of the group indigenous practices and techniques, passing knowledge not only to their biological ancestors, but to those of their tribe or Cree. The drafting of Article 27⁷²⁵ allows for this reality and threats thereto to be taken into account when deciding whether the rights drafted for application to individuals have been breached.⁷²⁶

For the construction of a case challenging particularly the licensing of excessive water consumption by the extraction projects of the regions impacted, the consideration of the First Nations tribes of Alberta as groups sharing a common culture which they express through interaction with one another is key. The application of the rights afforded under the domestic human rights provisions of Canada, through interpretation in line with those of the ICCPR, arguably prevents the Canadian and Albertan governments from meeting any individual needs for water by routing pipelines to indigenous communities. This is achieved by demanding the consideration of the culture, and manifestations thereof, of the groups as a whole and thus the necessity of the use of natural sources of water to perpetuate practices and knowledge crucial to their continued existence in the consideration of the individual

⁷²⁵ ICCPR (n176) Art.27

⁷²⁶ This was certainly taken into the consideration of the Poma Poma communication where the continued existence of the inimitable culture was significant in the View of the Human Rights Committee. See: *Poma Poma* (n271)

complainant.⁷²⁷ In this regard therefore the notion of collective manifestation introduced by the ICCPR, and clearly defined as fundamental to ensuring the freedoms afforded within Article 27, is crucial to avoiding any proposed margin of appreciation on the part of the State.

The right allows for the broader highly social manifestations of cultural expression practiced by the First Nations of Alberta to be recognised also. Thus, the provision of sufficient water to meet the needs of individuals alone, which could be fulfilled by the governmental and industrial authorities through culturally inappropriate means, would not be adequate to meet the obligations of Canada under the ICCPR. Such a subjective approach has been adopted in the cases of *Poma Poma*⁷²⁸ and *Lubicon Lake Cree Band*⁷²⁹ (which specifically concerned Canada and its First Nations peoples) by the Human Rights Committee of the UN, where the potential for the extinguishment of an inimitable culture is present. Note should be made however that in both cases tangible barriers to traditional activities were required to be evidenced to the Committee, and undoubtedly such a requirement would be placed upon a communication such as that suggested by the piece. This requirement of tangible barriers precludes the use of indirect effects such as those of tailings not proven to directly affect individuals but inhibitive of wildlife key to cultural practices with regards to this contention. Similarly any other such disturbances discussed, such as those in relation to caribou concerning noise and physical impediments on migratory pathways would not be deemed as directly inhibiting the ability to manifest culture. The previously discussed issues with proving the existence of such barriers with undisputed scientific certainty would also undoubtedly again restrict this assertion.

⁷²⁷ In spite of the individual nature of communications, a representative of a culture or identifiable group can be appointed to bring an action. See for example: *Lubicon Lake Band v. Canada*, Communication No. 167/1984 (26 March 1990), U.N. Doc. Supp. No. 40 (A/45/40) (1990).

⁷²⁸ *Poma Poma* (n271)

⁷²⁹ *Lubicon Lake Band v. Canada*, Communication No. 167/1984 (26 March 1990), U.N. Doc. Supp. No. 40 (A/45/40) (1990).

The communications of *Lansman* and *Aarela and Nakkalajarvi* submitted to the United Nations Human Rights Committee are also worthy of note in relation to the degree of impact necessary to suggest a breach of provisions pertaining to culture, such as Article 27 of the ICCPR and Article 20 of the DRIP to be discussed. Both concerned reindeer husbandry and its role in the continuation of the culture of the Sami indigenous peoples of Finland. The impacts of the restrictions upon traditional reindeer herding were considered in both instances and the Committee discussed the severity of impact required to breach Article 27 of the ICCPR. Two concepts emerged, that of a 'limited impact' and that of 'substantial interference.' In both instances the View of the Committee was that an impact must constitute substantial interference with culture, and not be merely a limited impact upon it. Elaborative statements in both however suggested that the threshold for constituting a 'substantial interference' was a threat to the survival of a culture. Limited impacts were those deemed justifiable to achieve broader social goals, assuming no direct threat to life or physical integrity was present. Thus for the purposes of the thesis they offer little beyond the interpretative guidance afforded by the decisions in *Awes Tingni*⁷³⁰ and *Saramaka*,⁷³¹ or the Views in *Poma Poma*⁷³² and *Lubicon*⁷³³ which have been discussed. Whilst the terminology used alters, the consideration remains identical. Where a threat to life or the continued existence of a culture cannot be sufficiently proven, the outcome of an action will be determined by whether the economic benefits of the tar sands can outweigh the environmental harms caused in the opinions of the respective judicial body.

⁷³⁰ *Awes Tingni* (n475)

⁷³¹ *Saramaka* (n458)

⁷³² *Poma Poma* (n271)

⁷³³ *Lubicon* (n729)

The wording of the right is of particular relevance to the First Nations peoples and their culture in this regard owing to the inclusion of the concept of their ‘own’ culture. To infer that the Canadian authorities would be permitted to force another culture upon the First Nations peoples had this drafting approach not been used would be remiss. The term ‘own’ is however of particular relevance to the reclamation of tailings ponds. The few ‘successful’,⁷³⁴ examples of reclamation of the tailings ponds have restored the land within which they are situated to alternative ecosystems, such as pastures fit for the grazing of bison.⁷³⁵ Under the regulatory system imposed by the provincial authorities of Alberta under the Environmental Protection and Enhancement Act⁷³⁶ all land used for the storage of tailings is to be returned to ‘equivalent land capability.’⁷³⁷ The meaning of this stipulation is the ability to, ‘support various land uses after conservation and reclamation,’ which must be, ‘similar to the ability that existed prior to an activity being conducted on the land, but that the individual land uses will not necessarily be identical.’⁷³⁸

The aim of the piece is, in part, to preserve the ability of the First Nations tribes resident on land impacted upon by the tar sands projects, directly or otherwise, ‘to enjoy their own culture,’⁷³⁹ and not a version thereof imposed by the land of ‘equivalent capability,’⁷⁴⁰ arbitrarily left by the industry following reclamation. As such the ecosystem present in the region prior to extraction must be preserved, or restored to the capability to support their cultural needs, and not a mere equivalent.

⁷³⁴ The reclamation of land used to store tailings material to ‘equivalent capacity’ as is demanded of the companies involved in the extraction of the tar sands by the provincial authorities of Alberta, is one of the most vociferously contested aspects of the debate surrounding the projects by the First Nations peoples.

⁷³⁵ This was the case in the reclamation of a Suncor tailings pond, which is now heralded as an indication that full reclamation of tailings ponds is achievable, though the health of the bison placed on the land has been questioned.

⁷³⁶ Environmental Protection and Enhancement Act, RSA 2000, c E-12

⁷³⁷ *ibid.* s.146(b)

⁷³⁸ *ibid.* s.146(c)

⁷³⁹ ICCPR (n176) Art. 27

⁷⁴⁰ Environmental Protection and Enhancement Act, RSA 2000, c E-12 at Art. 146 (b)

Such considerations were undertaken in the cases of the *Lubicon Lake Cree v. Canada*,⁷⁴¹ and *Poma Poma v. Peru*.⁷⁴² Although these can be factually distinguished from the case at hand, it would appear from their jurisprudence that such an extinguishment of a culture as a consequence of industrial activity which has failed to consider or mitigate such impacts breaches the right in question. In the construction of a case against the licensing of the tar sands therefore the link to a specific culture, and by extension features with which it is inextricably linked afforded by this right is essential. Without this connection the current framework for restoring and protecting the environment following the exploitation of the region to obtain the tar sands raw material would ensure merely the restoration of a healthy and stable environment. In itself this aim is a laudable one, and far more demanding than regimes imposed upon industries in many natural resource extraction projects globally. However, the culture and society of the First Nations peoples is predicated upon interaction with the native environment spanning centuries, and which has given rise to indigenous knowledge inherited through numerous generations. Thus to restore an ecosystem which does not support this interaction would, as a consequence, eradicate any potential ability to enjoy that culture entirely, breaching the protection afforded under Article 27.⁷⁴³

⁷⁴¹ *Lubicon* (n729)

⁷⁴² *Poma Poma* (n271)

⁷⁴³ ICCPR (n176) Art. 27

5.4 Harms Against the Person Prohibited By The International Covenant on Economic Social and Cultural Rights

5.41 Article 12

Environmental Hygiene

Article 12 of the Covenant suffers, like many in the text from definitional challenges. Affording a right to physical and mental health the provision places an onus on the ratifying state to improve, ‘all aspects of environmental and industrial hygiene.’⁷⁴⁴ As has been discussed however, the drafting of the article protecting ‘environmental hygiene’ akin to ‘equivalent capacity’ as is the case in the domestic regulations regarding the reclamation of land following extraction⁷⁴⁵ restricts its utility in relation to the aim of the piece. The inclusion of the notion of hygiene, and not capacity or safe and healthy conditions, implies a restriction of protection to an environment that is not harmful to the individual rather than one which is able to provide the most basic of needs. To paraphrase, a clean bathroom would not necessarily be supplied with running water for a person to bath, and it is this issue, albeit somewhat fastidious, which arises owing to the drafting of Article 12. As the obligation to strive to improve this hygiene is framed within the right to the enjoyment of ‘the highest attainable standard of physical and mental health,’⁷⁴⁶ it is immediately further constrained solely to quantifiable and undisputed impacts to health.

Article 12(2)(b) requires the state parties to the Covenant to take steps necessary for, ‘the improvement of all aspects of environmental and industrial hygiene’ in order to, ‘achieve the full realisation of,’ the right to the standard of health specified in the previous subsection

⁷⁴⁴ ICESCR (n254) Art. 12(2)(b)

⁷⁴⁵ As stated in the Environmental Protection and Enhancement Act, RSA 2000, c E-12 s.146(b)

⁷⁴⁶ ICESCR (n254) Art. 12(1)

of the article.⁷⁴⁷ The inclusion of the environment as an aspect of physical and mental health standards is not explicitly present in the domestic and regional provisions concerning the same subject matter. Effects to the environment of the province, including its wildlife, including crucially the migratory patterns and numbers of the boreal woodland caribou outlined, would consequently affect the physical and mental health of the indigenous populous by reducing or potentially removing entirely a preferred source of food and cultural enrichment. In relation to a potential case against the tar sands developments in the province of Alberta, this provision has significance in relation to all the effects under consideration within the thesis. The provision is undeniably of far greater importance in relation to arguments pertaining to the effects on water and air quality in the region. However, the effects to the ecosystem in which the caribou (amongst other culturally significant species) dwell, and the indigenous population consequently hunt, are also covered within its scope.

To fail to mention the provision as a potential basis for a case against the developments on the grounds of effects to wildlife, given its almost unique unequivocal consideration of the environment, in spite of its inherent limitations would be remiss. This is as similar provisions at other levels of legal enforcement to which Canada is subject would require a favourable judicial interpretation of the quality of the environment as constituting a significant factor adversely influencing health or the ability to secure culturally relative ‘necessities of life.’ Case law suggests the application of a low enough threshold to that connection for a breach to be suggested as the basis of a case may not be forthcoming.⁷⁴⁸ In this instance this is especially pertinent given the availability of other food sources to ensure

⁷⁴⁷ *ibid.* Art. 12(2)

⁷⁴⁸ The reluctance of the various judicial bodies considered to uphold breaches of rights concerning the physical integrity and life of the individual is supportive of this statement. Only where the impacts are grossly severe are such claims upheld. See *Yakye Axa* (n31)

basic dietary requirements and the lack of an explicit association to culture in the drafting of the right.

Considering environmental impacts in terms of human health directly prevents the causal links discussed being suggested without a high level of scientific evidence to accompany them. No statements with regard to the effects on the health of the indigenous populace as a result of proven impacts to wildlife or water levels can therefore be assumed solely on the basis that traditional culturally significant practices rely upon them. Cases in a number of jurisdictions have illustrated that proof of a high quality and lacking in contention is required. In essence a direct and irrefutable link between the actions of an industry and health impacts in an individual must be shown.⁷⁴⁹ As such the requirement laid down would be two scientific studies proving the two separate stages in the progression of the adverse effects incurred. This necessity of connected scientific proof of impacts as a result of the focus on human health, rather than the environment which predicates it, is too great a financial and logistical burden upon the First Nations peoples of Alberta. The fact that the only legal action currently in progress against the tar sands projects in the province initiated by them is appealing to the public for donations to its funds for the action is clear evidence of this.⁷⁵⁰

To illustrate the issue of breaching the high burden of proof a particular consideration of the impacts to water levels and quality in the regions exploited is pertinent. Thirst would be one basis upon which this action might be considered to have restricted physical health as an aspect of the security of the person afforded domestically. As has been discussed however were this a credible contention the Canadian government would already have begun piping

⁷⁴⁹ This was clearly the case in : *Tatar* (n31) where no link between industrially produced fumes and asthma could be established by the claimant.

⁷⁵⁰ Respecting Aboriginal Values and Environmental Needs Trust (RAVEN Trust) (n411)

water to even the most remote indigenous communities in order to meet this obligation and secure oil revenues for the foreseeable future. On this point also river flows are merely argued to have been severely reduced, water still flows through the water courses of even the most heavily consumed rivers of Alberta. This would rebut any potential contentions of health impacts based upon thirst, irrespective of access to man-made water sources. Impacts to health must therefore result from reduced, not non-existent flow rates, introducing yet another potentially contestable link to be established. As a result effects to flora and fauna beyond the human are the only avenue remaining in this regard.⁷⁵¹

The effective and impartial monitoring of both water quality and quantity in the regions surrounding the tar sands developments has been one of the most debated issues in relation to the projects. How to effectively measure the impacts upon flow levels and the resultant impacts of any discernible change in them has been the subject of articles authored by politicians, scientists and journalists alike.⁷⁵² Alterations to fish habitat in regions where water has been heavily consumed was one area of focus for the ‘Oil Sands Regional Aquatic Monitoring Program (RAMP) Scientific Peer Review of the Five Year Report (1997-2001)’⁷⁵³ into the water related impacts of the rapidly expanding industrial activity in north eastern Alberta. The review found that;

‘Given the extent of oil sands development in this region and their intensive use of water resources that all, ultimately, derive from the Athabasca River system, it may be necessary to

⁷⁵¹ This was arguably the case in *Poma Poma* (n271) where the reduction of water through natural courses generally would not have been upheld as a breach were alternate sources provided for health and sanitation purposes. Instead it was the threat to the existence of an inimitable culture via the inability to farm llamas in a traditional manner under Art. 27 of the ICCPR which was the *rationae decidendi* for the View.

⁷⁵² See for example the review of water impacts of the Pembina Institute: Pembina Institute *Water Impacts* <<http://www.pembina.org/oil-sands/os101/water>> Accessed July 30th 2014. Contrast this to the statements of the Alberta Government in this regard: Alberta Government *Alberta's Oil Sands: Water* <<http://www.oilsands.alberta.ca/water.html>> Accessed July 30th 2014

⁷⁵³RAMP (n226)

monitor the Athabasca River in more detail. The cumulative impact on low flows from the aggregate of regional development could have significant impacts on fish habitat.⁷⁵⁴

Various projects have attempted to ascertain the exact impact of the tar sands developments both in terms of water quality and quantity in the areas supplied with water by the Athabasca River and its tributaries. However the overwhelming consensus is one of uncertainty. As the Alberta government's own 'Water Management Framework' for the Lower Athabasca River, states, 'Methods for directly determining the impact of reduced water availability on the aquatic ecosystem are not available for the lower Athabasca River and to our knowledge are rare in the international scientific literature.'⁷⁵⁵

This somewhat startling admission appears damning with regards to the licensing of levels of water consumption thought to have the potential to be harmful to the ecosystems reliant upon minimum flow levels in the river. In relation to any potential utility for Article 12 of the ICESCR⁷⁵⁶ this reality is equally as harmful though not for the same reasons. The lack of scientific certainty as to the impact on fish habitat, or the aquatic ecosystems of the region in general resulting from water withdrawals, results in the inability to prove impact to human physical and mental health to a standard sufficient to meet that which would be required by the Canadian courts.⁷⁵⁷ Thus in relation to water quantity and quality, the interpretative breadth offered by Article 12⁷⁵⁸ would be of little use.

⁷⁵⁴ *ibid.* 14

⁷⁵⁵ WMSLAR (n278)

⁷⁵⁶ ICESCR (n254) Art. 12

⁷⁵⁷ This is in part owing equally to an unclear constitutional arrangement as to who should be protecting various facets of the environment and thus monitoring harms, potential or actual to it. In this regard see: Boyd, D.R. *The Right to a Healthy Environment: Revitalizing Canada's Constitution* (University of British Columbia Press, Vancouver, 2012) 10-15.

⁷⁵⁸ ICESCR (n254) Art. 12

Article 12 is undoubtedly useful for the construction of a case against the support for, and licensing of, tar sands developments by the Canadian and Albertan authorities. However, drafting necessitating burdensome evidence of impacts restricts its usage to ultimately being one aspect of a case brought against the government organs facilitating industries rather than the sole basis for a case in itself.

5.5 Suppressions of Abilities Protected by the International Covenant on Economic Social and Cultural Rights

5.51 Article 7

Favourable Conditions of Work

As Robin Churchill iterates, the Covenant, ‘contain(s) one express, albeit limited, environmental right.’⁷⁵⁹ With this comment Churchill is referring to Article 7 of the Covenant⁷⁶⁰ which whilst not including the word ‘environment,’ itself is widely regarded by jurists as concerning the concept due its clear discussion of all aspects of the surroundings of the individual. The provisions of Article 7 are of particular relevance to the legality of the damage incurred as a result of the ineffective storage of tailings material produced by the open pit extraction of bitumen. The article affords protection from unhealthy and unsafe working conditions, which are just and favourable for all aspects of life linked thereto, and specifically within this the significance of leisure and family is highlighted.

⁷⁵⁹ Churchill, R. *Environmental Rights in Existing Human Rights Treaties* in Boyle, A. and Anderson, M.R. (eds.) *Human Rights Approaches to Environmental Protection* (Clarendon Press, Oxford, 1996) 100

⁷⁶⁰ ICESCR (n254) Art. 7.

As a result of this connection to broader factors, the right is often considered in discussions of affording a basic conception of a right to a healthy environment in its entirety not merely within the sphere of work.⁷⁶¹ Such an approach is akin to that outlined in Article 11 of the San Salvador Protocol to the Inter American Convention of Human Rights,⁷⁶² and Article 24 of the African Charter on Human and Peoples Rights.⁷⁶³ The link to the notion of family in the conception outlined specifically within the Covenant is of particular significance with regard to the indigenous populace of the province, and the potential case against the licensing of extraction and refinement projects. This connection between safe conditions for work or the securing of a livelihood as it is termed in the domestic Canadian human rights provisions,⁷⁶⁴ and the maintenance of the family unit ‘in accordance with the provisions of the ... Covenant’,⁷⁶⁵ more widely, allows for the consideration of the cultural significance of said work and not merely the economic benefit afforded by the practice.

The acceptance that the work protected under the provisions of the ICESCR can include that undertaken for non-pecuniary rewards,⁷⁶⁶ affords further opportunities within the text of the Covenant to challenge the adverse effects of the tar sands developments. As discussed, Article 7 of the Covenant concerns the, ‘right of everyone to enjoy just and favourable conditions of work’,⁷⁶⁷ and thus in the case of the indigenous peoples of Alberta, to hunt caribou, fish and engage in productive activities of any type in such surroundings. Although the relationship with the national and provincial authorities might not be deemed as

⁷⁶¹ See for example: Shelton, D. *Human Rights and the Environment: Substantive Rights* in Fitzmaurice, M. Ong, D. M. and Merkouris, P. *Research Handbook on International Environmental Law* (Edward Elgar Publishing, Cheltenham, 2010)266

⁷⁶² AP-ACHR (n188) Art. 11

⁷⁶³ African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) Art. 24

⁷⁶⁴ CCRF (n174) s.6

⁷⁶⁵ ICESCR (n254) Art. 7

⁷⁶⁶ Craven, M. *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Clarendon Press, Oxford, 1998) 230

⁷⁶⁷ ICESCR (n254) Art 7

one constituting employer and employee, the right could be argued to still apply given the acceptance of non-pecuniary rewards as a motivation for undertaking such work. Similarly the fiduciary nature⁷⁶⁸ of the agreements made under the numbered treaties would support this proposition. The practice of caribou hunting or fishing in this regard is instead akin to a form of self-employment which under the provisions of Article 7 could not be unreasonably restricted.⁷⁶⁹ Indeed the need to ensure the provision of sustenance, and the ability to continue to obtain a source thereof without perpetual assistance from the provincial and national governments, is considered within the numbered treaties.⁷⁷⁰

As has already been considered, this negotiation also paid respect to the preference of the Indians with regard to how such sustenance was obtained. Arable farming for example was an essential source of sustenance in Western Europe at the time of the colonisation of Canada owing to a higher population density as a result of urbanisation. The practice was however noted as being met with, ‘disinclination’ by the Indians, ‘as a means of livelihood,’ and that, ‘the more congenial occupations of hunting and fishing,’⁷⁷¹ were still preferred. These notes, whilst being neither legally binding nor made within the modern context, provide useful insights into the purpose behind the drafting of provisions of the treaties, and the intended nature of the relationship they were to create.⁷⁷² The note of concern with regards to the congeniality of the options proposed to the Indians, and the recognition that the most efficient source of sustenance will not necessarily be that adopted by the Indians is telling. The consideration of this fact indicates an awareness, and indeed acceptance of, the

⁷⁶⁸ Webb, J. and Stevenson, M.G. (n170), 73

⁷⁶⁹ CCRF (n174) s.7 when interpreted in line with the test in *Oakes* (n207) concerning justification of derogation from fundamental right under the Charter.

⁷⁷⁰ Treaties 6 and 8 (n68)

⁷⁷¹ A quote from the negotiation notes of Treaty 8, <<http://www.otc.ca/siteimages/Treaty8.pdf>> (Accessed 12th December 2011) 24.

⁷⁷² This is supported by the inclusion of the notes of the Crown representatives to the treaty negotiations within the text of Treaty 8 provided by the Canadian government on their official website. Treaties 6 and 8 (n68)

cultural significance of the hunting of caribou. As such it provides a possible source of interpretation in relation to the Canadian state's vision of the concept of 'work,' and rights to such work in order to attain a minimum standard of living.

The use of the term, 'means of livelihood,' to describe the hunting of caribou also represents tacit recognition of the practice as a form of 'work' for the purposes of human rights law. The purpose of work is regarded in numerous legislative instruments in the field as being to attain any of a number of synonymous concepts, such as a particular standard of living, a livelihood, sustenance, or a minimum standard of living.⁷⁷³ This acceptance of the practice as both culturally significant, and more importantly in relation to the provisions of Article 7 of the ICESCR, as a form of work, allows claims to be brought in relation to breaches of those rights protecting this concept within the Covenant, the article in question being the most significant. As such the duties relating to working conditions enshrined in Article 7 could, via judicial interpretation, be enforced in relation to the practice of caribou hunting by the indigenous peoples of Alberta, against the relevant provincial and national authorities.⁷⁷⁴ The nature of the 'work' of caribou hunting or fishing prevents the provision of all conditions stipulated under Article 7 being reasonably and realistically demanded, such as the enforcement of remuneration with regards to periodic holidays and remuneration for public holidays. However, some of its stipulations are relevant to the practice, and thus the specific effects of the tar sands developments on the caribou, and consequently the ability of the First Nations Indians to hunt them in 'just and favourable conditions.'⁷⁷⁵

⁷⁷³ See for example CCRF (n174) s.6 and ADRD (n249) Art. XIV.

⁷⁷⁴ Such a proposition would conform with the decision in *Minister of Home Affairs v. Fisher* [1980] A.C. 319, 328 per Lord Wilberforce, necessitating interpretations which meet the international obligations of Canada with regards to human rights law.

⁷⁷⁵ ICESCR (n254) Art 7

The overarching concepts of, ‘just and favourable conditions’⁷⁷⁶ within Article 7 are defined more specifically in the subsections of the provision. These expansions on the main body of the article are of considerable relevance in relation to the effects of the tar sands on the ability of the First Nations to hunt boreal woodland caribou and fish using traditional methods. Expansion upon the concept of such ‘favourable’ conditions within the subsections of the article provide pertinent interpretative guidance in relation to the application of the provision to the case at hand in a number of ways. Firstly Article 7(a)(ii) requires that the product of the work undertaken, must ‘as a minimum’ provide, ‘a decent living for themselves and their family in accordance with the provisions of the present Covenant.’⁷⁷⁷ The addition of protection for the living of the family as dependents adds cultural and communal elements to the right. This insight also further emphasises that pecuniary compensation for any loss of living, or inhibition thereof, would not suffice in alleviating the relevant authorities of their duties in this respect. This is as interpretation it is stipulated that the provision of the minimum ‘decent living’ under the article must be secured, ‘in accordance with the provisions of the present Covenant,’⁷⁷⁸ and as such be culturally relative in accordance with Article 15⁷⁷⁹ to be discussed.

Unlike in the articles of the domestic and regional texts discussed applicable to Canada, which provide synonymous rights to work, just rewards for said work, and the conditions in which it should be undertaken,⁷⁸⁰ this subsection allows the text of the Covenant as a whole to be read into this provision. The practice of creating a hierarchical structure of rights has generally been frowned upon by jurists as being a potentially

⁷⁷⁶ *ibid.* Art. 7

⁷⁷⁷ *ibid.* Art 7(a)(ii)

⁷⁷⁸ *ibid.* Art. 7(a)(ii)

⁷⁷⁹ *ibid.* Art. 15

⁷⁸⁰ CCRF (n174) s.6 and ADRD (n249) Art. XIV.

dangerous precedent,⁷⁸¹ with the common opinion being that rights should be read together as a body of law rather than individually.⁷⁸² This is however rarely the reality, with judiciaries choosing which to apply or uphold on a case by case basis. Article 7(a)(ii) avoids this to some extent also by requiring that the concept of ‘a decent living for oneself and family’,⁷⁸³ be applied in line with all other provisions of the Covenant, rather than allowing its balancing against competing interests.⁷⁸⁴

In relation to any case which might be brought against the tar sands developments in Alberta regarding their adverse effects, such interpretation would be required in relation to the proposed bases for such litigation. Note should be made that it is for this reason that Article 11 of the Covenant would in this regard provide too tentative a basis for such a case. Despite providing a right to, ‘an adequate standard of living for himself and his family’,⁷⁸⁵ the Article offers no more than the identical domestic rights which can be enforced in the domestic legal system. The drafting of Article 7(a)(ii) however guarantees interpretation, which might otherwise be ultimately at the mercy of those adjudicating any such case. As such the concepts of cultural development, and respect for culture, beliefs and property, to name but a few are to be read into the minimum standards regarding work and the remuneration of that work, pecuniary or otherwise.

Thus the indigenous peoples of Alberta would be able to contest that the minimum decent living guaranteed under the article must also be ensured with respect given to the cultural significance of traditional activities they freely choose to undertake as their means of

⁷⁸¹ Brems, E. *Human Rights: Universality and Diversity* (Martinus Nijhoff Publishers, Dordrecht, 2001) 423

⁷⁸² As espoused in UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23 Art.5

⁷⁸³ ICESCR (n254) Art. 7 (a)

⁷⁸⁴ *ibid.* Art 7(a)(ii)

⁷⁸⁵ *ibid.* Art 11

subsistence. This would both further ensure that the remuneration of work could not be measured in purely pecuniary terms, but would also add weight to the contention that the destruction of the boreal woodland, and the resulting reduction in fauna numbers in the region, would breach the right of the First Nations to enjoy ‘just and favourable conditions of work which ensure... as a minimum... a decent living for themselves and their family.’⁷⁸⁶

As well as the remuneration, whether pecuniary or otherwise, for the work protected under the auspices of Article 7 of the Covenant, the conditions in which such work is undertaken are also protected. Article 7(b) requires that such work be allowed to be carried out in ‘safe and healthy working conditions.’⁷⁸⁷ More specific effects on the environment are discussed in depth in the thesis, though it suffices here to state it is well documented that the extraction of the tar sands and its refinement into highly profitable synthetic crude oil has a number of adverse effects to water and air qualities, and causes considerable physical damage to the land on which extraction is specifically undertaken and the surrounding area.⁷⁸⁸ Whilst many of these effects are limited to land leased legally to the oil companies, some afflict the indigenous peoples dwelling beyond the borders of those leases.

Air and water quality are arguably the most pertinent examples of this, and whereas precedent indicates a reluctance on the part of jurists generally to uphold that such damage could breach the rights to life, and private and family life except in the most severe of circumstances,⁷⁸⁹ when considered in relation to working conditions thresholds could be set

⁷⁸⁶ *ibid.* Art 7

⁷⁸⁷ *ibid.* Art 7(b)

⁷⁸⁸ Such impacts are conceded by the introduction of frameworks to limit them within the plan for the Lower Athabasca region in light of tar sands extraction: LARP (n109) 27

⁷⁸⁹ See for example the judgements in following cases from the European system: *Budayeva* (n670) *Lopez Ostra* (n186) and *Guerra* (n620)

at the levels considered acceptable in domestic Canadian health and safety regulations.⁷⁹⁰ Thus the likelihood of successfully breaching the required threshold for a violation of a human right would be far greater in relation to the provisions regarding working conditions for the indigenous peoples.

As such Article 7 provides a basis which in relation to a case against the permitting of the damage caused by tar sands extraction and refinement is arguably more likely to succeed than the bases provided by civil and political rights. However, to enable access to such a basis the more theoretical arguments surrounding the consideration of traditional activities such as fishing and hunting caribou as a form of work for the purposes of the Covenant would first have to be accepted by any judicial body considering the facts presented to them. Article 7 of the ICESCR⁷⁹¹ therefore potentially provides a decreased threshold demanded to be considered a breach of a human right, but the application of this right to the specific case of the damage wrought by the tar sands extraction is reliant upon a somewhat less conventional interpretation pertaining to the nature of work protected under the Covenant.⁷⁹² Such a problem admittedly does not afflict civil and political rights often utilised to challenge similar effects in spite of their higher thresholds for breach, owing to a wealth of precedents discussing their application to environmental concerns.⁷⁹³

⁷⁹⁰ The basis of which is to be found in: Canada Labour Code R.S.C.1985 c.L-2 Part II

⁷⁹¹ ICESCR (n254) Art. 7

⁷⁹² The need for a broader conception of work, beyond that prescribed to the *homo oeconomicus*, is outlined in: Saul, B. Kinley, D. and Mowbray, J. (eds) *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials*. (Oxford University Press, Oxford, 2014) 394

⁷⁹³ *Budayeva* (n670)

5.52 Article 6

Right to Work

The rewards gained from work have on numerous occasions been held as not necessarily being solely pecuniary in nature for the purposes of the law.⁷⁹⁴ Setting aside issues of taxation and fair remuneration with which the research is not concerned, this is a significant interpretation in relation to the indigenous peoples of Alberta, especially with regard to the hunting of boreal woodland caribou. As has already been eluded to, the hunting of caribou is not a viable source of income for the indigenous peoples of the province with the meat and hide of the animal being of little value, monetary or cultural, beyond the indigenous population. As such to access the protection the rights concerning occupation and the attaining of benefits from it, the acceptance of the non-pecuniary elements of a livelihood as being encompassed within their scope is essential. Despite being of little value to any not part of the Indian culture, and more specifically those First Nations which still practice traditional hunting methods and seek traditional prey as an aspect of that culture, the caribou undeniably provide a source of sustenance, livelihood and living as described and protected at the various levels of legal enforcement of human rights. Thus the means by which the caribou are hunted as an example of work, the caribou themselves as the source of a livelihood and sustenance, and the traditions of the First Nations as an example of a standard of living, are all arguably subject to the protection afforded by the aforementioned articles of the ICESCR, and domestic provisions interpreted in line with it.

⁷⁹⁴ The notion of a 'standard of living' within the section 6 of the CCRF right as opposed to particular features thereof supports this assertion as does precedent, particularly in the field of divorce law. See the consideration of components classified as an aspect of a 'standard of living in: *Droit de la famille* - 111526, 2011 QCCS 2662

The connection between the domestic right to work in Section 6 of the CCRF⁷⁹⁵ and that espoused in the article of the same designation in the ICESCR have long been recognised. Indeed in *Canadian Egg Marketing Agency v. Richardson*⁷⁹⁶ the parallels are explicitly highlighted by Justice Lamer, stating that the domestic right, ‘mirrors the provisions of several human rights instruments.’⁷⁹⁷ The comparisons are however based upon the mobility aspect of the right, on which the domestic protections indisputably focus. In this regard it is only through consideration of the domestic right in light of the international equivalent that the desired effect for the case at hand is achieved. Quite simply the domestic right assures beyond doubt only that there be no impact to occupation necessitating relocation. This approach was emphasised in the seminal case of *Winner v. S.M.T. (Eastern) Ltd*⁷⁹⁸ which underpinned the development of the Section 6 right some 30 years later. More recently this approach to the implementation of Section 6 was emphasised by Justice Etsey in the case of *Law Society of Upper Canada v. Skapinker*.⁷⁹⁹ In the judgement Etsey stated that it, ‘does not establish a separate and distinct right to work divorced from the mobility provisions in which it is found.’⁸⁰⁰ The international right represented by Article 6 adds the crucial component of that work being ‘freely chosen,’ rather than a freedom to locate oneself anywhere within Canada in order to work to gain a livelihood.

Article 6 of the economic, social and cultural Covenant concerning the right to work, which the hunting of caribou for sustenance could as discussed be deemed, provides that the living attained by an individual should be done so through work which he, ‘freely

⁷⁹⁵ CCRF (n174) s.6

⁷⁹⁶ *Canadian Egg Marketing Agency* (n607)

⁷⁹⁷ *Canadian Egg Marketing Agency* (n607) 58 (per Lamer CJ)

⁷⁹⁸ *Winner v. S.M.T. (Eastern) Ltd.*, [1951] SCR 887

⁷⁹⁹ *Law Society of Upper Canada v. Skapinker*, [1984] 1 SCR 357

⁸⁰⁰ *ibid.* at 33 per Etsey. J

chooses.’⁸⁰¹ The monetary value of the caribou outside of the Indian culture is all but negligible, however the freedom to choose the means by which an individual, ‘gain(s) his living,’ ensures that, as a result of said choice, members of the indigenous communities must have their ability to hunt caribou and to utilise the products of that practice protected. This is true regardless of its pecuniary value within a wider economic context or the availability of alternatives.⁸⁰²

Suggestions have been made with regard to the practice of land reclamation, the provision of livestock, and its ability to prosper on reclaimed land, that alternatives have been provided to the practice of caribou hunting, or that the land reclaimed will support caribou habitation.⁸⁰³ With regard to the rights provided under the ICESCR however it is pertinent at this juncture to highlight that the right to freely choose the work by which the standard of living, livelihood, or sustenance is obtained staunchly rebuts any defence on the part of corporations, or the Canadian or provincial Albertan authorities that adequate alternatives in terms of financial and nutritional value have been provided.

Further expansion of the right provided under Article 6(1) and its utility in relation to the adverse effects is offered within its second subsection,⁸⁰⁴ which concerns the measures to be taken by state parties, ‘to achieve the full realization,’ of the right outlined in the previous subsection. Specifically the duty on the parties to implement, ‘policies and techniques to

⁸⁰¹ ICESCR (n254) Art 6

⁸⁰² See the consideration of components classified as an aspect of a ‘standard of living in: *Droit de la famille* - 111526, 2011 QCCS 2662

⁸⁰³ See the report of the Parkland Institute in this regard. Note should be made that the Parkland Institute is a research institute based in the University of Alberta, which is non-partisan in nature, though has repeatedly suggested that prevailing economic and energy policy with regards to the oil sands is ill-founded: Parkland Institute. *Reclamation Illusions in Oil Sands Country*. 2009

<http://parklandinstitute.ca/post/story/reclamation_illusions_in_oil_sands_country/> Accessed July 30th 2014.

⁸⁰⁴ ICESCR (n254) Art 6(1)(2)

achieve steady economic, social and cultural development,⁸⁰⁵ to facilitate the aim of, ‘full realisation,’ is worthy of consideration. This right would undoubtedly be regarded as derogable in nature, and as such would be subject to reasonable economic and political considerations on the part of the state. The suggestion of the means by which a party is expected to uphold the obligations to which it has acquiesced however provides a potential added impetus and a model framework for those wishing to suggest those obligations have not been fulfilled. In relation to the effects of the tar sands developments in Alberta, it allows the consideration of decisions made by provincial and national authorities beyond merely permitting extractions and to how said decisions were reached in relation to those developments.

Assessment can therefore be made as to whether the right of an individual, ‘to gain his living by work which he freely chooses,’⁸⁰⁶ has been considered in the decision making processes and policies of the relevant authorities. Whether the reasoning behind them considered adequately their economic, social and cultural impact and its limitations of that right might also therefore be scrutinised. Thus these provisions place the organs of state parties under a duty to respect and not breach the right in the actions and decisions they undertake. Further to this they are also required to actively promote the right and avoid actions which inhibit the opportunity to gain a living through freely chosen work.⁸⁰⁷ In relation to the wildlife of Alberta, and particularly the boreal woodland caribou the knowing reduction of the numbers and inhibition of the migration of these animals could be argued to constitute a breach of the duties to which the Canadian state had subjected itself. As such, the excessive consumption of water reducing river flows, preventing indigenous peoples from fishing using traditional methods, and consequentially driving the native flora and fauna from

⁸⁰⁵ *ibid.* Art 6(1)(2)

⁸⁰⁶ *ibid.* Art 6

⁸⁰⁷ See the discussion of positive and negative right in; Donnelly (n673) 30

the reserve lands of these peoples preventing them from hunting traditional prey such as caribou, would arguably be allowed only in highly restricted incidences. This argument would be strengthened by the unique relationship the indigenous populous have with the caribou outlined above, a key point given the overall aim of protecting the non-pecuniary and culturally relevant living they represent.

The provisions of Article 6 allow the consideration of the livelihood, or sustenance protected in human rights provisions across the levels of legal enforcement to which the Canadian state is subject within a specific cultural context, and not solely upon a purely pecuniary or nutritional basis. Any case based upon this article, or the interpretation of similar rights at the other levels of enforcement in light of it would, owing to the derogable nature of such provisions, have to contend with the weight of economic potential the tar sands yields. However, to ignore the implications of the interpretative insight it provides in relation to the consideration of the cultural significance of the caribou would be foolhardy.

Links between both cultural development and other fundamental rights offering protections regarding the obtaining of means to meet basic needs for oneself and family are reflective of the realities of indigenous peoples across the world and in Canada. Thus, whereas *prima facie* the application of the right to work might otherwise be narrowly applied to the context of mobility, a broader interpretation is afforded under Article 6 of the Covenant⁸⁰⁸ to include the form of work. This aspect as has been discussed is not protected by domestic Canadian rights specifically, and is not only beneficial to the construction of a case against the impacts and licensing of the tar sands developments, but arguably essential to its very conception.

⁸⁰⁸ ICESCR (n254) Art 6

5.53 Article 11

Standard of Living

The significance of the family unit and the protections extended to include it, enshrined throughout the ICESCR,⁸⁰⁹ are furthered by Article 11 of the Covenant, which affords protection to the beneficiary, ‘himself and his family.’⁸¹⁰ The subject matter of the right is far broader than that of Articles 6 and 7,⁸¹¹ as it protects the more general concept of, ‘an adequate standard of living.’⁸¹² The right particularly pertains to, ‘adequate food, clothing and housing,’⁸¹³ though as has been alluded to by the United Nations, water plays a crucial role in the realisation of ‘an adequate standard of living.’⁸¹⁴ Whilst the aforementioned provisions concerning employment are of relative utility in the forming of a case such as that aimed at by the piece, the breadth of Article 11⁸¹⁵ has considerable potential usage. The concept of a ‘standard of living’ describes all essential aspects of the daily life of an individual, and their family, all of which are inextricably linked to the availability of water and the native flora and fauna in the instance of the indigenous peoples of Alberta and especially those living within the boreal forest ecosystems.

Reductions in flow rates of any significance would have adverse impacts on other ecosystem features reliant upon the water provided by the natural water courses of the

⁸⁰⁹ Articles 7, 10 and 11 all afford their protections to the family unit as well as the individual, a considerable number given that only Articles 1 through 16 grant rights rather than impose obligations on state parties.

⁸¹⁰ ICESCR (n254) Art. 11

⁸¹¹ *ibid.* Arts. 6 and 7

⁸¹² *ibid.* Art. 11

⁸¹³ *ibid.* Art. 11

⁸¹⁴ Committee on Economic, Social and Cultural Rights, General Comment 15, The Right to Water (Twenty-ninth session, 2003), U.N. Doc. E/C.12/2002/11 (2002)

⁸¹⁵ ICESCR (n254) Art. 11

province.⁸¹⁶ Alterations in habitat owing to the death or receding of native flora, would have more severe impacts further up the food pyramids of which they formed the base. The peaks of the pyramids in this instance are the indigenous peoples of the regions affected, and the potential for breaches of human rights provisions arises from the causal links between effects to that flora and to them.

Caribou, already highlighted as of greater significance to the First Nations peoples in terms of numbers using them as a means of expressing their culture, would be particularly at risk. Reduced flow levels in rivers and low levels in static watersheds of the province in the form of underground aquifers⁸¹⁷ owing to extractions by projects accessing the tar sands would impact adversely upon the flora upon which the caribou prefer to eat. Caribou have been recorded as relocating to areas where their preferred sources of sustenance are available.⁸¹⁸ As this preferred source is long established boreal forest supporting lichen, any negative impact might take decades to redress, and as such be exponentially increased from that seen *prima facie* at its source in water flow and volume levels.

The provisions of Article 11 of the ICESCR⁸¹⁹ whilst not mentioning any aspect of cultural relativity to the obligations placed upon the state parties, must be read into the domestic provisions of Canada afforded under the CCRF.⁸²⁰ This is as the optional protocol to the Covenant⁸²¹ has not been ratified by the Canadian government. Clear links between the

⁸¹⁶ See in this regard the concerns of the 'Assessment of Climate and Hydrology Component' in the Peer Review of the Regional Aquatic Monitoring Program Five Year Report: RAMP (n226)

⁸¹⁷ Such aquifers are regarded as in effect non-renewable owing to the considerable amount of time needed for them to replenish any reduction incurred by industrial extraction.

⁸¹⁸ See the US. Forestry Service database description of caribou migratory habits: Luensmann, P. on behalf of the U.S Department of Agriculture, U.S. Forest Service. *Rangifer Tarandus* (August 2014) <<http://www.fs.fed.us/database/feis/animals/mammal/rata/all.html>> Accessed July 30th 2014.

⁸¹⁹ ICESCR (n254) Art. 11

⁸²⁰ CCRF (n174)

⁸²¹ OP-ICESCR (n644)

content of Article 11 of the Covenant⁸²² and Sections 6 and 7 of the CCRF,⁸²³ in terms of subject matter are however apparent. As such, they represent the best avenue for the broad interpretation of domestic rights in line with the obligations under Article 11 by which the Canadian government bound itself by signing and ratifying the text. Once this link is established however and domestic rights afforded the broader interpretation offered by the ICESCR, they can equally be applied in line with Section 27 of the CCRF. The section which declares that the, ‘Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.’⁸²⁴

As such the ‘adequate standard of living’ for an individual and his family should be protected in a manner resulting in the securing of the unique cultural idiosyncrasies of the First Nations tribes of Alberta. Thus an underlying principle of protecting the cultural diversity of Canada is demanded, and is key to ensuring that rights afforded generally to all Canadians by the organs of the State are adapted in their interpretation to reflect the realities of minority cultures. Thus the provisions of Article 11 of the ICESCR are moulded from a right to the basic necessities of life into one relative to the indigenous peoples of the regions affected. In the context of potentially creating a case against the developments causing the adverse environmental impacts described, it is this link which is crucial. This assertion is supported by the reference specifically to indigenous peoples in the General Comments 12⁸²⁵ and 15⁸²⁶ of the Committee on Economic, Social and Cultural Rights. The comments deal with the right to food and water respectively and refer to both Article 11 and indigenous

⁸²² ICESCR (n254) Art. 11

⁸²³ CCRF (n174) s. 6 & 7

⁸²⁴ CCRF (n174) s. 27

⁸²⁵ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, U.N.Doc. E/C.12/1999/5 (12 May 1999)

⁸²⁶ Committee on Economic, Social and Cultural Rights, *General Comment 15, The Right to Water* (Twenty-ninth session, 2003), U.N. Doc. E/C.12/2002/11 (2002)

peoples in their texts. General Comment 12 highlights the, ‘particular vulnerability,’⁸²⁷ of indigenous peoples when denied access to lands traditionally utilised to source food. General Comment 15 makes a direct connection between access to water and, ‘securing the livelihoods of indigenous peoples,⁸²⁸’ and goes on to highlight both their peculiar vulnerability⁸²⁹ and the need to access water sources on the aforementioned culturally significant lands.⁸³⁰ Whilst not binding in themselves upon the Canadian state, even in light of the decision in *Reference Re Public Service Employee Relations Act (Alta.)*,⁸³¹ they provide significant insight into the intentions of the drafters of the Covenant and the aspects of the elements of an ‘adequate standard of living.’ As well as supporting an interpretation in line with Article 27 of the CCRF therefore, they provide an approach to doing so and evidence crucial elements of said standard in a culturally relative manner.

As has been discussed obligations resulting from rights of universal application can be more easily met by the Canadian executive.⁸³² However, the requirement for an element of cultural relativity to be applied in the fulfilment of those obligations prevents the method adopted for meeting the duties placed upon them from merely being the most simple or cost effective. In this regard it becomes apparent when rights afforded are not specifically given to minority or indigenous cultures that this link to those notions is key to the success of any case against the licensing of tar sands projects and their adverse impacts. This is undeniably the case in relation to any potential application of Article 11 of the ICESCR⁸³³ in this endeavour. Thus the efficacy of Article 11 for the purposes of the piece hinges upon a culturally relative

⁸²⁷ GC12 (n825) Art. 13

⁸²⁸ GC15 (n826) Art. 7

⁸²⁹ *ibid.* Art. 16

⁸³⁰ *ibid.* Art. 16 (d)

⁸³¹ *Reference Re Public Service Employee Relations Act (Alta.)* [1987] 1 S.C.R. 313., 349

⁸³² Such as the provision of water by means of a pipeline to negate contentions based on the reduction of water in natural courses in regions impacted upon by tar sands extraction which has been suggested.

⁸³³ ICESCR (n254) Art. 11

interpretation of the provision through the lens of Section 27 of the domestic Charter⁸³⁴ as well as into domestic provisions affording similar protections.

5.54 Article 15

Taking Part in Cultural Life

Given that the unique nature of the culture of the First Nations peoples of Alberta is central to the suggested case against the government licensing of industrial tar sands projects, rights affording cultural protection specifically are of considerable significance. The domestic provisions of the CCRF afford only that, the, 'Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.'⁸³⁵ As such rights originating in the regional and international legal systems relating a direct right to cultural practice, as opposed to the interpretation of non-specific rights, are of considerable utility. The recognition of the cultural idiosyncrasies of the First Nations of the region from the majority of the population of Canada, but also from the other tribes in the region, would arguably result in both their protection and that of the ecosystems on which their culture was predicated.⁸³⁶

This recognition would potentially ensure the protection of greater portions of the region and various ecosystems therein, as the First Nations in the north east of Alberta are vastly different to those of the southern half inhabiting the radically different plains ecosystems, and to some extent from those in the west inhabiting mountainous regions. Even neighbouring tribes in relatively close geographic proximity can have significant differences

⁸³⁴ CCRF (n174) s. 27

⁸³⁵ *ibid.* Art. 27

⁸³⁶ As was held in the communications of the Lubicon Lake Cree Band: Lubicon (n729)

in practices and lifestyle. One common feature to most tribes⁸³⁷ however is their links to the ecosystems which they inhabit, and thus in order to protect those peoples, they too must be protected and preserved.⁸³⁸ In this endeavour the interpretation of domestic Canadian human rights legislation in line with Article 15 of the ICESCR⁸³⁹ is of considerable significance.

The article requires state parties to, ‘recognise the right of everyone... To take part in cultural life,’⁸⁴⁰ and to take steps to realise this right which, ‘shall include those necessary for the conservation, the development and the diffusion of...culture.’⁸⁴¹ The article, like others discussed, suffers from the lack of a direct comparator amongst the human rights afforded within the domestic Canadian legal system under the CCRF. This does not however restrict its utility to the degree that it does in other instances for a number of reasons. Most obvious amongst these is the non-scientific nature of the concept of culture. The physical and mental health of individuals can be measured scientifically and thus the courts rightly demand a burden of proof based upon more accurate methodologies, allowing for conclusive evidence being demanded in all instances. Culture by contrast is a far more subjective concept.⁸⁴² As a result the interpretation of the obligations of the Canadian and Albertan governments under Article 15 into domestic human rights provisions is far more easily achieved, and less likely to be rebutted by conflicting scientific evidence.

The nature of Article 15 outlined above and that which it protects, ensures that its potential application through domestic interpretation is broad. Introducing the notion of the

⁸³⁷ A number of tribes have retained their presence on lands which have now become absorbed into large urban areas and as such have vastly different lifestyles to the tribes with which the work is concerned.

⁸³⁸ This is reflective of the approach adopted by the UNHRC in *Poma Poma* (n271) in relation to the potential for the extinction of a culture owing to environmental impacts.

⁸³⁹ ICESCR (n254) Art. 15

⁸⁴⁰ *ibid.*

⁸⁴¹ *ibid.*

⁸⁴² Snyder, R. Williams, D. and Peterson, G. *Culture Loss and Sense of Place in Resource Valuation: Economics, Anthropology and Indigenous Cultures* in Jentoft, S. Minde, H. and Nilsen, R. *Indigenous Peoples: Resource Management and Global Rights* (Eburon Academic Publishers, Delft, 2003) 107

rights to remain,⁸⁴³ gain a livelihood,⁸⁴⁴ and have personal liberty and security,⁸⁴⁵ as being conducive to the ability of those peoples ‘to take part in cultural life’ is highly beneficial to the potential construction of a case against the licensing of the tar sands developments and their impacts. However, the recognition that the unique nature of the indigenous populace and their ability to express their culture is affected by them, thus requiring their licensing to be approached in such a manner as to ensure the continued existence of said culture, is key to the aim of this piece. All First Nations peoples would possess the domestic rights outlined above by virtue of their being considered Canadian citizens in the eyes of the law.⁸⁴⁶ However, Article 15⁸⁴⁷ allows for these rights to potentially be interpreted in a culturally relative manner.

The utility of the article is also heavily based upon the aforementioned unique nature of the First Nations as a collective across Canada from the rest of the populace, but also as individual tribes from others. By way of illustration, the nature of physical and mental health is that its minimum requirements are, relatively speaking, universal. All individuals require a certain amount of water for basic needs, which can be calculated and provided in a culturally neutral manner, thus relieving the state party of its minimum obligations to preserve the nutrition and sanitation provided by water. By contrast the unique nature of the First Nations cultures, both nationally, provincially, and in some instances individually, can only be preserved by in turn preserving that which makes them unique. In the majority of instances the development of their idiosyncrasies is a result of their interactions with the ecosystems upon which they rely and reside. For example, tribes with fish laden rivers within their traditional territories might develop greater ties to the river and the fish which inhabit it. This is as opposed to tribes living within the migratory habitats of the boreal woodland caribou

⁸⁴³ CCRF (n174) s. 6 (1)

⁸⁴⁴ *ibid.* at s. 6 (2) (b)

⁸⁴⁵ *ibid.* at s. 7

⁸⁴⁶ Canadian Citizenship Act, S.C. 1946, c. 15 s.9

⁸⁴⁷ ICESCR (n254) Art. 15

who might instead opt to source sustenance from them. Thus the cultural practices which develop in each instance do so in line with the fruits of the ecosystems most readily available to them.⁸⁴⁸

The individual cultural significance of the practices which are inhibited by the environmental impacts of the tar sands projects provide an immediate relevance and importance to any case brought based upon the suggestion that they breach Article 15 of the Covenant. The provision as discussed affords the right, ‘To take part in cultural life,’⁸⁴⁹ and to receive the benefits thereof, as well as imposing upon the States party to the text to take steps to achieve the, ‘full realisation of this right,’⁸⁵⁰ including those necessary for the, ‘conservation, the development and the diffusion of ... culture.’⁸⁵¹ The efficacy of a case concerning the impacts based on this right is however potentially questionable should a strict interpretative approach be taken. The notion of ‘taking part’ in cultural life and what constitutes a restriction upon this is potentially a broad one, dependent upon the position adopted by a judicial body.

A broad interpretation of the provision might recognise reductions in the population of caribou in the regions subject to tar sands extraction projects as a breach of the right to take part in cultural life by extension. This is as hunting them would become more difficult and the breadth of the participation in the culture and associated practices would potentially reduce.⁸⁵² The same might be said for impacts to fish and the practice of fishing, or the

⁸⁴⁸ See in relation to the adaptation of First Nations peoples to the environments in which they remained or relocated following the cession of the fur trade: Finkel, A. *The Fur Trade and Early European Settlement* in Finkel, A. *Working People in Alberta: A History* (Athabasca University Press, Edmonton, 2012) 24

⁸⁴⁹ ICESCR (n254) Art. 15 (1) (a)

⁸⁵⁰ *ibid.* Art. 15 (2)

⁸⁵¹ *ibid.* at Art. 15 (2)

⁸⁵² This is arguably already evidenced by the foregoing of traditional practices to undertake work in the oil sands industry by some First Nations. Anderson (n347) 97-128

prevalence of flora constituting boreal forest ecosystems and Indian activities more broadly. This may be as a result of strategic deforestation to provide access to the overburden supporting open pit mining operations and store tailings, through seismic impacts or the increased number of communications routes supporting the industrial growth of the region. All such impacts could arguably be curtailed under this broad approach to application of the right.

A narrow interpretation of the drafting by contrast would not necessarily hold that such breaches existed. The mere reduction in the aforementioned environmental features would not inhibit ‘taking part’ in culture in that it would not be a barrier to the individual participating in cultural practices in an overtly proactive manner. For example outlawing the hunting of caribou or fishing altogether, or specifically physically inhibiting the ability of an individual directly would obviously breach the provision. However, by reducing the extent of features which are involved in a culture alone would not restrict the individual from partaking in cultural practices *per se*.⁸⁵³ Given that the rights espoused in both covenants, stemming as they do from the Universal Declaration on Human Rights, are afforded on the basis of inherent human dignity, it follows that only where that dignity itself is threatened will a breach occur.⁸⁵⁴ Demanding merely extra exertion might not be deemed as breaching this threshold.

As has been outlined the restriction on taking part in culture itself is arguably non-existent, only the aspects used in cultural practices are restricted or reduced. In essence therefore any case brought on this basis would turn on the outcome of the question of whether the provision protecting the participation in culture includes the features inextricable from the

⁸⁵³ In itself

⁸⁵⁴ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III) Preamble.

culture itself.⁸⁵⁵ Whilst this is a seemingly minute, and meticulous difference and one which is not always easily established in practice, the degree of success of a case against the aforementioned impacts would rest upon the position taken in this regard by the judiciary. Whilst the Committee on Economic, Social and Cultural Rights has suggested a more expansive approach than a restricted reading of the article might suggest, to propose that it protects all features supportive of traditional practices without evidence it threatens the continued existence of said culture would be remiss.⁸⁵⁶ Given the gravity of the issue at hand, to allow a potential action to be brought on this basis alone would be foolhardy, especially given the breadth afforded in other alternative articles within the ICESCR regardless of those potentially of use in other texts. That having been said to exclude it from a group of suggested breaches, would be equally as remiss as the significance attributed to the preservation of cultures, especially those of a vulnerable nature such as those of the minority indigenous populations of which the First Nations of Alberta are, would not be considered.

The likely outcome would be something of a middle ground. Whether a restriction was deemed as having breached rights would be heavily based upon the severity of the impact incurred. Thus to contaminate water courses so severely as to make fish inedible, or reduce their stocks to such a degree that even fishing by traditional methods was no longer sustainable would be expected to breach the provision.⁸⁵⁷ The lack of jurisprudence with regards to the application of this article, given the relative recentness of the entry into force of

⁸⁵⁵ Arguably this is conceded by the Canadian courts in the case of *R. v. Isaac* (1975) 13 N.S.R. (2d) 460, 9 A.P.R. 460 (N.S. C.A.) in which it was stated the purpose for which numbered treaty lands were reserved could not be restricted by governmental actions permitted therein, including mineral resource extraction such as that to obtain the oil sands.

⁸⁵⁶ UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)*, 21 December 2009, E/C.12/GC/21

⁸⁵⁷ Such an interpretation would conform with the View of the Human Rights Committee in the communication of: *Poma Poma* (n271)

the individual complaints mechanism for the ICESCR,⁸⁵⁸ is problematic. However, the likely approach to be adopted by the Committee on Economic, Social and Cultural Rights can be inferred from two texts.

The first is the 23rd General Comment of the Human Rights Committee⁸⁵⁹ in relation to Article 27 of the ICCPR⁸⁶⁰ which is itself concerned with the protection of culturally idiosyncratic groups within States, and has been the subject of individual complaints.⁸⁶¹ The text firstly affirms the link between cultural practice and natural resources, stating that the ability, 'to enjoy a particular culture - may consist in a way of life which is closely associated with territory and use of its resources.'⁸⁶² The Committee also suggests the link crucial to this aspect of the thesis in particular, the link between the ability to express culture through traditional practice and the very continued existence of that culture. Specifically the Comment espouses that;

'Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture.... Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture ... in community with the other members of the group.'⁸⁶³

In the context at hand this connection is vital to ensuring that the Canadian State and its organs are required to consider the impacts upon indigenous practices in decisions regarding

⁸⁵⁸ The optional protocol establishing the mechanism entered in to force in May 2013 having received the required number of ratifications to do so. OP-ICESCR (n644)

⁸⁵⁹ Governing the sister covenant of the text at hand, the ICCPR and created by the text of that Covenant.

⁸⁶⁰ ICCPR (n176). Art. 27

⁸⁶¹ Most notably: *Poma Poma* (n271), *Lubicon* (n729) and *Apirana Mahuika et al. v. New Zealand*, Communication No. 547/1993, U.N. Doc. CCPR/C/70/D/547/1993 (2000)

⁸⁶² UN Human Rights Committee (HRC), *CCPR General Comment No. 23: Article 27 (Rights of Minorities)*, 8 April 1994, CCPR/C/21/Rev.1/Add.5 para. 3.2

⁸⁶³ *ibid.* para. 6.2

tar sands projects. Although not affording protection of the broad nature described above, this affords protection beyond that of the narrow conception of the prohibition of absolute barriers to practice regardless of its potential for success.

The second text is General Comment 9 of the Committee on Economic, Social and Cultural Rights⁸⁶⁴ concerning the domestic implementation of the Covenant it was created to uphold. Although providing a broad insight into the Committee's position with regards to the domestic application of the Covenant generally, paragraphs 5 and 9 are of particular relevance to the piece. Paragraph 5 indicates that judgements as to whether the actions of the State are in conformity with the obligations placed upon it by the Covenant will be based upon whether the means used are, 'consistent with the full discharge of its obligations.'⁸⁶⁵ Paragraph 9 adds that this discharge of obligations, and the defence against breaches arising from a failure to do so, should be achieved in part by ensuring, 'that all administrative authorities will take account of the requirements of the Covenant in their decision-making.'⁸⁶⁶

In relation to Article 15 of the ICESCR therefore there is a clear indication that the 'middle ground' discussed above would be the most appropriate way of meeting the expectations placed upon States by the Committee with regards to the fulfilment of obligations via application in administrative decisions. The assessment of the severity of the potential and actual impact of environmental affects upon traditional practices could be accurately ascertained by the various administrative bodies involved in licensing tar sands projects. Such an approach would clearly ensure the fulfilment of State obligations to not inhibit the ability of the individual to take part in cultural life under Article 15. This approach

⁸⁶⁴ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 9: The domestic application of the Covenant*, 3 December 1998, E/C.12/1998/24

⁸⁶⁵ *ibid.* para 5

⁸⁶⁶ *ibid.* para 9

would also meet with the demands placed upon the protection of this right by the clear connection to minority group survival considerations which individual cultural rights entail as identified by the Human Rights Committee in relation to Article 27 of the ICCPR.⁸⁶⁷

The assessment of environmental impacts upon features of cultural significance could be made on the basis of ensuring traditional practices able to sustain a culturally bound community in proximity to the impact. Such an assessment could be made based upon the presumption that a connection between the complainant individual (and their community, or in this case First Nation)⁸⁶⁸ and the specific environmental feature, the foundations of which were to be found in a traditional practice, had been established. As a result a mechanism ensuring the protection of culturally significant environmental features could be established, which would give effect to both Article 15 and other international human rights provisions. This would give effect to the recognition of a connection between environmental features and traditional practices recognised by various international bodies, and as a result ensure the protection of fundamental human rights in respect of the First Nations of Alberta and their very survival as a culturally distinct group.

The significance of this recognition is easily illustrated. Without it, the right to pursue the gaining of a livelihood⁸⁶⁹ would offer less protection to the traditional caribou hunting practices of some tribes owing to its non-essential nature in respect of providing sustenance. The fact that the protection of this practice can be viewed as ensuring also the ability of that individual, his family and indeed other members of his tribe to continue to take part in

⁸⁶⁷ This has been communicated in the View regarding *Poma Poma* (n271) , and a general comment concerning Article 27: General Comment 23 (n837)

⁸⁶⁸ Note should be made that despite the communication procedure being a right for an individual of a State party to the First Optional Protocol to the ICCPR to uphold, the Committee has allowed an individual to represent an identifiable group who they can both be agreed to represent and which can be clearly identified. This was held as the case for Bernard Ominayak in: *Lubicon* (n729)

⁸⁶⁹ CCRF (n174) s. 6 (2) (b)

cultural life however adds significant weight to any contention that this practice ought to be protected through the auspices of the *prima facie* narrow domestic provision. This link between the distinctive elements of indigenous cultures and the protections afforded within the domestic legal system of Canada to all its citizens in effect modifies those rights to include those elements in respect of the indigenous peoples. Thus the right to gain a livelihood becomes the right to gain a culturally relevant livelihood, regardless of its merit and economic validity in the eyes of the majority of Canadian society outside that culture. Rights applicable to all Canadians being applied to the specific context of the indigenous cultures of the First Nations is fundamental to the success of any proposed case against the adverse environmental impacts of the tar sands extraction projects. The likelihood of this approach being adopted in practice is undeniably significantly improved by the reading of domestic human rights provisions in light of Article 15 of the ICESCR.⁸⁷⁰

5.6 The Declaration on the Rights of Indigenous Peoples

The ICCPR and ICESCR undeniably represent the two most influential and noteworthy legally binding texts relating to human rights law in the international sphere. Indeed Shelton asserts that the creation of the covenants and the Convention on the Elimination of All Forms of Racial Discrimination,⁸⁷¹ was the beginning of modern human rights law stating that codification of the law in this regard in the three texts, ‘resulted in a vast body of international human rights law.’⁸⁷² However there are a plethora of binding and non-binding legal texts which also might provide both interpretative and enforceable aspects to challenges to the contentious developments with which the thesis is concerned. The United

⁸⁷⁰ ICESCR (n254) Art. 15

⁸⁷¹ International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res 2106 (xx) U.N.T.S. vol. 660 p.195 (21 Dec. 1965) entered into force 4 Jan. 1969.

⁸⁷² Shelton, D. *Remedies in International Human Rights Law* (Oxford University Press, Oxford, 2006) 8

Nations Declaration on the Rights of Indigenous Peoples⁸⁷³ (DRIP) is the most relevant and valuable of these in relation the preparation of a case against permitting of the tar sands developments and their effects upon the indigenous peoples of Alberta. The text contains many similar rights to those contained within the UDHR and the twin covenants discussed above, and even the domestic provisions of the Canadian Charter of Rights and Freedoms, the most obvious example of this is in the drafting of the article relating to the right to life, liberty and security of the person which is almost indistinguishable.⁸⁷⁴

In a general sense the declaration also affords the right which the piece is focused upon, securing the ability of the indigenous peoples of Alberta to, 'freely pursue their...cultural development,'⁸⁷⁵ in a manner consistent with their traditional practices. Beyond these rights common to the texts considered by the piece however the Declaration contains a number of rights which are of significance to the aim of the piece, namely the construction of a case against the governmental approval of tar sands extraction projects rooted in human rights law. Note should be made that the rights afforded under the declaration are not enforceable directly by the indigenous populous of Alberta, either in the domestic courts of Canada, or any international judicial body owing to its non-binding nature. However, its interpretative influence is significant and numerous precedents exist suggesting the willingness of the domestic Canadian courts, the Inter-American Commission and the United Nations Human Rights Committee to consider the provisions of this and other declarations and apply binding rights in line with the principles they espouse.⁸⁷⁶ The

⁸⁷³ DRIP (n39)

⁸⁷⁴ DRIP (n39) Art. 7 and CCRF (n174) s. 7.

⁸⁷⁵ DRIP (n39) Art. 3

⁸⁷⁶ *Baker* (n170) para.71, *Saramaka* (n458) and UNHCR 'Concluding Observations on Congo's Initial Ninth Reports on Implementation of the ICERD' (23 March 2009) UN Doc CERD/C/COG/CO/9 at 8.

declaration has even been said to assert and support existing customary international law,⁸⁷⁷ though this is itself a contested interpretation,⁸⁷⁸ and therefore not one which would be worthy of inclusion in a case brief submitted to a judicial authority. The interpretative significance of the declaration is however apparent, and backed by precedent in all of the levels of legal enforcement available to the First Nations of Alberta.⁸⁷⁹ Thus to disregard completely its relevance to the impacts of the tar sands on the grounds of direct applicability would be remiss.⁸⁸⁰

Despite initial resilience to the declaration, preferring instead the domestic law of Canada for dealing with the rights of its indigenous peoples, the Canadian executive gave its approval of the text of the declaration in November 2010. The text was endorsed shortly following a statement that it was, ‘unworkable in a Western democracy under a constitutional government,’ and that in relation to Canada specifically it was, ‘inconsistent with our constitution’⁸⁸¹ by the then Minister of Indian Affairs and Northern Development, Chuck Strahl. The argument of the state had essentially followed the principle of subsidiarity,⁸⁸² in that domestic legal provisions were the most appropriate and effective to deal with indigenous legal rights issues of Canada, an approach which was maintained for some four years until the eventual endorsement of the text. As a result of this acquiescence, the declaration can be used as an interpretative tool in relation to binding legal obligations on the

⁸⁷⁷ Anaya, J.S. *The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era in Charters*, C. and Stavenhagen, R. (eds.) *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (International Working Group for Indigenous Affairs, 2009) 184

⁸⁷⁸ Xanthaki, A. ‘*Indigenous Rights in International Law over the Last 10 Years and Future Developments*’ (2009) 10 *Melbourne Journal of International Law* 27, 36

⁸⁷⁹ *Baker* (n170) para. 71

⁸⁸⁰ See in relation to the significance of the Declaration in spite of its non-binding nature: Dorrough, S. *The Significance of the Declaration on the Rights of Indigenous Peoples and Its Future Implementation in Charters*, C. and Stavenhagen, R. (eds.) *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (International Working Group for Indigenous Affairs, 2009) 264

⁸⁸¹ Canwest News Service. ‘Native rights declaration inconsistent with legal tradition: Strahl’ (2007)

<<http://www.canada.com/nationalpost/news/story.html?id=23df9769-3423-4f43-b828-a755725c2719&k=23677>> Accessed 30th July 2014.

⁸⁸² The argument of the Canadian government was that domestic legislation afforded more appropriate protections to the indigenous peoples of Canada than the Declaration.

Canadian state, despite not being of itself binding. This position was declared in a speech by the Governor General of Canada,⁸⁸³ in which he stated Canada was to, ‘endorse this aspirational document in a manner fully consistent with Canada’s Constitution and laws.’⁸⁸⁴

The contentious nature of the endorsement of the declaration by Canada, along with a number of other major developed States,⁸⁸⁵ could potentially plague the applicability of the text within the domestic court structure of Canada and its provinces. The major concern in relation to the applicability of the text therefore is simply its untested nature to date. As such the text is again of use primarily as an interpretative aid to more narrowly drafted domestic provisions. As Ward suggests, ‘the idea behind a Declaration and other non-binding instruments is that they create norms that can guide the behaviour of States,’ and has been, ‘referred to as an international standard.’⁸⁸⁶ Examples of such applications are however infrequent,⁸⁸⁷ and thus the text is also to be considered in its role in adding weight to contentions of breaches of binding rights placing obligations on the Canadian state. The declaration therefore represents a potential source of interpretation by virtue of it embodying a piece of soft international law, which the Canadian Supreme Court has accepted as potentially possessing such gravitas in respect of both domestic and international legal obligations of the state.⁸⁸⁸ This is supported by the acceptance of the text by the Canadian

⁸⁸³ The representative of Queen Elizabeth II, the Official Head of State of Canada according to the Canadian Constitution.

⁸⁸⁴ Aboriginal Affairs and Northern Development Canada *Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples* (2010) < <http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142> > Accessed 30th July 2014

⁸⁸⁵ The United States of America, Australia and New Zealand in particular were also vehemently opposed to the Declaration.

⁸⁸⁶ Ward (n698)

⁸⁸⁷ Ward suggests that this was the case in the *Maya Indigenous Communities* (n464) but this was only following considerable assertion on the part of regional and international authorities. In Canada specifically *Baker* (n170) para. 71 remains the seminal instance of this approach to non-binding texts being utilised as interpretatively significant.

⁸⁸⁸ *Baker v. Canada* (Minister of Citizenship and Immigration), [1999] 2 SCR 817 para. 71

executive itself following the acquiescence to its core principles declared during the period leading up to and within its eventual endorsement of the text.

The drafting of the text places the Declaration on the Rights of Indigenous Peoples as the most utilisable sources of non-binding or ‘soft’ international law with respect to the proposed challenge to the licensing of tar sands developments. The specificity of provisions to the effects resulting from the tar sands developments in Alberta, and further in relation to the unique nature of indigenous peoples and their cultures in comparison to broader human rights provisions ensures that the declaration becomes inimitable in its utility to the proposed case. The aforementioned acceptance of the declaration as ‘fully consistent’ with Canadian law by the executive of the state precludes many arguments against interpretation of that law in light of the provisions of the Declaration. This has the effect of further elevating its utility in respect of any case concerning its objects, but especially with regard to the subject of the thesis. The inclusion of the text in this manner allows a more expansive interpretation of binding obligations on the Canadian state with which the piece is concerned than might otherwise have been possible.

5.61 Article 8

Destruction of Culture

A number of provisions within the text afford incomparably specific rights and duties, not found in broader legally binding texts. These texts can now be interpreted in light of the declaration however, and thus are of great consequence to the province’s indigenous inhabitants. Article 8 of the declaration for example concerns the, ‘forced assimilation or

destruction of ... culture,⁸⁸⁹ including, according to the elaborative subsections, 'Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities.'⁸⁹⁰ The role of native fauna, such as caribou within the culture of the Indians of north-eastern Alberta, where tar sands developments are at their most intense and destructive, is integral to the maintenance of the distinction between it and other indigenous and non-indigenous cultures present in the province.

Matsui, in his discussion of the historic development of water rights in the regions now subject to tar sands industry expansion illustrates the fundamentally opposed approaches to natural resource utilisation which once characterised the conflict between indigenous peoples and the majority population. He suggests that in, 'establishing...an agrarian society depended largely on effective exploitation of natural resources...by curtailing the power of indigenous peoples over their territories.'⁸⁹¹ Thus, the key distinction between the cultures became the central point of opposition between communities with opposing cultural values. Historically this resulted in conflict, now it is protected as there has been a, 'shift away from a global culture of assimilation.'⁸⁹² This shift is embodied by the creation of texts such as the DRIP, which Manus suggests, 'asserts the interconnectedness of indigenous cultural survival and environmental rights.'⁸⁹³ By continuing to utilise caribou as a source of food and clothing (despite it no longer commonly embodying the main element of the diet of a group) and using it in cultural ceremonies and practices, the First Nations of Alberta have chosen to preserve and distinguish their social group from those found throughout the rest of the province.

⁸⁸⁹ DRIP (n39) Art 8

⁸⁹⁰ DRIP (n39) Art 8 (2)(a)

⁸⁹¹ Matsui, K. *Native Peoples and Water Rights: Irrigation, Dams, and the Law in Western Canada* (McGill-Queens University Press, Montreal, 2009) 140

⁸⁹² Manus, P. 'Sovereignty, Self Determination, and Environment Based Cultures: The Emerging Voice of Indigenous Peoples in International Law.' (2000) 23(4) *Wisconsin International Law Journal* 553, 614

⁸⁹³ *ibid.* 603

The aforementioned effects of the tar sands developments upon caribou numbers, migratory and feeding patterns and ranges impact heavily on the ability of the First Nations to hunt these animals in pursuit of cultural expression and preservation. The extraction of the tar sands material for the production of synthetic crude oil does not directly inhibit the participation in culture of individuals or the expression thereof. However, the influence felt by the caribou in turn have the equivalent, ‘effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities.’⁸⁹⁴ In this respect the drafting of the provisions of the declaration coupled with a number of seminal applications of the text, represent, ‘authoritative interpretations of the substantive provisions.’⁸⁹⁵ As such they eliminate the need for significant and baseless interpretative steps to be made on the part of a judicial body considering a case against tar sands developments based on binding legal principles.

The narrower construction of binding legal norms such as those of the ICCPR, ICESCR, and the CCRF, protect only the right to cultural freedom. The aspects comprising cultural practices are not expressly protected, merely the freedom to perform them. Manus for example highlights the failings of the ICESCR in this regard stating that it does not, ‘address means through which traditional territories or natural resources may be preserved or protected for an indigenous peoples’ use.’⁸⁹⁶ As such they may not entitle First Nations to argue for the protection of the boreal woodland caribou of Alberta by virtue of it representing a fundamental element of their culture. This is in spite of the fact that their right to hunt caribou in the regions affected has been protected with constitutional strength under the provisions of

⁸⁹⁴ DRIP (n39) Art 8 (2)(a)

⁸⁹⁵ Kambel references in particular the *Suriname* decisions in the HRC, IACHR and CERD. Kambel, E-R. *The Rights of Indigenous Peoples and Maroons in Suriname* (International Working Group for Indigenous Affairs, 1999) 153.

⁸⁹⁶ Manus, P. ‘Sovereignty, Self Determination, and Environment Based Cultures: The Emerging Voice of Indigenous Peoples in International Law.’ (2000) 23(4) *Wisconsin International Law Journal* 553, 580

the numbered treaties, and specifically in Alberta, Treaties 8 and 6.⁸⁹⁷ A note should be made that this constitutional protection was limited severely by the Natural Resources Transfer Agreements⁸⁹⁸ given constitutional force themselves in 1930.⁸⁹⁹ The agreements removed any commercial element of the rights afforded under the numbered treaties and replaced them with broad rights to hunt, trap and fish for the purposes of securing food on which the focus has been placed by the piece.⁹⁰⁰

The DRIP offers an indirect causal link between the effects on the native flora and fauna of significance, such as boreal woodland caribou and the resulting threat to the culture of the indigenous peoples of Alberta. The judgement of the Inter-American Court of Human Rights stated this connection clearly, referring to both binding legal texts and the Declaration and asserting that, ‘by violating the rights of a community to continue to subsist...a number of basic human rights are violated...[including the right] to survival.’⁹⁰¹ Applied to the provisions of binding human rights instruments the rights would potentially be enforceable against the national and provincial authorities of Canada. This would however require considerably broad judicial interpretation, thus leaving the success or failure of the argument resting on the judgment of the existence of such a link. Whilst circumstances such as *Poma Poma v Peru*⁹⁰² have suggested that such a link is not beyond the interpretative breadth afforded to such rights,⁹⁰³ focus has been placed upon economic activities, or the protection of particular tracts of land, as was the case in the *Lubicon Lake Cree* action.⁹⁰⁴

⁸⁹⁷ Constitution Act (n200) s.35

⁸⁹⁸ Alberta Natural Resources Transfer Agreement (Memorandum) 1930

⁸⁹⁹ Constitution Acts, 1867 to 1982. 1982, c.11. s.35

⁹⁰⁰ *Baker* (n170) para. 71

⁹⁰¹ *Mayagna (Sumo) Awas Tingni Community v Nicaragua* Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001), Oral and Expert Evidence (d.)

⁹⁰² *Poma Poma* (n271)

⁹⁰³ Specifically in the *Poma Poma* case focus was placed upon Art. 27 of the ICCPR instead of Art. 1(2) under which the communication was submitted to the Committee.

⁹⁰⁴ Note should be made that the *Lubicon Lake Cree* action remains unresolved owing to the concessions made to the form of mitigation and settlement being left to the parties to agree. *Lubicon* (n729)

Neither of these factors is of concern in the present case, which focuses upon peoples already granted reserve land,⁹⁰⁵ whose hunting is not undertaken for economic gain, and indeed would not be protected under Canadian law if it was.⁹⁰⁶ Article 8 of the DRIP provides a considerable interpretative stepping stone in relation to legal instruments with binding effect on the Canadian state and organs thereof, which could not otherwise be relied upon. Specifically it affords protection from the ‘forced assimilation or destruction of culture, or actions which might result therein. The omission of this interpretative insight would as such leave any potential case pivoting on a subjective decision concerning otherwise indirect links to flora and fauna.

With respect to the particular role of the boreal woodland caribou within the culture of the indigenous peoples of Alberta affected by the tar sands developments, the provisions of the DRIP also expand upon the protection potentially afforded by Article 8 outlined above. The provisions iterate that, ‘Indigenous peoples have the right to practice and revitalise their cultural traditions and customs,’⁹⁰⁷ a right which, ‘includes the right to maintain, protect and develop the past, present and future manifestations of their cultures.’⁹⁰⁸ The use of caribou for a number of purposes, which persists despite the availability of more effective and readily available alternatives, alludes to the animal being of great significance as a continuing expression of the culture of indigenous Albertans and vital to its preservation. The significance of the caribou is therefore inherently linked to the notion of intergenerational

⁹⁰⁵ This was not the case for the Lubicon Lake Cree whose case also concerned their recognition as Indians within the Canadian legal system.

⁹⁰⁶ Owing to the restrictions placed upon the use of natural resources on reserve lands under the Constitution Acts, 1867 to 1982. 1982, c.11. s.35 which codified the Natural Resource Trade Agreements and which were confirmed to relate only to the sourcing of food for the peoples for whom the land was reserved in the case of *Badger* (n269).

⁹⁰⁷ DRIP (n39) Art 8

⁹⁰⁸ *ibid.* Art. 11

equity,⁹⁰⁹ which as Judge Weeramantry stated in the International Court of Justice, ‘is an important and rapidly developing principle of contemporary environmental law.’⁹¹⁰ As such to ignore the consequences of reduced caribou numbers beyond immediate and universal notions of the species as an aspect of subsistence would fundamentally undermine principles of both human rights law and environmental law. Whilst this connection is not strictly binding in nature, the consistent conflagration of the principles intimates the willingness of judicial bodies to consider it in practice.⁹¹¹

Article 8 of the Declaration also has particular relevance to the impacts of the tailings ponds upon the First Nations and their ability to express their culture. The provision requires as discussed that States do not subject indigenous peoples, ‘to forced assimilation or destruction of their culture.’⁹¹² The impacts felt by the First Nations would undoubtedly be ‘acts which states must prevent or provide redress [for] when they fail to prevent,’⁹¹³ which under the Article include, ‘dispossession of land, territories or resources.’⁹¹⁴ The adverse effects of the tailings ponds outlined previously, including land use, disturbance to the inimitable flora and fauna of the boreal forest ecosystem, contaminant seepage and the issues surrounding reclamation of the ponds, might necessitate either an alteration or abandonment of indigenous cultural practices if unchecked. This might take the form of a geographical relocation from an area, with the added consequence of potentially foregoing the

⁹⁰⁹ ‘The principle of intergenerational equity implies that the present generation owes a duty to future generations to leave earth and its environment in no worse a condition than when they received it.’ Tladi, D. *Sustainable Development in International Law: An Analysis of Key Enviro-Economic Instruments* (Pretoria University Law Press, 2007) 41

⁹¹⁰ *Nuclear Tests Case (Australia v. France)* I.C.J. Reports 1974, p. 253, 341

⁹¹¹ See in this regard: Weiss, E.B. *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* (Transnational Publishers, United Nations University, 1989)

⁹¹² DRIP (n39) Art. 8 (1)

⁹¹³ Vrdoljak, A.F. *Reparation for Cultural Loss* in Lenzerini, F. (ed.) *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford University Press, Oxford, 2008), 208

⁹¹⁴ *ibid.* 208

constitutionally protected rights afforded under the numbered treaties⁹¹⁵ which are inextricably linked to defined tracts of land. Relocation would therefore not only create difficulties with regard to readjustment to a new habitat, even if the features of the ecosystem were identical to those abandoned, but also result in the sacrifice of domestic rights negotiated to ensure the continuation of the First Nations peoples and their culture.

Another solution would be to alter practice, relinquish cultural practices linked to the boreal forest ecosystem, and instead pursue an existence more akin to that of the non-indigenous populous of the region. Such a choice has been made by a number of First Nations tribes whose lands either were not protected by the numbered treaties, or opted to ensure the continuation of their communities, even if it was not within the traditional cultural mould.⁹¹⁶ Often the surrender of rights over lands is made in return for assurances from companies and authorities with regards to levels of employment in the extractive industries for members of their communities. Decisions and arrangements of this nature would undeniably not be made were the extractive industries not altering the native environment and features thereof with their operations. Thus a valid contention emerges that the relevant authorities of Alberta and Canada failed to, ‘provide effective mechanisms for the prevention of, and redress for...action which has the aim or effect of dispossessing [indigenous peoples] of their lands, territories or resources.’⁹¹⁷

⁹¹⁵ Treaties 6 and 8 (n68)

⁹¹⁶ Anderson (n347) 97-128

⁹¹⁷ DRIP (n39) Arts. 8 (2) and 8 (2) (b)

5.62 Article 20

Traditional Means of Subsistence and Development

Article 20 of the DRIP appears to mirror provisions provided in other texts to which Canada is subject, and concerns the right of peoples to the ‘enjoyment of ... means of subsistence and development, and to engage freely in all their traditional and economic activities.’⁹¹⁸ This provision, or a highly similar drafting thereof, is common to all the international documents considered thus far under the auspices of self-determination.⁹¹⁹ The article also highlights arguably one of the most significant hurdles over which the contentions of the piece must overcome. A broad range of elements common to indigenous cultures across the world, such as specific means of subsistence, the development of political, economic and social mechanisms, and free engagement in traditional activities are all to be protected by state parties to the Declaration under the article. The drafting of the provisions is however the area of concern, specifically with regard to the implied limitation it imposes. This is as it arguably undermines its utility to a significant enough degree in relation to the aim of the piece as to make its inclusion as an interpretative aid indefensible.

Firstly it should be noted that the focus of the piece is on the impact of environmental damage on the expression and existence of the culture of First Nations peoples. As such issues surrounding the maintenance and development of institutions protected as a right under Article 20 is not the concern of the piece and will not be considered beyond any ramifications in relation to participatory rights. As the numbered treaties⁹²⁰ establishing reserved lands, and

⁹¹⁸ DRIP (n39) Art 20

⁹¹⁹ Note should be made that, as has been discussed, the application of the principle of self-determination in practice has been consistently avoided by judicial and quasi-judicial bodies, and especially by the UNHRC as it was in *Poma Poma* (n271) and *Lubicon* (n729)

⁹²⁰ Treaties 6 and 8 (n68)

the Indian Act⁹²¹ outline the recognised indigenous peoples, and the representatives thereof in their texts this aspect of the provision can be disregarded for the purposes of the thesis also. Similarly the right to ‘engage freely in all...traditional and other economic activities,’⁹²² is of potentially limited utility dependent upon its application.

The notion of ‘free engagement’ if narrowly interpreted would require only non-interference on the part of the state parties subject to the Declaration, as opposed to any positive obligation to support or promote engagement in culturally expressive practices. Indeed the ability to exist and express culture, ‘which includes a wide range of activities free from state interference,’⁹²³ is a key addition of the DRIP to international debates on the role of indigenous peoples within the broader framework of international law according to Abate and Kronk. Whilst the principle of the freedom to engage in one’s culture of choice is an admirable one, the obligation only not to interfere with this freedom affords less protection in reality. Direct actions inhibiting cultural expression, whether administrative or legislative are clearly forbidden if the state wishes to comply with this article. However, indirect impacts on the ability of indigenous peoples, or any person wishing to express a minority culture, are not overtly declared as incongruent with the provision.

The tailings ponds formed of by-products from the tar sands extraction projects are an illustrative example of the potential flaw highlighted above. Whilst the ponds are not directly restricting the ability of the First Nations peoples of the regions in proximity to them from expressing their culture, their impacts on the surrounding ecosystem have inhibitory effects.

⁹²¹ Indian Act R.S., 1985, c.I-5

⁹²² DRIP (n39) Art. 20

⁹²³ Kebec, P. *REDD+: Climate Justice of a New Face of Manifest Destiny Lessons Drawn From the Indigenous Struggle to Resist Colonisation of Ojibwe Forests in the Nineteenth and Twentieth Centuries* in Abate, R.S. and Kronk, E.A. (eds.) *Climate Change and Indigenous Peoples The Search for Legal Remedies* (Edward Elgar Publishing, Cheltenham, 2013) 184

By way of illustration, the relocation or culling of boreal woodland caribou to facilitate the construction of an extraction project would be held to be a clear breach of this right and those binding obligations with which it shares clear interpretative links.⁹²⁴ As boreal woodland caribou are however a migratory species such an action would not be necessary. The resultant effect upon the indigenous populous of the surrounding area would however be identical to that which is currently occurring it is suggested. Tailings ponds reduce the prevalence of caribou in proximal habitat both due to disturbing natural camouflage and cover, as well as reducing the occurrence of their preferred food sources. Potential pollution of the water table in the immediate vicinity of the ponds owing to seepage of the materials contained therein, would arguably through bioaccumulation in the flora of the ecosystem have subsequent detrimental impacts upon larger fauna such as caribou. Whilst other rights discussed in the piece would arguably be breached by the secondary effects of the tar sands upon the First Nations of Alberta, the ‘free engagement’ in cultural practices is clearly not directly inhibited by the creation of tailings ponds.

A clear comparator here is the *Lubicon Lake Cree* action before the Human Rights Committee. Whilst the Committee delivered a View supporting the contention that the right to enjoy their own culture had been breached by the presence of industrial oil projects, it was reserved in elaborating what exactly had caused said breach. The Committee did not oppose the Canadian State’s argument that the Daishowa pulp mill did not pose any ‘serious adverse consequences, pointing out that the pulp mill, located about 80 kilometres away from the land set aside for the reserve, is not within the Band’s claimed traditional territory.’⁹²⁵ Indeed Mr. Nisuke Ando in his individual opinion suggested that Article 27 of the ICCPR was not the

⁹²⁴ The natural behaviour of caribou and the approaches tailings pond construction process make such a suggestion almost farcical and its suggestion is merely by way of illustration of a potential issue of drafting in relation to the case study on which the piece focuses.

⁹²⁵ *Lubicon* (n729) at 29.11

appropriate provisions to couch the claim under at all, noting his, ‘reservation to the categorical statement that recent developments have threatened the life of the Lubicon Lake Band and constitute a violation of article 27.’⁹²⁶ His comments were based on the need to protect economic development and would intimate that only the expropriation of land altogether, the primary concern of the contest, should be held as inhibiting the enjoyment of culture. This individual opinion coupled with the sparse single paragraph on the violation which had occurred⁹²⁷ indicate a reticence to connect secondary or particular impacts to fundamental breaches, and instead a desire to suggest overall disapproval with a particular project or projects and their administration. Certainly in this instance land expropriation, thus preventing any expression of culture linked to land whatsoever, was evidently the primary concern of the Committee.

The right provided under Article 20 of the DRIP would appear to mirror this approach prohibiting only direct inhibitions. From its drafting, the Article is clearly intended to operate in a manner akin to rights protecting against discrimination,⁹²⁸ as a non-specific obligation not to act, rather than a more focused positive duty to prevent or promote.⁹²⁹ For the purposes of the construction of a case against the Canadian authorities for their licensing and permitting of projects which necessitate tailings ponds therefore, the provisions of Article 20 are rendered ineffective. With no direct restriction on cultural practice resulting from the tailings ponds, only consequential impacts, the utility of Article 20 is reduced too greatly to warrant its inclusion as an element of the suggested action. This assertion is based upon the lack of consideration of the Committee in *Lubicon* of the non-proximal Daishowa pulp mill

⁹²⁶ *ibid.* Appendix 1

⁹²⁷ The paragraph outlined only historical inequities between the parties.

⁹²⁸ DRIP (n39) Art. 9

⁹²⁹ For examples of such positive obligations see Arts. 11(2), 14 (3) and 19 of the same declaration (*ibid.*)

and its impacts on the indigenous populace,⁹³⁰ which is indicative of only direct inhibitions giving rise to breaches. Such an approach would exclude all but the most poorly placed tar sands extraction projects from being challenged, which is not the aim of the piece. Similarly such an approach would not reflect the broad range of impacts that the industry has upon the First Nations resident in the regions exploited.

In relation to impacts to boreal woodland caribou habitat and those resulting from excessive water consumption, a direct inhibition of free engagement would be necessary to suggest a breach had occurred. With the exception of fishing by traditional methods,⁹³¹ no direct inhibition of engagement in traditional activities has occurred as a result of extraction projects. Establishing links between industrial projects permitted by governmental authorities and direct inhibitions on the ability to engage in such practices is extremely difficult. By way of example successful actions involving similar impacts and which have referenced the DRIP have been based upon actions which absolutely prevent cultural activities, rather than inhibiting their efficacy. The *Poma Poma*⁹³² action which prevented indigenous peoples from farming llamas by traditional methods as grazing lands and water sources were decimated; the *Awes Tingni*⁹³³ case where logging concessions levelled forest utilised for hunting, gathering and sourcing building and crafts materials; and the *Saramaka*⁹³⁴ case before the IACHR which in the court suggested that concessions to mining and logging industries threatened, 'their survival as a tribal people,'⁹³⁵ are illustrative of the degree of impact upon engagement necessary to induce to a successful claim.

⁹³⁰ *Lubicon* (n729)

⁹³¹ Note the scarcity of this practice and difficulties highlighted throughout in establishing the impacts of water consumption upon fish spawning data.

⁹³² *Poma Poma* (n271)

⁹³³ *Awes Tingni* (n475)

⁹³⁴ *Saramaka* (n458)

⁹³⁵ *ibid.* para 129

Whilst these cases did consider impacts having an equivalent effect to inhibiting free engagement, the cases were not based on suggestions of direct inhibitions to which there is no administrative redress the likes of which Article 20 prohibits. Instead they focused upon lack of participation, traditional conceptions of property rights, and the very survival of the peoples concerned. *Prima facie* therefore Article 20 is of use in relation to the restrictions upon free engagement in cultural activities which the impacts of the tar sands rise to. However, the inability to prove an absolute inhibition upon said engagement severely restricts its utility in relation to the aim of the piece in light of established jurisprudence.

5.63 Article 29

Productive Capacity of Lands

The DRIP as discussed expands upon the broad and often unelaborated rights afforded by treaty texts which have frequently been interpreted narrowly, without reference to indigenous peoples specifically, and sometimes not at all in relation to individual claims in the international sphere.⁹³⁶ Charters describes the text as, ‘the most progressive of international instruments dealing with indigenous peoples’ rights,’ highlighting that its creation is a, ‘response to the international legal system’s long-standing neglect of indigenous peoples.’⁹³⁷ This is achieved by providing the security of the elements which compose indigenous cultures as well as the cultures themselves, and Article 29 provides a clear example of this. The provision offers a considerable addition to the argument that the impacts of tar sands projects breach the established rights of the indigenous peoples of Alberta by adversely affecting the environment to which their culture is inextricably linked. Article 29

⁹³⁶ Common Article 1 being exempt from the individual complaints procedure concerning the ICCPR and that now in force for the ICESCR established by optional protocols to the twin covenants.

⁹³⁷ Charters, C. *Reparations for Indigenous Peoples: Global International Instruments and Institutions* in Lenzerini, F. (n913), 168

iterates that, ‘Indigenous peoples have the right to conservation and protection of the environment and the productive capacity of their lands or territories and resources.’⁹³⁸

Article 29 provides an avenue through which a domestic judiciary might consider a broad range of effects upon the environment and productive capacity of lands of indigenous peoples in relation to legally binding provisions present in texts to which the Canadian state is party. Such provisions internationally rarely provide explicit rights concerning the environment in a broad conception. Instead said protection concerns more specific instances, for example a safe environment in which to undertake work⁹³⁹ as has already been considered within the domestic, regional and international legal spheres. Such an environment is not necessitated as being relative to specific needs, merely to be safe and fit for purpose.⁹⁴⁰ As such the interpretative opportunity provided by the provision is of some significance in a broader context beyond that considered by the thesis and even indigenous peoples generally. This aside however, its significance is also immeasurable in relation to the context of the tar sands specifically.

With reference to the preservation of the boreal woodland caribou as an element of the culture of the First Nations, the protection afforded by the article is arguably the most pertinent of any in the declaration, and indeed all of the international legal instruments considered. Similarly the ability to fish, where still practiced using traditional methods, and source water from natural courses, as well as the secondary impacts low flow levels or quality of water would have upon the wider ecosystem are encompassed by the drafting of the article. Preserving, ‘the right to the conservation and protection of the environment and the

⁹³⁸ DRIP (n39) Art. 29

⁹³⁹ For example: ICESCR (n254) Art. 7.

⁹⁴⁰ Menghistu, F. *The Satisfaction of Survival Requirements* in Ramcharan, B.G. (ed.) *The Right to Life in International Law* (Martinus Nijhoff Publishers, Dordrecht, 1985) 64

productive capacity of their lands,⁹⁴¹ the article provides what might be perceived as an all encompassing solution to the damage the tar sands are wreaking upon Alberta. Leib's description of the article illustrates this clearly in asserting that as a result of the drafting of this provision and reading in line with the other articles of the declaration, 'states are obligated to give legal recognition and protection to these lands and resources according to the customs, traditions and land tenure systems of the indigenous peoples concerned.'⁹⁴² However, as has been discussed, the provision can only be used in an interpretative capacity and merely obligates, but does not necessitate state action.

The 'conservation ... of ... the productive capacity' of the land reserved for the Indians under the numbered treaties, would undeniably include the preservation of the suitability of that land to support the culturally significant species native to it. State parties to the declaration are required to, 'establish and implement assistance programmes for indigenous peoples for such conservation and protection.'⁹⁴³ In the case of the boreal woodland caribou this would entail ceasing or at least limiting disturbances to the ecosystem they inhabit. With reference to water quality and quantity, the right would require the maintenance of flow levels and pollutants which did not interfere with the ability to source culturally relative materials from the environment. Gilbert in this regard connects the provision of Article 29 to the comments of the Committee on Economic Social and Cultural Rights⁹⁴⁴ which highlighted that, 'Indigenous peoples' access to water resources on their ancestral lands is protected from encroachment and unlawful pollution.'⁹⁴⁵ Plans to restore land disturbed by

⁹⁴¹ DRIP (n39) Art. 29

⁹⁴² Leib, L.H. *Human Rights and the Environment: Philosophical, Theoretical and Legal Perspectives* (Martinus Nijhoff Publishers, Dordrecht, 2011) 150

⁹⁴³ DRIP (n39) Art. 29

⁹⁴⁴ Gilbert, J. *Indigenous Peoples' Land Rights Under International Law: From Victims to Actors* (Transnational Publishing, Ardsley, 2006) 124

⁹⁴⁵ Committee on Economic, Social and Cultural Rights, General Comment 15, The Right to Water (Twenty-ninth session, 2003), U.N. Doc. E/C.12/2002/11 (2002) para 1(f)

the tar sands developments have been proposed by oil companies and the Canadian executive alike,⁹⁴⁶ as have measures proposed to reduce the impact felt by the indigenous wildlife and the consumption of water in the regions affected. The commitment to reaping the economic benefits of extraction remains undeterred however, and caribou numbers, flow levels and water quality continue to fall in flagrant breach of the principles outlined above.

The article also considers the effects of hazardous materials deposited on the land of indigenous peoples as a result of the exploitation of natural resources situated within them. This is of obvious relevance to the discussion regarding the impacts of the tailings ponds, which is focused upon the potential seepage of materials, or aspects thereof, into the ecosystem in which they are situated, and the controversy surrounding their reclamation. However, the impacts to which they contribute are more widespread than simply contamination and failed reclamation. For example, many of the impacts which adversely affect boreal woodland caribou and are caused by reduced water levels directly in the north east of Alberta can also be attributed, wholly or in part, to the creation and management of tailings ponds which are composed of, amongst other materials, vast quantities of water.

The combination of the varied effects of their physical presence and the potential contamination they might cause allows for the consideration of a variety of legal provisions applicable to the impacts upon those most susceptible to tailings ponds. The overall aim of such a varied approach would be to promote a progression towards either the abandonment of their use or technological, scientific and administrative steps towards eliminating or significantly reducing the aforementioned impacts. This however is unlikely to come to

⁹⁴⁶ See for the example the work of Canada's Oil Sands Innovation Alliance (previously the Oil Sands Tailing Consortium), a body comprised seven companies, which have opted to share technology and resources on the management of tailings in order to ensure continuing improvements in their storage, disposal and reclamation. See: Canada's Oil Sands Innovation Alliance <<http://www.cosia.ca/>> Accessed 30th July 2014.

fruition and abate the concerns of the First Nations affected in the short term, and as such focus is largely upon the granting of participatory rights to curb the immediate use of this form of waste storage. In this regard, the recognition of the need to, as a minimum, consult⁹⁴⁷ indigenous peoples affected by the storage of such materials under Article 29 is of particular significance. The provision necessitates the gathering and consideration of information regarding adverse impacts as part of the regulatory framework comprising binding legal commitments. Canada has itself adopted the aforementioned minimalist approach as is evidenced by its comments on the Declaration and specifically Article 29. Aboriginal Affairs and Northern Development Canada⁹⁴⁸ conceded consent may be required where hazardous materials were stored on indigenous peoples' lands directly. However, the universal application of the concept to all situations in which storage may give rise to secondary or transboundary⁹⁴⁹ impacts, as in this instance, was said to be, 'clearly not an appropriate standard.'⁹⁵⁰

The key addition to the binding provisions available within the domestic and international legal spheres is the aforementioned concept of the 'productive capacity' of the land to which the indigenous peoples are entitled. This interpretative addition to the right to traditional lands is of use to the contention that all of the impacts of the tar sands projects

⁹⁴⁷ Whether there exists a right to free, prior and informed consent is the source of heated academic debate. See: Anton, D.K. and Shelton, D.L. (n696) 431 and Magraw, D and Baker, L. 'Communities and Human Rights: Community Based Property Rights and Prior Informed Consent (2007) 35 *Denver Journal of International Law and Policy* 413 and by contrast the more supportive assertions of , Upasana, K. 'Indigenous Peoples' Right To Free, Prior, and Informed Consent In The Context Of State-Sponsored Development: The New Standard Set By *Sarayaku v. Ecuador* And Its Potential To Delegitimize The Belo Monte Dam' (2013) *American University International Law Review* 29(1) 165 and Buppert, T. and McKeehan, A. 'Free, Prior and Informed Consent: Empowering Communities for People-Focused Conservation' (2014) *Harvard International Review* 35(3) 48. However for the purposes of the piece only the generally accepted demand for consultation will be considered owing to the aim of creating a viable basis for litigation with a reasonable prospect of success.

⁹⁴⁸ The federal government authority responsible for First Nations issues according to the constitutional arrangements of Canada with respect to the division of federal and provincial responsibilities and jurisdictions.

⁹⁴⁹ Internally defined administrative boundaries in this case.

⁹⁵⁰ Aboriginal Affairs and Northern Development Canada *Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples* (2010) < <http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>> Accessed 30th July 2014

discussed by the piece are a breach of established rights the Canadian state is obliged to respect, protect and fulfil. However, it is of particular utility to the arguments concerning available water quantity and quality. Specifically the difficulties with regard to proving the secondary impacts of low water flows⁹⁵¹ and high contaminant levels in the water courses of north east Alberta as a result of extraction projects would arguably be reduced. Normally the effect of such projects on the flora and fauna of the region would have to be shown to directly inhibit the ability of the First Nations populace to express their culture, or affect their health, both high burdens of proof. Should Article 29 of the DRIP⁹⁵² be read into provisions protecting those lands this threshold may be reduced significantly. This would mirror existing Canadian approaches to the protection of proprietary rights to First Nations lands, which are increased relative to the strength of the title to land.⁹⁵³ In this regard it could be argued that reading domestic precedents in line with obligations under Article 29, the stronger the connection to the land, the more stringent and precautionary the protection of the ecosystem prevalent upon it must also be.

As has been highlighted, at present for damage to breach the rights to land afforded in the domestic sphere, the severity of that damage would likely be required to be great, irreversible, and reasonably avoidable on the part of the industry and authorities. This is especially true as a result of the numbered treaties,⁹⁵⁴ owing to the protection of the right of the government⁹⁵⁵ to exploit natural resources of those lands. By introducing the concept of 'productive capacity' to those domestic provisions, via interpretation in light of Article 29,⁹⁵⁶

⁹⁵¹ RAMP (n226)

⁹⁵² DRIP (n39) Art. 29

⁹⁵³ In this regard, see; Potes, V. Passelac-Ross, M and Bankes, N. *Oil and Gas Development and the Crown's Duty to Consult: A Critical Analysis of Alberta's Consultation and Practice*. (2006) <<http://science.ucalgary.ca/iseee/files/iseee/14-oil-and-gas-development-and-the-crown's-duty-to-consult.pdf>> Accessed 30th July 2014

⁹⁵⁴ Treaties 6 and 8 (n68)

⁹⁵⁵ Eluded to as 'the Crown' in the original text.

⁹⁵⁶ DRIP (n39) Art. 29

the threshold for demonstrating a breach would be reduced to proof that only the ability of the land to support traditional activities had been impaired. Aboriginal Affairs and Northern Development Canada highlighted the degree of relativity to the use of the environment protected by the provision in commentary on the position of the federal government in respect of the text. The government department suggested that it, 'would have preferred text that ensured that the duties of States with respect to the protection of the environment generally are consistent with those in relation to indigenous lands,' rather than the provision of a, 'right to the conservation and the protection of the environment.'⁹⁵⁷

Thus, reading such a right into the context at hand, consistent reductions in fish stocks, flora in the proximity of projects, or caribou sightings would all support cession or restriction of water withdrawals, or the construction of tailings ponds and in-situ extraction operations. Under the mere protection of land itself, the capacity of First Nations traditional lands would have to be reduced to a degree approaching nil, or certainly to a potentially irretrievable level and be evidenced as being a direct result of said water withdrawals. This is as general environmental law provisions would allow both a margin of appreciation and permit many actions which did not impact on human health and established proprietary rights. In relation to the contention that licensed water withdrawals from, and contamination of, the natural water courses and bodies by tar sands extraction projects adversely impact the environment of the region to such a degree as to breach the rights of the indigenous peoples dwelling there, this degree of relativity is therefore of immense significance. In the construction of a case against the licensing authorities therefore the interpretation of binding provisions in line with the principle espoused in Article 29 of the DRIP⁹⁵⁸ is crucial. This is

⁹⁵⁷ Aboriginal Affairs and Northern Development Canada *Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples* (2010) < <http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>> Accessed 30th July 2014

⁹⁵⁸ DRIP (n39) Art. 29

due to the controversy and contention surrounding the scientific measurement of the impacts of water withdrawals⁹⁵⁹ and levels of contaminants⁹⁶⁰ which otherwise could potentially rebut any case brought on this basis.

The inextricable link between the unique ecosystem of the boreal forest, the caribou reliant upon it and the continued existence of the culture of the First Nations Indians of north eastern Alberta is evident and well documented. Morse succinctly describes the paramount significance of this connection stating that, ‘the most fundamental matter of importance for First Nations...all across Canada is sustaining or regaining their relationship with traditional territories.’⁹⁶¹ Article 29 of the DRIP both highlights and allows respect to be paid to this fundamental connection. The lack of binding effect for the Declaration is telling though, and potentially dramatically reduces its efficacy in relation to this and indeed any case concerning environmental damage. Despite the initial reluctance on the part of Canada to acquiesce to its provisions a bold and unabashed endorsement thereof followed. This fact, when coupled with the sheer number of state parties to it, means the Declaration gains significant weight as a source of soft law with considerable interpretative impact in relation to cases concerning indigenous peoples, and that proposed by the thesis is no exception.

5.7 Concluding Remarks

International instruments afford a range of rights potentially applicable to the aim of the piece. However their discussion herein has highlighted the boundaries similarly felt at the regional and domestic levels to the use of those rights concerning harms against the person.

⁹⁵⁹ RAMP (n226)

⁹⁶⁰ Indeed the peer review of aquatic monitoring in the regions impacted upon by the oil sands suggested increased monitoring of species native to those regions for contaminants specifically associated with such extraction in order to provide accurate data on their presence within the ecosystem. *ibid.* 39

⁹⁶¹ Morse, B. W. *Peoples of Canada and Their Efforts to Achieve True Reparations* in Lenzerini, F. (n913) , 286

The consideration of the rights concerning society, culture and the family however has raised further interpretative and actionable additions to the potential litigation considered by the piece. In particular the introduction of the concept of ‘dependents’ upon the work of an individual as opposed to necessitating a familial connection common within the interpretations of what might broadly be termed ‘rights to work’ in other jurisdictions considered is significant. This significance is owing to the communal nature of many indigenous practices, and in particular hunting. An individual would be unlikely to hunt a caribou for himself and his family, but rather it would be divided amongst the nation to which he belonged.

Added to this common protection of work is the stipulation that it need not be the most economically productive form of work available, nor as seen in the regional sphere afford a pecuniary reward. The DRIP also affords an interpretative connection between conceptions of work in the indigenous context and the productive capacity of traditionally utilised lands. These two additions in particular to the broader protection of subsistence using traditional methods are of considerable significance to the context of the piece. They ensure that the general concept of work is able to be argued as interpreted in a manner in conformity with indigenous cultural approaches to securing a livelihood. In the prevention of the extinguishment of indigenous cultures by the tar sands extraction projects it is these culturally relative interpretations of broader rights which the piece argues are key, and which are provided in the international context.

Chapter 6

Conclusions

The construction of any litigious action against the continued licensing and approval of tar sands extraction projects in Alberta, Canada would be met with significant opposition, both juristic and political, regardless of the field of law in which it was based. The proposal of a case in the field of human rights law however offers unique challenges to any potential applicants, and yet it is suggested also affords both relevant provisions and outcomes to the idiosyncratic reality of the indigenous populace impacted upon so acutely. In the conclusion to the piece, the most pertinent provisions and those with the greatest likelihood of success based will be put forward. This will be based upon assessments as to those which best reflect or are appropriate in which to frame the nature of the relationship between First Nations and specific environmental features, and which are best supported by precedents or progressive but not excessive interpretations of existing provisions. As was discussed in the methodological section of the piece, the proposed basis for such an action will be weighed against the demand that all legislative and administrative actions be for the ‘peace, order and good government of Canada,’ and that any limitations upon rights afforded to Canadian citizens only be limited to such an extent as is, ‘justifiable in a free and democratic society.’

6.1 Forum Conveniens

Throughout the piece a number of fora in which a case might be brought have been discussed. The three main options are that of the domestic Canadian courts, the Inter-American Commission, and the Human Rights Committee of the United Nations. All three could potentially hear an action brought under the auspices of the rights discussed herein, though there are merits and concerns to the utilisation of each. The aim of the piece was to suggest the optimum basis for a case against the tar sands developments in human rights law which takes into account the idiosyncratically acute nature of the relationship between the

indigenous populace and the ecosystems they inhabit, however to fail to consider the most appropriate for such an action would be remiss.

The piece has considered the rights discussed in a manner suggesting either the use of the forum native present in each legal sphere,⁹⁶² or through the interpretation of domestic rights in light of the provisions at the regional and international levels to which Canada was subject. The regional system underpinned by the American Declaration on Human Rights⁹⁶³ offers the Inter-American Commission as a potential setting for a case akin to that suggested by the piece to be brought. The Commission and the Declaration it protects do not possess the ability to bind the Canadian state however and as such the consequences of even the most favourable Opinion of the Commission would be subject to the acquiescence of the domestic executive to the recommendations therein. Whilst the regional system to which the text and body belong possesses a binding forum, that of the American Court of Human Rights, which enforces the American Convention on Human Rights,⁹⁶⁴ Canada refuses to ratify the Convention and thus be bound by the decisions of the Court owing to an aforementioned dispute regarding the prohibition of abortion.⁹⁶⁵

The jurisdiction of the Commission is also voluntary in nature, and as such any action brought by the indigenous populace would be subject to a decision on the part of the Canadian executive to engage with such a motion. As a result of the utility of the Commission with regards to the aim of the piece is dramatically reduced. The sheer amount of variables and decisions of other parties to which such an action would be subject is not

⁹⁶² The Inter-American Commission regionally, the United Nations Human Rights Committee internationally and the Canadian judicial system domestically.

⁹⁶³ ADRD (n249)

⁹⁶⁴ ACHR (n187)

⁹⁶⁵ This is discussed in detail in the introduction to the chapter considering the rights emanating from the Inter-American regional system.

appropriate for a case of the nature suggested by the piece. Given the immense economic benefit of the tar sands to Canada and North America as a whole,⁹⁶⁶ to suggest these consents would be forthcoming and that in the event of an unfavourable petition the state would comply in a manner satisfactory to the First Nations impacted would be foolhardy. Instead it is proposed that this fora be recognised as being of political influence, and an avenue through which pressure might be put upon the Canadian executive, it is devoid of binding legal impact upon them. As such the Inter-American system will be utilised as a source of interpretative influence on the forum identified as being the most appropriate to bring an action such as that suggested by the piece.

The international forum considered in relation to the International Covenant on Civil and Political Rights,⁹⁶⁷ the UNHRC suffers from similar complications with regards to the aim of the piece. Firstly the Commission also possesses a voluntary jurisdiction over parties, and as such the acquiescence of the executive would be required. The Views of the Committee, like the outcomes of petitions to the Inter-American Commission, are not able to bind Canada to a particular course of action or make awards to one of the parties to an action. Again with regard to the aims of the piece, this reality is somewhat damning with regards to its utility. Indeed Canada has a chequered record with regards to the effectiveness of this organ of the United Nations as a means to solving disputes with its indigenous peoples. Arguably the most high profile action involving Canada before the Human Rights Committee, that of *Lubicon Lake Band v Canada*,⁹⁶⁸ remains unresolved.⁹⁶⁹ As such whilst the body remains one of the most significant in international human rights law, as a forum for a case

⁹⁶⁶ Alberta Government, *US Economic Impact Oil Calculator* (2010)

<<http://www.oilsands.alberta.ca/USEconomicImpactOilCalculator.html>> Accessed 30th July 2014

⁹⁶⁷ ICCPR (n176)

⁹⁶⁸ *Lubicon* (n729)

⁹⁶⁹ Whilst the Committee has issued a View in this regard and suggested an outcome no agreement on the matter on which the communication was based has been reached.

such as that suggested by the piece it is not the most appropriate. A note might also be made that given the controversy surrounding the outcome, or lack thereof, of the *Lubicon Lake Band* communication, especially in the eyes of the Canadian indigenous community, the forum may not be approved of by the First Nations affected by tar sands extraction except as an absolute last resort.

The piece also considers two further international instruments, the International Covenant on Economic Social and Cultural Rights⁹⁷⁰ and the Declaration on the Rights of Indigenous Peoples. Neither of these instruments however have a monitoring or enforcement body which governs them in relation to Canada with regard to individual complaints. Although the economic, social and cultural rights Covenant has recently attained a monitoring body which can consider non-state complaints as the optional protocol establishing it received the requisite number of ratifications, Canada is not a party to it. By contrast the DRIP has no provision for monitoring compliance and is regarded by some as merely an aspirational text as a result. In relation to the assertions made by the piece regarding an action against continued tar sands extraction projects, neither of the two texts could be directly enforced by the indigenous populace impacted upon. As a result the provisions of both texts might be used solely as interpretative aids to similar rights in texts which are afforded enforcement mechanisms at various levels of enforcement considered by the piece.

By contrast to the international and regional legal spheres, the domestic judicial system offers a binding forum and potentially outcome for a case against the tar sands developments based in human rights law. The Canadian judiciary has, on numerous occasions been willing

⁹⁷⁰ ICESCR (n254)

to interpret legislation in light of the commitments made at regional and international levels by the executive.⁹⁷¹ Whilst this can also be said of the Inter-American Commission⁹⁷² and the UNHRC⁹⁷³ the lack of a system of binding precedents in both systems does not ensure that previous judicial practice will be followed. A number of the contentions made within the piece are based upon the positions and interpretations adopted in previous decisions of these two organs of the regional and international human rights systems. As such to bring a case on the basis of those precedents in fora which were not necessarily bound by them would considerably lessen the likelihood of success, or certainly leave the outcome to little other than the opinion of the officials therein.

The domestic system of Canada is also an avenue through which any attempt to suggest breaches of the rights contained in the regional and international texts would have to pass. Both the Inter American Commission and Human Rights Committee require the exhaustion of all pertinent domestic remedies in all but the most exceptional of cases as an element of their admissibility criteria. As such the Canadian domestic system is not only the most effective forum in terms of potential outcome, but also must be utilised to ensure that any action in the other forums discussed be admissible. Whilst this reality suggests that the choice of forum is predetermined, the concerns regarding the regional and international systems require consideration should the case at the domestic level fail and the action be carried forward into them as was the case for the *Lubicon Lake Band*.⁹⁷⁴

Rights suggested as forming the basis for a case against the continued licensing of tar sands developments suggested as harming ecosystems on which indigenous cultures are

⁹⁷¹ *Slaight* (n517)1056-7.

⁹⁷² *Grand Chief Michael Mitchell v. Canada*, Case 790/01, Report No. 74/03, Inter-Am. C.H.R., OEA/Ser.L/V/II.118 Doc. 70 rev. 2 at 160 (2003).

⁹⁷³ *Lubicon* (n729)

⁹⁷⁴ *ibid.*

reliant must therefore originate from, or be interpreted via those available in the Canadian domestic system, and specifically its seminal human rights legislation, the Canadian Charter of Rights and Freedoms.⁹⁷⁵ The expansive approach to interpretation of this text adopted in by the Canadian judiciary,⁹⁷⁶ facilitates such an approach and further supports the contention of the piece that the domestic legal system of Canada offers the best forum in which to bring the proposed case. As a result the provisions to be suggested as representing the most appropriate basis for said action will be assessed on the basis of the protection offered to the environmental features inextricable for the indigenous culture, but also whether the interpretation of them in a manner supportive of the case at hand, or via the domestic provisions with which they share subject matter is probable. The reasoning for assessment of the rights on this ground is that a case based solely in theoretical and academic debate is of little use for the indigenous peoples of north east Alberta impacted upon by the tar sands extraction projects, but also to ensure that the conclusions reached add the growing academic field of the protection of the environment under human rights law.

6.2 Knowledge is Power

Before considering the rights which will be suggested as bearing the most potential to protect the inextricable connection between the First Nations peoples and particular environmental features, another issue is worthy of note. Regardless of the rights suggested as representing the best basis for a litigious action against tar sands extraction, the success of such an action would be predicated upon verifiable and supported evidence of impacts of the types discussed. In this regard, and although this has been discussed in detail in particular in relation to the domestic and European regional contexts, the right to access to information is

⁹⁷⁵ CCRF (n174)

⁹⁷⁶ Embodied by the 'living tree doctrine' created in *Edwards* (n196), 136

crucial to any action of this type and warrants reference here. Whilst rights to access information exist within the domestic legal system of Canada, and are afforded in the context of the oil sands debate, the expansion on this concept emanating from the European system is of particular relevance. In particular the principles considered in the case of *Guerra and others v. Italy*⁹⁷⁷ add significantly to domestic Canadian legislation concerning this notion.

As previously discussed the case extended the concept of access to information to entail the concepts of mitigation of damage and adequate provision of information regarding said damage, rather than simply access thereto. In the context of the piece, this addition affords a significant contribution to any case against the licensing of tar sands extraction projects, regardless of the other rights suggested as having been breached. The interpretation of this common right⁹⁷⁸ in the European context converts the right from its traditional conception as imposing a negative duty on the state to not inhibit, or allow the inhibition of information whether that be of a form which should be publicly available, or through active attempts to curtail the passage of information.⁹⁷⁹ The Court held that the right to receive and impart information now represented a, ‘positive obligation to collect, process and disseminate such information, which by its nature could not otherwise come to the knowledge of the public’ and, ‘had a preventive function with respect to ... serious damage to the environment and ... came into play even before any direct infringement of other fundamental rights, such as the right to life or to respect for private and family life, occurred.’⁹⁸⁰

⁹⁷⁷ *Guerra* (n620)

⁹⁷⁸ Espoused in the ADHR, ACHPR, ECHR, ICCPR and the majority domestic constitutional documents and legal systems.

⁹⁷⁹ Though this is not the concern of the piece, there are clearly permitted derogations from the freedom of information common to human rights texts across the world. Few are applicable to the focus of the piece however, with the exception of the weaker exception to the concept of the preservation of private information in relation to commercially sensitive data.

⁹⁸⁰ *Guerra* (n620)

In relation to the case at hand, this alteration in application of the right is particularly pertinent to the plight of the indigenous populace of Alberta. The interpretative value of the *Guerra* case is to demand that the potential for risk is constantly assessed, and that where necessary a risk to health or culturally significant environmental features is declared. The benefit of such an occurrence would be twofold in nature. Firstly as is implied by the right all available information regarding the risk in question would have to be disseminated to all potentially affected and means of mitigating damage suggested. The inference of the *Guerra* judgement being that should mitigation not be possible, compensation is presumed.⁹⁸¹ Secondly, such a declaration would concede an actual impact, or the significant risk thereof to human health, or the environment on which individuals and their families rely. The concession of an actual effect would circumvent or at least limit the perpetual issue regarding the burden of proof discussed throughout the piece. As such, in the context of the piece and the suggestion for a basis of a case against the developments, the influence of the principle emanating from the European jurisdiction and the *Guerra* case in particular is irrefutable. Although the result of successfully interpreting domestic provisions in line with the judgement would not in itself result in the cession of projects, or protection of particular parcels of land from licensing, it undeniably would facilitate and support contentions based upon the vast majority of the other rights considered in the piece.

6.3 Harms Against the Person

The rights discussed throughout the piece have been separated into two broad categories, those concerning harms against the physical and psychological integrity of the person, and those concerning the suppression of the abilities of those individuals to engage in

⁹⁸¹ Whilst compensation is not at the forefront of the concerns of the First Nations peoples affected by the developments, the deterrent for the government of ignoring potential risks or failing to assess them adequately before acting upon them is considerable.

activities relevant to their culture. This broad grouping of ‘harms’ primarily concerns the right to life and freedom from maltreatment which are common to all of the legal spheres considered. This distinction served to segregate rights bearing considerably different burdens of proof to establish their breach, and impacts which have varying degrees of separation from the individuals themselves. Harms to the individuals themselves are caused by impacts which directly affect the physical integrity or health of the individual, whereas suppressions of their abilities arise where impacts to features on which they rely to perform certain actions. The latter group undoubtedly entails the consideration of a far greater number of rights, and is inherently a more expansive notion, but both groups are worthy of note and the division best reflects judicial approaches to protecting the environment utilising human rights law.⁹⁸²

The rights considered concerning harms against the person have focused on two broad areas, threats to the life of the individual and threats to their physical integrity. These are predominantly various conceptions of the almost universal ‘right to life’ and prohibitions on severely harmful treatment.⁹⁸³ The provisions themselves are however not the only consistent element to this potential contention regarding the impacts of the tar sands upon the indigenous populace of the regions exploited to attain them. The burden of proof necessary to establish a breach of rights by actions alleged to have impacted upon the physical integrity of the individual are, as has been discussed, necessarily high. Whilst not insurmountable, a significant and scientifically proven detriment to health has to be illustrated to judicial organs in all legal spheres considering potential breaches of such rights. This is largely as a result of actions known to breach these provisions being seen as the most heinous of actions a state

⁹⁸² Approaches to date have been somewhat bifurcated into impacts which cannot be justified under the doctrine of margin of appreciation (or a variation thereof), essentially those harming the individual directly, and those which can under certain circumstances.

⁹⁸³ Though the terminology of the three rights considered in the piece in relation to this concept varies (‘inhumane and degrading’ or ‘cruel and unusual’) the interpretation of the provisions and the type and severity of acts to which they pertain are largely identical.

can take against its citizens, and as such bearing the most severe condemnation and consequences for breach.⁹⁸⁴

In relation to the impacts of the tar sands extraction projects, the impacts to human health have been the source of one of the most heatedly debated factors. The hamlet of Fort Chipewyan has formed the focus of this intense conflict regarding the safety of the economic juggernaut that is tar sands extraction. Potential human health ramifications gives the argument a ‘winner takes all’ nature, with proof of impacts of this nature likely halting developments at least until further investigation has been undertaken at a considerable cost to provincial and federal governments not to mention extractors. Supposed carcinogenic consequences to the populace of the hamlet have however been widely discredited by official health organisations at both provincial and federal levels.⁹⁸⁵ Indeed the doctor at the centre of what governmental authorities suggest is little more than a ‘scare’,⁹⁸⁶ John O’Connor was threatened with having his licence to practice medicine revoked and for some time relocated to practice outside of the province for fear of persecution.

A series of competing reports have since been published by both sides of the debate, and more are forthcoming, yet a definitive answer remains elusive with both sides staunchly defending mutually exclusive positions. The reality is that after almost a decade of dispute no significant alteration in the licensing of projects or the practices of companies engaged in extraction can be attributed to the contentions of Dr O’Connor.⁹⁸⁷ In relation to the thesis, this

⁹⁸⁴ Clearly this is dependent upon the forum in any particular case, owing to the non-binding nature of some as has been discussed.

⁹⁸⁵ Alberta Cancer Board, *Cancer Incidence in Fort Chipewyan, Alberta 1995-2006* (2009) <<http://www.albertahealthservices.ca/rls/ne-rls-2009-02-06-fort-chipewyan-study.pdf>> Accessed 30th July 2014

⁹⁸⁶ Wente, M. ‘The Great Oil-Sands Cancer Scare’ *The Globe and Mail* (2014) <<http://www.theglobeandmail.com/globe-debate/the-great-oil-sands-cancer-scare/article17685139/>> Accessed 30th July 2014.

⁹⁸⁷ Dr O’Connor began the official proceedings of which the region is still seeing the results in early 2006. Marsden describes in detail the chronology of his struggle with the federal and provincial authorities in this

is a somewhat damning illustration of the likelihood of success with regards to a claim that the extraction of tar sands has had direct impacts to human health. To suggest therefore that further to this, in light of the aims of the piece being focused on the protection of the indigenous populace specifically, that they are in some way acutely impacted upon would raise the threshold of proof beyond the considerable height at which it already appears set.⁹⁸⁸ As such it is suggested that the considerable burden of proof which would be set to establish a breach of the rights pertaining to harms to the individual is so inhibitory to the validity of any proposed action that this group of rights is reduced to inefficacy in relation to the aims of the piece.

This analysis is however based upon the existing body of knowledge and research with regards to the impacts of tar sands extraction. The body of precedent and jurisprudence in human rights law concerning the application of prohibitions on harms to the person to environmental harms is considerable. As such note should be made that this analysis would be subject to revision in the event of the production of evidence sufficient to potentially breach the burdens placed upon establishing a breach of the aforementioned rights. The utility of said rights for the purposes of the piece is considerably diminished owing to the idiosyncratic nature of the evidence available and uncontested with regards to the impacts of tar sands extraction. To suggest however that such rights are of little utility with regards to environmental protection under the auspices of human rights law, or would never support a claim against the tar sands industry would be at best remiss.

regard. See: Marsden, W. *Stupid to the Last Drop: How Alberta is Bringing Environmental Armageddon To Canada (and Doesn't Seem to Care)* (Random House, Toronto, 2007) 185-194

⁹⁸⁸ There is something of a macabre irony in the fact that the indigenous populace has already been the focus of debate in relation to the case of Fort Chipewyan. This is as it has been suggested that persons of indigenous descent are more susceptible to the forms of cancer which are suggested to have increased in prevalence in the population there. See: Mahoney, M.C. and Michalek, A.M.' A meta-analysis of cancer incidence in United States and Canadian native populations.' (1991) 20(2) *International Journal of Epidemiology* 323.

Beyond the evidentiary burden borne by these rights however, the jurisprudence in this regard is equally as ill-suited to the aims of the piece. Again this issue relates to the severity of both cause and effect in relation to actions concerning rights protecting the fundamental physical integrity and life of the individual. Owing to the high thresholds rights of this type entail, both in terms of evidence to establish and consequences of a breach for the perpetrator thereof, the minimum requirements placed upon meeting obligations in this regard are generic in nature. The 'right to life' common to human rights texts internationally is a clear example of this, being commonly interpreted as a minimum to be the prohibition of arbitrary killing of citizens by the state, and not a right to a life of a particular standard or lifestyle.⁹⁸⁹ By way of explanation in relation to the context of the piece, cases involving suggested breaches of rights to life and freedom from abhorrent treatment arising from environmental conditions have considered impacts to environments which individuals inhabit solely in terms of their ability to sustain life, and not present risks to human health.⁹⁹⁰ The form of the environment in-situ is simply not considered by courts and non-binding judicatory bodies, including those considered by the piece, in seminal cases and actions of this type.⁹⁹¹ This reality is evident in the discussion of Article 12 of the ICESCR concerning environmental hygiene, which is focused not upon a particular type of environment but one devoid of risk to human health.

In the context of the thesis presented therefore the approach taken by seminal bodies, and indeed conceded by many academics, in this regard reduces further the utility of this type of right in relation to the aims of the piece. Harms to the individual are rarely conceived of in

⁹⁸⁹ Schabas, W. *The Abolition of the Death Penalty in International Law* (3rd Edition, Cambridge University Press, Cambridge, 2002) 8

⁹⁹⁰ The decision to hear the case of *Tatar* (n31) under the auspices of the right to private and family life as opposed to the right to life owing to a lack of evidence of a direct harm to health is clear evidence of such an approach.

⁹⁹¹ In such cases contentions as to the form of environment have been brought under the auspices of other rights such as those pertaining to cultural expression (*Lubicon* (n729)) and to private and family life (*Guerra* (n620)).

the culturally relative manner demanded by the piece in order to ensure protection of particular, culturally significant, environments and aspects thereof. As such rights pertaining to the physical integrity and life of the individual will form no part of the suggested basis for a case against the tar sands extraction projects and the licensing thereof, aimed at protecting environments inextricably linked to the First Nations peoples of Alberta.

6.4 Suppression of Abilities

The rights affording protection against harms to the person lacked a sufficient degree of, or potential for, culturally relative application. However, the rights considered affording protection against the suppression of the abilities of the individual to engage in activities relevant to their culture do not all suffer from such deficiency. This grouping encompasses protections of the expression of culture and the enjoyments of the benefit thereof. An element of choice is also embodied by this group as it protects also the idiosyncrasies of minorities from dominant cultural hegemonies. As a result of these factors they offer the most appropriate provisions on which to base an action such as that suggested by the piece. This is not to say that all of the rights in this grouping are of utility, merely that the nature of the rights contained therein affords, or has the potential to, the necessary recognition of the inimitable connection the First Nations peoples have with the ecosystems they inhabit.

The rights pertaining to the suppression of abilities can be segregated into three main groups; rights concerning cultural expression directly, those protecting rights to gain a livelihood, and those afforded protection to property and residence. Favourable interpretations of each would add significantly to any case against the developments in Alberta discussed in the thesis, however such interpretations are of varied degrees of

elaboration on the accepted core requirements each places upon states party to them. As such the likelihood of the suggested potential interpretation of the rights discussed will be considered in establishing which offer the most positive basis for a challenge to the tar sands extraction projects threatening culturally significant environments or features thereof.

Rights protecting cultural expression would *prima facie* appear to offer an established basis for a case such as that suggested by the piece. Seminal actions such as that of *Poma Poma*, *Mahuika*, and the *Lubicon Lake Band*⁹⁹² would support such an assertion, all having afforded protection to cultural expression as a result of environmental impacts. These actions are however largely predicated upon direct impacts to land used by the peoples concerned which are beyond dispute and are regarded as potentially threatening their continued existence.⁹⁹³ Indeed where impacts to indigenous peoples and traditional practices were limited, they have been deemed to potentially not be afforded protection over and above the interests of the majority of the population of a state.⁹⁹⁴ In relation to the impacts of the tar sands, this once again raises the spectre of having to establish to a high burden of proof impacts with the potential to cease the existence of a particular culture or traditional practice in its entirety. Whilst the impacts felt might over time have such an impact, to wait for them to reach a degree sufficient to breach this threshold would be to allow them to reach an irreparable level.

The plight of the First Nations is in contrast to the Sami people who brought the action in *Lansman et. al. v Finland*⁹⁹⁵ however. The Sami were herders of reindeer, rather than

⁹⁹² *Poma Poma* (n271), *Mahuika* (n861) and *Lubicon* (n729)

⁹⁹³ In *Poma Poma* (n271) in particular the threat to the continued existence of an inimitable culture was particularly emphasised.

⁹⁹⁴ See for example the permitting of a 'certain limited impact' upon indigenous cultures in: *Lansman et al. v. Finland*, Communication No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992 (1994) at 9.4

⁹⁹⁵ *Lansman et al. v. Finland*, Communication No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992 (1994)

hunters of a species which might adopt alternate migratory patterns or feeding grounds over time and outside of the control of those reliant upon them as is the case with boreal woodland caribou. The connection of particular practices to the continued existence of minority cultures established in the cases mentioned above is of immeasurable utility in relation to the aim of the piece, indeed it represents the basis for the case itself. However, the necessary degree of impact that established jurisprudence suggests is necessary to establish a breach intimates that other protections will also be needed in order to ensure the cession or restriction of tar sands developments in particular areas sought by the piece.

Protections afforded to property by the legal texts considered in the piece are focused on the home and the standard thereof, and the ability to locate oneself and family as one sees fit. The rights considered are largely construed as protecting from unlawful interference with, or seizure of, the home or forced relocation or removal from a particular area. Rights to remain in particular⁹⁹⁶ were intended, in part, to prevent arbitrary removal from a location by the state to allow for projects of utilitarian value to the majority at the expense of an individual. The drafting intentions underpinning these rights are the factors which also inhibit their utility in relation to the aims of the piece. The First Nations peoples of Alberta could not be argued to be directly being forced to relocate from their reserved lands, nor are their homes being directly violated unlawfully. Whilst expansive interpretations of the rights might be suggested to afford protection from being left the choice to either abandon traditional and culturally significant practices as has been discussed, these are exactly that, expansive.

Such interpretations, whilst not completely unprecedented, offer little consistent application in this manner and thus certainty. Rights concerning the inviolability of the home

⁹⁹⁶ CCRF (n174) s.6. and ADRD (n249) Art. VIII

and residence in particular offer protection to inhabit a private property or area without direct interference from public authorities, but offer no guarantee as to the form of the surrounding environment.⁹⁹⁷ Thus only where impacts of the tar sands extraction projects forced relocation from an area in an absolute manner, such as through seizure of lands (and thus homes) by public authorities, or would force all persons, indigenous or otherwise, to relocate would these rights assure the protection sought by the piece. The aim of the piece is however to halt or restrict developments long before impacts reached such severity, and preserve cultural practices and the environments on which they rely prior to them becoming irreversible. As such rights concerning protection of the home and residence will not be suggested as a viable basis for an action of the type proposed by the piece.

Protections afforded to the gaining of a livelihood, whether this be in the form of work, a standard of living, or the productive capacity of lands, by contrast offer a degree of cultural relativity which is not present in other rights outside of those directly protecting cultural expression. The connection to a particular practice however ensures that inhibitions of a non-absolute nature can however be considered. Whilst these would need to be greater than mere inconveniences in order to outweigh the margin of appreciation afforded to economically beneficial projects such as the tar sands project, restrictions on practices connected to certain lands which are deemed to have, 'given rise to a distinctive culture,'⁹⁹⁸ will be prohibited. As such, a recognition of traditional practices of such significance as to form an integral part of the culture itself will be protected to the extent that the very lands on which they are performed will also be afforded a degree of protection sufficient to ensure their continuation.

⁹⁹⁷ Russell, P.H. Knopff, R. and Morton, T. *Federalism and the Charter: Leading Constitutional Decisions* (McGill Queen's Press, Montreal, 1989) 392

⁹⁹⁸ *J.G.A. Diergaardt (late Captain of the Rehoboth Baster Community) et al. v. Namibia*, Communication No. 760/1997, U.N. Doc. CCPR/C/69/D/760/1997 (2000).

Key in this regard is the inherent relativity the rights of this type afford. Notions of ‘work freely chosen,’⁹⁹⁹ and accepted¹⁰⁰⁰ or a freely chosen vocation,¹⁰⁰¹ supported by aspirational assurances of the ability to subsist¹⁰⁰² on lands with a maintained productive capacity,¹⁰⁰³ accompany the basic protection of the ability to attain an adequate standard of living¹⁰⁰⁴ through work. Whilst these notions were not solely intended to protect activities of a culturally significant nature, the expansion of ‘work’ to include actions which do not produce a pecuniary income, but instead provide for dependents¹⁰⁰⁵ or bear social value¹⁰⁰⁶ support the assertions of the piece. As such it is in rights not specifically intended to afford culturally relative protection that a viable basis for a case against the impacts of tar sands extraction felt so acutely by the indigenous peoples of Alberta is found. The protection of the ability to continue traditional practices as an extension of rights to gain a livelihood in the domestic context will therefore be suggested as the basis for the action proposed by the piece to restrict or cease operations harmful to ecosystems of cultural significance in Alberta, Canada. Before such a case can be suggested however, the validity of the case in light of Canadian human rights jurisprudence must first be considered.

6.5 For Peace, Order and Good Government and Justification in a Free and Democratic Society

The contention that the current approach to licensing tar sands projects is not for the peace, order and good government of Canada and thus breaches fundamental freedoms

⁹⁹⁹ CCRF (n174) s.6

¹⁰⁰⁰ ICESCR (n254) Art. 6

¹⁰⁰¹ ADRD (n249) Art XIV

¹⁰⁰² DRIP (n39) Art. 20

¹⁰⁰³ *ibid.* Art. 29

¹⁰⁰⁴ ICESCR (n254) Art 11

¹⁰⁰⁵ *ibid.*

¹⁰⁰⁶ ADRD (n249) Art XIV (*pro homine* interpretation) and DRIP (n39) Art. 11

afforded in the CCRF is rebuttable in nature. An illustration that they are, ‘demonstrably justifiable in a free and democratic society’¹⁰⁰⁷ would undermine any case suggested by the piece. The constitutional test, created in the case of *R v. Oakes*¹⁰⁰⁸ demands;

‘respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.’¹⁰⁰⁹

A legitimate breach of such rights must meet two conditions following the case. The reasoning for a breach must be, ‘of sufficient importance to warrant overriding a constitutionally protected right or freedom.’¹⁰¹⁰ Secondly proportionality must be shown, an assessment based on three criteria. The cause of the breach must be designed to achieve the objective set, to have the least impact upon rights and freedoms achievable, and the resultant limitations must be proportionate to the aim to be achieved.¹⁰¹¹

The case suggested by the piece as able to be brought against the current permitting of tar sands extraction projects must also contend that the limitations to rights they cause are not justifiable under the above test prescribed in *Oakes*. Whilst a number of rights have been disregarded as offering the best potential basis for such a case above, and as such need not be assessed in this regard, a particular issue is worthy of note. Environmental impacts to human health, and specifically those deemed of requisite severity to breach the various conceptions of the right to life, have been consistently regarded as non-derogable by either the texts affording

¹⁰⁰⁷ CCRF (n174) s.1

¹⁰⁰⁸ *Oakes* (n207)

¹⁰⁰⁹ *ibid.* 64

¹⁰¹⁰ *Big M Drug Mart Ltd.* (n212), 352.

¹⁰¹¹ *Oakes* (n207), 69

them or courts enforcing them. As such the assessment as to the validity of limitations in this regard would be futile, as they are considered invalid by virtue of their severity alone. The rights proposed as forming the most appropriate basis for the action advocated by the thesis are however not contentions of direct impacts to human health. Indeed such insinuations are actively to be avoided owing to the inherent uncertainty caused by the need to prove almost incontrovertibly, and scientifically, a connection between extraction processes and the harms caused of relative proximity. The potential for governmental justification of the limitations to rights concerning the gaining of a livelihood potentially arising from the tar sands extraction projects as a result of environmental harms will therefore be the focus of discussion.

Limitations on the ability to secure a livelihood, as protected under the Charter could not be suggested as necessary for the preservation of peace or order in Canada. As such the provision of legislation and the administrative processes constructed thereby with regards to the licensing of tar sands extraction would have to be suggested as being under the auspices of ensuring good government. The ability of the government to legislate for the extraction industries, and the consequent environmentally and planning focused administrative bodies, is not in question. The format of the bodies might be questioned as being unbalanced and unjust but this does not preclude the ability of the governments of Alberta or the federal institutions of Canada to create them within the purview of the powers assigned to them within the constitution. Case law concerning the principle of 'peace, order and good government' focusing on the separation of powers between the federal and provincial jurisdictions offers little to a challenge that the approach taken to licensing is not 'good government.'

Such an approach is not however without some support, though the predominance of the application of the so called POGG¹⁰¹² criteria is to delineate between provincial and federal authority, the requirement of a legitimate purpose for the legislation, federal or provincial, has been proposed.¹⁰¹³ Seizing the economic benefits of the tar sands at the expense of the fundamental rights of the indigenous populace of Alberta would arguably not be a legitimate purpose. Indeed, given that the contention of the piece will be the inhibition of the ability to gain a livelihood the suggestion that attaining the considerable number of jobs the extraction projects create was not a legitimate purpose for supporting the industry would be tenuous. This is especially true given that the suggestion of the legitimacy of purpose in *Macdonald*¹⁰¹⁴ as a criteria for justifying legislation is based merely upon a supportable public policy. However, the continued licensing of tar sands extraction projects and more specifically the legislation underpinning the administrative processes could be challenged on the basis of the *Oakes* test.

A successful challenge on this basis would thus require the valid assertion that the current licensing procedure inhibited the rights of the indigenous populace in a manner that could have been foreseen and had not been addressed to the greatest possible degree at present. This is as the principle of least drastic means would by definition not require the absolute cessation of any environmental impacts. Instead only reasonable measures to limit or prevent harms would be necessary. In relation to the case to be suggested by the piece therefore it must be shown that the methods of obtaining the tar sands raw material are not the least impactful available upon the ability to continue to seek a livelihood in a culturally relevant manner. Given the current lack of monitoring of culturally significant species within the licensing procedure,

¹⁰¹² A common abbreviation given to the principle of 'peace, order and good government.'

¹⁰¹³ See in this regard the discussion by Justice Lamer of the colouring of criminal provisions in the case of *RJR-MacDonald Inc. v. Canada (Attorney General)* [1995] 3 S.C.R. 199

¹⁰¹⁴ *RJR-MacDonald Inc. v. Canada (Attorney General)* [1995] 3 S.C.R. 199

and the approach of prescribed reclamation of restoring the ecosystem to one merely of 'equivalent capacity'¹⁰¹⁵ such a suggestion could be made. As such it is possible that on this basis the validity of the legislation underpinning the licensing of tar sands projects might be challenged. Such an action would halt the licensing procedures of Alberta until an approach able to account sufficiently for these impacts in the eyes of the court was found and implemented. Litigation of this type would contrast to the suggestion on a single instance of breaches of rights by specific licensed projects which would arguably be more likely to yield success, but which would only inhibit harmful practices in a single instance of extraction.

6.6 The Case Proposed

The premise that the impacts of governmental actions having severe health effects can give rise to breaches of human rights afforded under the CCRF is established in the case of *Chalouli v Quebec (Attorney General)*.¹⁰¹⁶ However the notion that environmental impacts specifically could breach articles of the CCRF remains secured only in repeated *obiter dicta*.¹⁰¹⁷ Crucial to the success of such a suggestion is the case of *Vriend v Alberta*,¹⁰¹⁸ which permitted the 'reading in' of protections into the rights of the Charter beyond a strict interpretation of the wording in which it was originally composed. As such the Canadian judiciary is both capable and supportive of the notion of environmental protection. Indeed some suggest Canada has one of the most proficient courts internationally with regard to environmental protection in the SCC.¹⁰¹⁹ The courts in Alberta have even accepted in the case of *R. v. Sioui*¹⁰²⁰ regarding

¹⁰¹⁵ LARP (n109)

¹⁰¹⁶ *Chaoulli v. Quebec (Attorney General)* [2005] 1 SCR 791

¹⁰¹⁷ Accepting the notion of a right to a safe environment in *Ontario v Canadian Pacific Ltd*, [1995] 2 S.C.R. 1028 and that the environment is 'a public purpose of superordinate importance' in *R. v Hydro-Quebec*. [1997] 3 S.C.R. 213

¹⁰¹⁸ *Vriend* (n219)

¹⁰¹⁹ Jerry v. DeMarco, "The Supreme Court of Canada's Recognition of Fundamental Environmental Values: What Could Be Next in Canadian Environmental Law?" (2007), 17 *Journal of Environmental Law & Practice*. 159.

culturally significant practices that, ‘the question is whether the type of occupancy ... is incompatible with the exercise of the activities...as these undoubtedly constitute religious customs or rites,’¹⁰²¹ and as such entail a duty to consult the peoples on the part of governmental authorities. The judgement in *Cold Lake First Nation v. Alberta (Tourism, Parks and Recreation)* stopped short of making this a veto power over any such occupancy or utilisation of traditional lands but did impose a duty to consult.¹⁰²²

These features of the Canadian legal system coupled with the particular nature of the tar sands projects present a highly suited case study to consider the application of human rights law to the protection of culturally significant environments and features thereof. Thus it is in the basis for a case suggested as potentially viable in this instance that it is hoped an approach to human rights based protection of environments beyond direct impacts to human health might be found. This aim, as well as the construction of the CCRF, necessitated the consideration of both the judicial and interpretative potential of relevant regional and international instruments. As such the case suggested below should be read not only as a viable case in the Canadian legal system, but also as embodying a series of jurisprudential considerations which might be applied in other jurisdictions.

As has been discussed the focus of the case suggested will be the capacity of the indigenous populace to continue to gain a livelihood of cultural significance, regardless of its pecuniary or nutritionally sustaining value in the context of wider society. The core for this contention would be Section 6 of the domestic Charter of Rights and Freedoms. The right contained therein to ‘pursue the gaining of a livelihood in any province,’¹⁰²³ although

¹⁰²⁰ *R. v. Sioui* [1990] 1 S.C.R. 1025

¹⁰²¹ *ibid.* per Lamer J.

¹⁰²² *Cold Lake First Nation v. Alberta (Tourism, Parks and Recreation)* [2012] ABQB 579, 26

¹⁰²³ CCRF (n174) s.6

originally conceived as a mobility right now prevents the use of removal of a means of securing a livelihood to force relocation. This elaboration to ensure all provinces, ‘cannot divest [anyone] of his right or capacity to remain and to engage in work,’¹⁰²⁴ is key to the case proposed here. The inclusion of the notion of capacity to work allows for the consideration of features crucial to securing a livelihood. Further to this, given the multijurisdictional nature of the piece, the case of the *Canadian Egg Marketing Agency v. Richardson*¹⁰²⁵ is also particularly significant. The case suggested that the domestic right should be read in conformity with provisions from jurisdictions beyond that of the Charter itself and specifically referenced international human rights standards. As an illustration of both the broad interpretative approach of the Canadian courts, and the precise manner in which this provision should be read, the precedent of the case is at the core of the suggestions made by the piece.

The interpretative breadth afforded by the *Canadian Egg Marketing Agency* litigation allows for proposed applications of the right to pursue a livelihood arising from provisions in particular internationally from the ICCPR, ICESCR and DRIP, and regionally from the ADHR. In spite of the fractious relationship between the Canadian government and the Inter-American human rights system¹⁰²⁶ the provisions of the American Declaration on Human Rights offer some interpretative insight into the protection of the ability to secure a livelihood afforded domestically. Article XIV of the Declaration in particular adds two key components to the basic conception of productive capability protected by the domestic Charter. The first is the necessity for that capability to provide for both the individual bearer of the right and his family. Whilst the domestic right has been interpreted as incorporating the ability to provide

¹⁰²⁴ *Winner* (n773), 919

¹⁰²⁵ *Canadian Egg Marketing Agency* (n607)

¹⁰²⁶ This is owing to the aforementioned disagreement regarding the interpretation of the scope of the right to life with regard to abortions.

for dependents,¹⁰²⁷ the relativity of that work to the dependents is not assured. This is the second addition of the regional provision to the case at hand. Under Article XIV the work through which said living is made must be 'suitable' for both bearer and dependents. The notion of suitability adds recognition of a degree of relativity to the living attained. As such without the interpretative breadth afforded by the regional provision, the binding right afforded domestically would not protect a manner of working which did not afford a living able to sustain himself and his dependents in a culturally relative manner.¹⁰²⁸

In the context of the impacts of tar sands extraction projects upon the ability of the indigenous populace of Alberta to secure culturally significant resources from the ecosystems they inhabit, this seemingly relatively minor addition to the domestic right is paramount. As has been put forward, the economic and wider social value beyond indigenous cultures of materials sought and practices engaged in, such as the hunting of caribou for meat and hide, would preclude it from being classed as work providing a standard of living were it not for this recognition. The prevalence of protection for cultural practices has been based upon potential extinguishment of inimitable cultures in their entirety, whether through land consumption as was the case in *Lubicon*,¹⁰²⁹ or resource reallocation as in *Poma Poma*.¹⁰³⁰ As such progressive impacts or mere limitations to the ability to, for example, hunt caribou would not necessarily give rise to the level of protection which has become more common in human rights law in recent decades. For this reason the reading in of a degree of cultural relativity to the domestic right to pursue a livelihood ensures that the particular impacts of the

¹⁰²⁷ *Children's Aid Society* (n553)

¹⁰²⁸ The reading of cultural relativity into the provisions emanating from the Inter-American system would also meet with the general perception of it as focusing heavily upon cultural sensitivity in relation to Latin America and the preservation of inimitable cultures in the face of developing government there. This approach is noted in particular by Lixinski. Lixinski, L. 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law' (2010) 21(3) *European Journal of International Law* 585, 595

¹⁰²⁹ *Lubicon* (n729)

¹⁰³⁰ *Poma Poma* (n271)

tar sands can be addressed, and the difficulties in ascertaining and proving the specificities thereof can be avoided. Such an approach would also be supported by a reading of Section 6 of the CCRF¹⁰³¹ in light of Article XV of the Declaration¹⁰³² which highlights the importance of leisure activities with a non-pecuniary benefit in relation to culture. Whilst no comparator right to Article XV is available in the domestic context, the recognition of significance of activities with no or little conventional economic or social value is important in supporting the case outlined above.

The international legal sphere also offers a number of interpretative expansions upon the domestic and regional rights discussed in the formulation of a case against the licensing of tar sands extraction projects. The twin international human rights covenants which form the basis for many binding texts around the world offer further expansions upon the relatively restrictive domestic right to gain a livelihood. The immediate comparator right is found in the economic, social and cultural rights Covenant in Article 6.¹⁰³³ As well as providing a further example of the right provided domestically however, the right adds that the activity protected should also be freely chosen. This addition rebuts the contention that the diminishing tendency for traditional practices to form an aspect of the provision of sustenance or nutrition reduces the need to ensure their continuation which might be proposed by governmental authorities. The ICESCR also offers the support for the core aspect of the case proposed from Articles 7 and 11 of the Covenant which demand the provision of healthy working conditions¹⁰³⁴ and an adequate standard of living.¹⁰³⁵ These two provisions build upon the base protection of the gaining of a livelihood by demanding certain environmental standards in which to conduct said pursuit, and that the fruits of said labour be relative to those seeking

¹⁰³¹ CCRF (n174) s.6

¹⁰³² ADRD (n249) Art XV

¹⁰³³ ICESCR (n254) Art. 6

¹⁰³⁴ *ibid.* Art.7

¹⁰³⁵ *ibid.* Art.11

them. Again in the context of the piece, these relatively minor additions encompass the idiosyncrasies of the impacts of the tar sands upon the indigenous populace of Alberta.

The ICCPR offers no right to work *per se* and might as such appear to offer little to the case proposed herein. This suggestion would however fail to consider the potential addition to the connections between the practices the piece hopes to protect and their cultural significance beyond the individual practising them which the text offers. Article 17 of the Covenant prohibits interference with family life on the part of the government. Such an interference it is argued would occur should the ability to engage in culturally significant practices, and pass the skills required to partake in them on to future generations, be restricted by the impacts of the tar sands extraction projects licensed by the authorities of both the province and the State. Although often conceived and indeed applied as a right to non-interference with the home, property and correspondence, certainly in the European context,¹⁰³⁶ the potential impacts of the tar sands upon family life of the First Nations of Alberta are undeniable, and as such to fail to add them to the contention of the piece would be inattentive to the aim thereof. The application of this right within the European regional system also explains the lack of its use here in the core aspects of the case proposed by the piece. The undoubted focus of the application of the mirror provision in that regional system to harms to the home and the ability in a generic sense to raise a family, which is still largely predicated upon impacts to human health and particularly the raising of children, offers little to the basis suggested beyond that which might be gleaned from Canadian Charter rights to life liberty and security of the person.¹⁰³⁷

¹⁰³⁶ In particular the application of the similar right in the European Court of Human Rights suggests such an interpretation even in relation to environmental harms. As is seen in the case of *s* is seen in the case of

¹⁰³⁷ CCRF (n174) s.7

Beyond the binding provisions discussed above, the influence of non-binding instruments has also been considered by the piece.¹⁰³⁸ The most relevant of these to the focus of the piece is the United Nations Declaration on the Rights of Indigenous Peoples.¹⁰³⁹ Obviously the concentration of the text on indigenous peoples heightens its utility with regards to the piece generally, however a number of provisions of particular utility to the main contention of the piece. The key connection they add is that between traditional practices and the survival of the cultures engaging in them. The Inter-American Court of Human Rights, has highlighted this link succinctly stating that, “by violating the rights of a community to continue to subsist...a number of basic human rights are violated...[including the right] to survival.”¹⁰⁴⁰ Article 11 of the Declaration in particular affords ‘the right to practise and revitalize their cultural traditions and customs,’¹⁰⁴¹ and demands measures to ensure this from State parties. The rights also incorporate an intergenerational aspect, necessitating the assurance of the ability of indigenous peoples to perpetuate the practices protected for as long as they choose. In relation to the impacts of the tar sands such an aspect is of considerable significance as it would support suggestions that impacts with the potential to accumulate, such as the seepage of tailings material over time, which may have no adverse impacts at present should be taken into account by the judiciary considering the action suggested. There are also undeniable connections in this regard to the precautionary principle found in environmental law.

Highly specific interpretative approaches to the rights afforded in binding texts , and especially that in relation to the ability to gain a livelihood, are also found in the provisions of

¹⁰³⁸ Indeed it should be noted that the American Declaration of Human Rights is not in itself binding, though is subjected to a greater degree of respect by Canada and possesses its own governing authority in the form of the Inter-American Commission, which Canada has generally submitted to the jurisdiction of.

¹⁰³⁹ DRIP (n39)

¹⁰⁴⁰ *Mayagna (Sumo)* (n901)

¹⁰⁴¹ DRIP (n39) Art. 11

Article 7 and 29 of the Declaration. The two provisions afford protection to the productive capacity of traditional lands and from the assimilation of inimitable cultures into broader society.¹⁰⁴² These provisions are of particular relevance to the reclamation of tailings ponds and the alteration of the ecosystems in the regions impacted upon. This is as the returning of reclaimed ponds to a safe environment but not that which once prevailed meets many of the legal demands upon the provincial and federal authorities. Articles 7 and 29 however necessitate the preservation to the greatest degree possible of the environment which supports the indigenous culture of the First Nations and the expression thereof. As a jurisprudential addition to the broader protections of the ability to secure a livelihood, they preserve also the expression of culture through activities which can also be deemed the securing of a livelihood. As the connection between these practices and the prevalent ecosystem of the regions exploited for the tar sands is inextricable, the representation of this connection in the legal protection and the case proposed by the piece ought to be so also. As such any contention as to the breach of provisions securing a livelihood in this context must also incorporate the significance of the cultural relativity of the livelihood protected, the necessity for respect of that livelihood regardless of its pecuniary value, and the significance within securing it of the ecosystem upon which it is predicated. Articles 7 and 29 pay respect to these fundamental connections in relation the action proposed by the piece, and indigenous peoples generally.

The piece therefore proposes that the protection of the ability to gain a livelihood offers an alternate approach to the protection of culturally significant environments under the auspices of human rights law to the prevailing precedents concerning harms to the physical security of the individual. Recognition of the inextricable connection to historically prevalent and untouched environments which indigenous peoples so often have is fundamental to this. However, a

¹⁰⁴² *ibid.* Arts. 7 and 29

precedent of the need to preserve environments to ensure non-indigenous¹⁰⁴³ livelihoods could also be contested should the case proposed by the piece be brought and be successful. This would however be far more speculative and likely to fail to overcome the considerable economic benefits of the extraction of a material as valuable as the crude oil yielded from the tar sands under any test akin to that established in *Oakes*¹⁰⁴⁴ in the Canadian legal system.

The basis for the case circumvents the numerous potential issues for any suggestion of a human rights breach arising from the adverse impacts of the tar sands extraction projects it is argued. Contentions with regards to the scientific burden of proof necessary to establish human health impacts prevent the utilisation of rights conventionally used to oppose harmful industrial projects concerning physical integrity are avoided. The necessity to establish direct links between adverse impacts and the individuals themselves in relation to inhibitions to many of the rights discussed is also highly beneficial. This is as the impacts to the gaining of a livelihood can be suggested on the basis of increased difficulty in doing so, as opposed to complete inhibitions as has been required in seminal cases concerning indigenous rights protection, where only immediate threats to the very survival of cultures are upheld as breaches.¹⁰⁴⁵ Similarly the rights considered from the various levels of enforcement combine to elaborate upon the core right enshrined in the domestic legislations and construct the proposed case which encompasses the fundamental connections to the environment upon which First Nations culture is predicated.

Thus, it is in the protection of an economic concept, that of work, which might be more habitually connected to those working within the tar sands industry than those impacted upon by it, that the thesis suggests there is the potential for the most pertinent protection to the

¹⁰⁴³ The contention that the concept of indigenous peoples is not clearly defined in human rights law and legal protections concerning them generally

¹⁰⁴⁴ *Oakes* (n207)

¹⁰⁴⁵ See for example: *Poma Poma* (n271)

indigenous populace of Alberta. This irony is furthered by the fact that, ‘philanthropic instruments of ‘progress’ and ‘material advancement’¹⁰⁴⁶ were suggested as reasoning for the establishment of federal control over indigenous lands. Now, ‘resource extraction initiatives have professed an interest in ‘helping’ Native communities by way of offering them ‘steady development.’¹⁰⁴⁷ Yet it is in protections created to protect these very concepts that salvation for those threatened by them may be found.

Many of the jurisprudential arguments made herein might be applied to other instances of industrial impacts upon indigenous peoples where a domestic right to work exists and respects a non-pecuniary motivation for doing so. The contentions made however relate predominantly to the specific context of the tar sands extraction projects discussed and it is in this regard that they are therefore at their strongest, and indeed are needed to be. As Marsden suggests, individuals reliant upon the prevalent ecosystems of north east Alberta are, ‘Battling a government they regard as deaf and an urban culture that seems disconnected and uninterested,’¹⁰⁴⁸ and as such in this conflict they require not only all the assistance available to them, but which is specific to them, and it is this which it is proposed that the thesis provides.

¹⁰⁴⁶ Huseman, J. and Short, D. (n17)

¹⁰⁴⁷ *ibid.* 228

¹⁰⁴⁸ Marsden (n987) 230

Chapter 7

Annexes

7.1 Annex 1

U.S. Imports from Canada of Crude Oil and Petroleum Products (Thousand Barrels)

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
1993	32,597	30,671	32,030	31,564	34,965	33,499	39,198	38,659	39,560	42,463	37,084	38,892
1994	38,488	38,485	41,117	35,811	35,949	36,173	38,339	42,059	38,993	38,365	37,519	43,019
1995	41,691	36,714	37,441	37,294	43,590	42,609	39,647	41,708	37,550	40,308	42,081	45,597
1996	46,205	40,987	40,978	42,812	42,577	41,850	43,193	43,175	38,281	43,628	45,479	51,936
1997	48,713	44,940	46,735	43,619	48,688	46,373	47,952	50,528	47,322	46,589	46,771	52,372
1998	52,796	48,659	45,381	47,580	49,592	50,644	51,734	48,476	47,249	48,681	44,848	47,788
1999	49,613	40,844	42,310	41,186	47,222	44,314	52,516	51,256	42,202	50,435	47,772	52,211
2000	57,927	55,230	51,848	52,510	59,123	54,892	55,014	55,478	53,677	53,209	52,067	60,376
2001	59,983	52,274	60,065	55,546	55,182	56,994	52,387	53,405	50,564	53,766	56,957	60,251
2002	58,920	53,112	57,151	60,958	61,052	57,408	58,942	62,609	56,479	65,413	62,495	64,795
2003	70,440	55,908	58,740	53,372	62,463	58,684	66,066	66,082	62,462	67,535	65,575	69,027
2004	68,323	61,902	65,665	61,789	64,708	67,214	67,503	62,358	64,230	68,972	63,235	66,699
2005	69,297	59,199	63,159	62,175	68,689	65,121	64,492	64,637	66,447	65,380	69,156	78,467
2006	73,948	65,456	70,935	68,749	73,134	69,075	68,337	76,123	70,213	67,465	79,108	76,296
2007	78,398	70,922	73,063	74,942	77,494	72,291	73,971	78,336	75,604	75,285	72,124	73,546
2008	82,260	73,364	79,463	77,470	73,378	72,886	74,933	69,648	71,984	80,135	76,027	80,715
2009	79,026	70,808	75,818	68,602	68,662	76,134	82,576	78,201	70,737	73,363	76,962	84,025
2010	80,479	69,750	77,662	74,172	78,371	81,514	79,013	77,148	74,367	72,764	75,377	84,811
2011	90,552	82,104	84,446	80,790	77,652	75,451	81,171	81,295	85,077	82,810	83,919	90,741
2012	93,980	88,647	91,538	89,595	91,934	92,090	90,548	91,570	82,773	81,892	86,101	97,744
2013	107,143	96,793	94,148	96,243	88,464	86,540	93,428	95,556	92,574	99,743	93,898	102,172
2014	106,540	89,915	99,356	95,064	101,226	97,119						

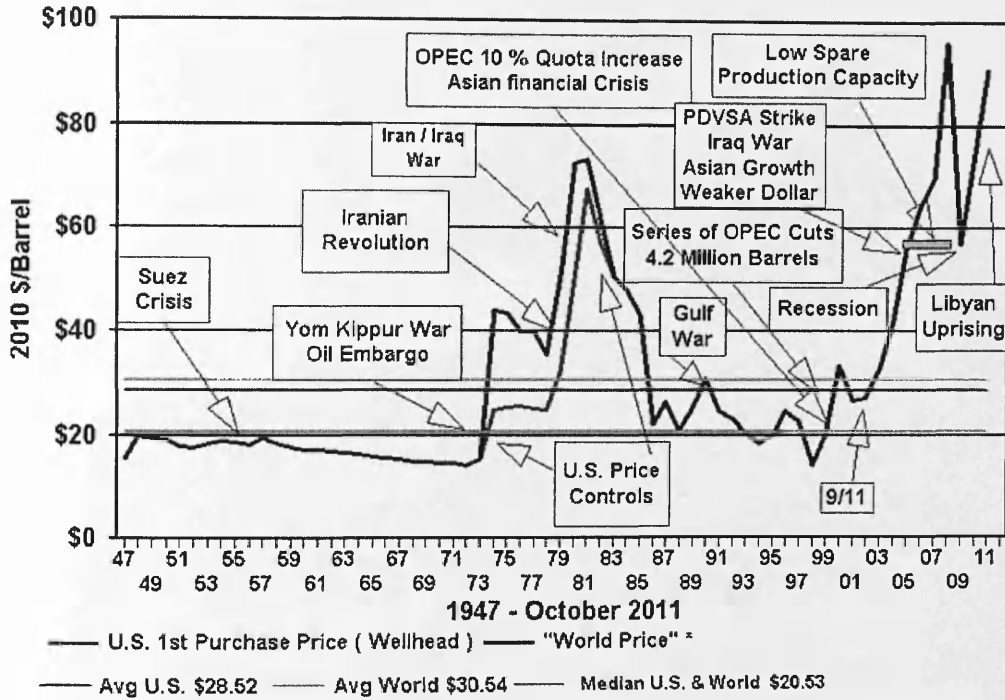
7.2 Annex 2

US Crude Oil Imports 1973 - Date

Month	Crude Oil Imports (Quadrillion Btu)
1973 August	0.647828
1975 August	0.826675
1976 August	1.00026
1977 August	1.151803
1978 August	1.157337
1979 August	1.226328
1980 August	0.865325
1981 August	0.753761
1982 August	0.695586
1983 August	0.763207
1984 August	0.586334
1985 August	0.563063
1986 August	0.88921
1987 August	1.007903
1988 August	0.930819
1989 August	1.201971
1990 August	1.1868
1991 August	1.225217
1992 August	1.191582
1993 August	1.225679
1994 August	1.381096
1995 August	1.368929
1996 August	1.482504
1997 August	1.591171
1998 August	1.693515
1999 August	1.640907
2000 August	1.835986
2001 August	1.738239
2002 August	1.766664
2003 August	1.854909
2004 August	1.939387
2005 August	1.927738
2006 August	1.958306
2007 August	1.914033
2008 August	1.917094
2009 August	1.636131
2010 August	1.771768
2011 August	1.664252
2012 August	1.655919
2013 August	1.517119
2014 May	1.342265

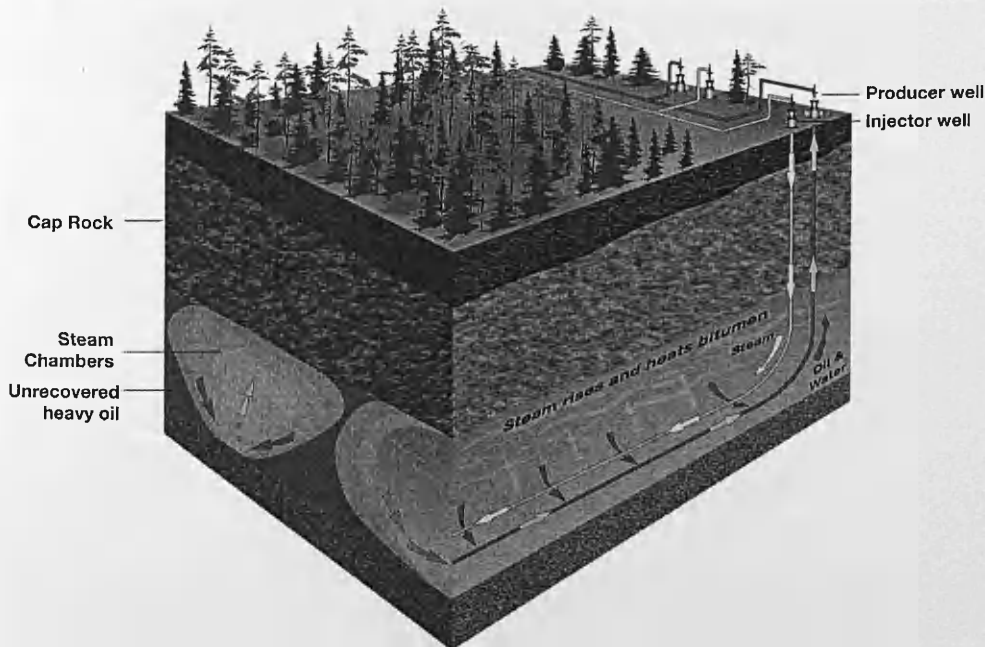
7.3 Annex 3

Crude Oil Prices (US\$) 1947 -2010



7.4 Annex 4

Steam Assisted Gravity Drainage (SAGD) Diagrammatic Representation



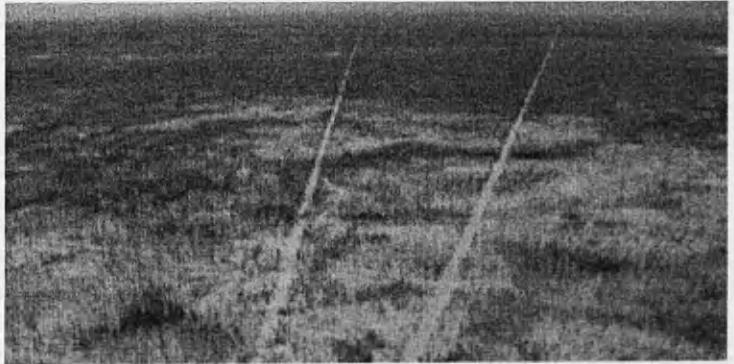
7.5 Annex 5

A Map Illustrating the Oil Sands Fields of Alberta



7.6 Annex 6

Aerial Images of Seismic Lines Caused by Surveying



7.7 Annex 7

Aerial Images of Tailings Ponds



7.8 Annex 8

Images of Birds Following Landing Upon Tailings Ponds



7.9 Annex 9

Aboriginal Census Data 2006

Geographic name	Total population	Aboriginal identity population	North American Indian	Métis	Inuit	Non-aboriginal identity population
Canada	31,241,030	1,172,785	698,025	389,780	50,480	30,068,240
Alberta	3,256,355	188,365	97,275	85,495	1,610	3,067,990

Bibliography

Legislation

Domestic

Aboriginal Affairs and Northern Development Canada *Treaty Texts - Treaty No. 8* (1966)
<<http://www.aadnc-aandc.gc.ca/eng/1100100028813/1100100028853>> Accessed 30th July
2014.

Access to Information Act, RSC 1985, c A-1.

Alberta Act 1905, 4-5 Edw. VII, c. 3

Alberta Human Rights Act, R.S.A. 2000, c. A-25.5

Alberta Natural Resources Transfer Agreement (Memorandum) 1930 Natural Resource Trade
Agreements

British North America Act 1930 20-21 Geo. V, c.26 (U.K.)

Canadian Bill of Rights S.C. 1960 c.44

Canadian Charter of Rights and Freedoms, s. 15, Part I of the Constitution Act, 1982, being
Schedule B to the Canada Act 1982 (U.K.), 1982, c.11.

Canadian Citizenship Act, S.C. 1946, c. 15

Canadian Human Rights Act RS., 1985 c.H-6

Canadian Multiculturalism Act R.S.C., 1985, c. 24 (4th Supp.)

Canada Labour Code R.S.C.1985 c.L-2 Part II

Canada Wildlife Act R.S.C. 1985 c W-9

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11.

Constitution Acts, 1867 to 1982. 1982, c.11

Employment Equity Act S.C. 1995, c.44

Environmental Protection and Enhancement Act, RSA 2000, c E-12,

First Nations Oil and Gas Moneys Management Act SC 2005 c48

Freedom of Information and Protection of Privacy Act, RSA 2000, c F-25

Indian Act R.S.C.1985, c 1-5

North West Irrigation Act 1894 c.30

Oil Sands Conservation Act, R.S.A. 2000, c. O-7

Royal Proclamation of 1763 R.S.C. 1985, App. II, No. 1

Species At Risk Act 1985 S.C. 2002 c.29

The Constitution Act, 1867 (U.K.), 30 & 31 Victoria, c. 3

Treaty 8 <<http://www.ainc-inac.gc.ca/al/hts/tgu/pubs/t8/trty8-eng.asp>> Accessed 15th February 2011>

Treaty 6 <<http://www.ainc-inac.gc.ca/al/hts/tgu/pubs/t6/trty6-eng.asp>> Accessed 15th February 2011.

Water Act, RSA 2000, c W-3 Part 2

Regional

Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador," O.A.S. Treaty Series No. 69 (1988), *entered into force* November 16, 1999, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 67 (1992)

African [Banjul] Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5; 1520 UNTS 217; 21 ILM 58 (1982)

American Convention on Human Rights O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123 entered into force July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX Art I
Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5; 213 UNTS 221

Charter of the Organization of American States, 119 U.N.T.S. 3, entered into force December 13, 1951

Treaty on European Union and the Treaty on the Functioning of the European Union [2012]
OJ C 326 /47

International

Committee on the Rights of the Child, General Comment No. 17 The Right of the Child to Rest, Leisure, Play, Recreational Activities, Cultural Life and the Arts (Art. 31)
CRC/C/GC/17 (2013) 40

International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res 2106 (xx) U.N.T.S. vol. 660 p.195 (21 Dec. 1965) entered into force 4 Jan. 1969.

International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force 23rd March 1976.

International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976.

Optional Protocol to the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, entered into force 23rd March 1976.

Optional Protocol to the International Covenant on Economic, Social and Cultural Rights GA Res. 832, UN GAOR, 63rd Session, UN Doc A/RES/63/117 (2008).

Rio Declaration on Environment and Development (1992), UN Doc. A/CONF.151/26 (vol. I) / 31 ILM 874

Stockholm Declaration of the United Nations Conference on the Human Environment, 16 June 1972,

U.N. Doc. A/CONF.48/14/Rev.1 at 3 (1973)

UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 9: The domestic application of the Covenant*, 3 December 1998, E/C.12/1998/24

UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, U.N.Doc. E/C.12/1999/5 (12 May 1999)

UN Committee on Economic, Social and Cultural Rights, *General Comment 15, The Right to Water* (Twenty-ninth session, 2003), U.N. Doc. E/C.12/2002/11 (2002)

UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)*, 21 December 2009, E/C.12/GC/21

UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III)

UNHCR ‘Concluding Observations on Congo’s Initial Ninth Reports on Implementation of the ICERD’ (23 March 2009) UN Doc CERD/C/COG/CO/9 at 8.

UN Human Rights Committee (HRC), *CCPR General Comment No. 23: Article 27 (Rights of Minorities)*, 8 April 1994, CCPR/C/21/Rev.1/Add.5

United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295)
HR/PUB/13/2

United Nations General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23

Case Law

Canadian Cases

A.-G. Que. v. Blaikie, [1979] 2 SCR 1016

Archibald v. Canada (T.D.) [1997] 3 F.C. 335

Athabasca Chipewyan First Nation v. Alberta (Minister of Energy) [2009] ABQB 576 at 70

B.(R.) v Children’s Aid Society of Metropolitan Toronto [1995] 1 S.C.R. 315

Baker v Canada (Minister of Citizenship and Immigration) [1999] 2 S.C.R. 817

Blencoe v. British Columbia (Human Rights Commission), [2000] SCC 44

Board of Commerce [1922] 1 A.C. 191

Brooks v. Canada Safeway Ltd [1989] 1 S.C.R. 1219

Canada Temperance Federation [1946] A.C. 193

Canadian Egg Marketing Agency v. Richardson, [1998] 3 S.C.R. 157 [CAN]

Castle-Crown Wilderness Coalition v. Alberta (Director of Regulatory Assurance Division,

Alberta Environment) [2005] ABCA 283,55

Chaoulli v. Quebec (Attorney General) [2005] 1 SCR 791

Cold Lake First Nation v. Alberta (Tourism, Parks and Recreation) [2012] ABQB 579, 26

Corbiere v. Canada (Minister of Indian and Northern Affairs) [1999] 2 SCR 203

Dagenais v. CBC [1994] 3 S.C.R. 835

Droit de la famille - 111526, 2011 QCCS 2662

Edwards v A-G Can.[1930] A.C. 124, 136

Guerin v. The Queen [1984] 2 S.C.R. 335

Haida Nation v BC [2004] 3 S.C.R. 511, [2004] S.C.C. 73

Hill v Church of Scientology [1995] 2 S.C.R. 1130

Hill v. The Minister of Small Business [1999] 2 CNLR 176

Hunter v. Southam [1984] 2 S.C.R. 375

Law Society of Upper Canada v. Skapinker, [1984] 1 SCR 357

Lochner v. New York (1905) 198 U.S. 45

Miller et al. v. The Queen, [1977] 2 SCR 680

Mills v. The Queen [1986] 1 S.C.R. 863

Minister of Home Affairs v. Fisher [1980] A.C. 319

New Brunswick (Minister of Health and Community Services) v. G.(J.), [1999] 3 SCR 46, 60

Ontario v Canadian Pacific Ltd, [1995] 2 S.C.R. 1028

Pembina Institute v Alberta (Environment and Sustainable Resources Development) 2013
ABQB 567

R. v. Badger, [1996] 1 S.C.R. 771

R. v. Big M Drug Mart Ltd. [1985] 1 S.C.R. 295,

R v Brydges [1990] 1 S.C.R. 190

R. v. Edwards Books and Art Ltd. [1986] 2 S.C.R. 713.

R v. Hape [2007] 2 S.C.R. 292, 2007 SCC 26

R v. Hill (1907) 15 O.L.R. 406 (C.A.)

R. v Hydro-Quebec. [1997] 3 S.C.R. 213

R. v. Isaac (1975) 13 N.S.R. (2d) 460, 9 A.P.R. 460 (N.S.C.A.)

R. v. Jones, [1986] 2 S.C.R. 284

R. v. Kapp [2008] 2 S.C.R. 483

R v. Morgentaler [1988] 1 S.C.R. 30

R. v. Oakes [1986] 1 S.C.R 103

R. v. Pennington (1981) ABCA 190

R v. Rahey [1987] 1 S.C.R. 588, 78 N.S.R. (2d) 183.

R. v. Sioui [1990] 1 S.C.R. 1025

R v. Sparrow [1990] 1 S.C.R. 1075.

R v. Van Der Peet [1996] 2 S.C.R. 507

Re. Anti-Inflation Act [1976] 2 S.C.R. 373

Re. B.C. Motor Vehicle Act [1985] 2 S.C.R. 486

Re. Mitchell and the Queen (1983), 150 D.L.R. (3d) 449.

Re Powers to Levy Rates on Foreign Legations [1943] S.C.R. 208

Re. Regulation and Control of Radio Communication in Canada [1932] A.C. 304

Reference Re. Public Service Employee Relations Act (Alta.) [1987] 1 S.C.R. 313.

RJR-MacDonald Inc. v. Canada (Attorney General) [1995] 3 S.C.R. 199

Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519

Russell v. The Queen (1882) 7 App. Cas. 829

Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177

Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038 at 1056-7.

Suresh v Canada (Minister of Citizenship and Immigration) [2002] SCC 1.

Vriend v Alberta [1998] 1 SCR 493

Winner v. S.M.T. (Eastern) Ltd., [1951] SCR 887 [CAN]

European Cases

Budayeva and Others v. Russia, Application No. 15339/02 (ECHR 20th March 2008)

Dubetska and Others v Ukraine Application no. 30499/03 (ECHR, 2011.02.10)

G and E v. Norway (1983) 35 DR 30

Guerra v Italy, (1998) 26 EHRR 357

Handyside v. United Kingdom (1976) 1 EHRR 737.

Hatton v United Kingdom (2002) 34 EHRR 1; (2003) 37 EHRR

Ivan Atanasov v Bulgaria Application no. 12853/03 (ECHR, 2010.12.02)

James and Others v. the United Kingdom (1986) 8 EHRR 123

Kyrtatos v. Greece [2003] ECHR 242

L.C.B. v U.K. (1999) 29 EHRR 245

López Ostra v Spain (1994) 20 EHRR 277

Öçkan and others v. Turkey, Application No. 46771/99 (ECHR 28th March 2006),

Oneryildiz v. Turkey, Application No. 48939/99 (ECHR 657, 30th November 2004)

Sdruženi Jihočeské Matky v. Czech Republic Application no. 19101/03 (10 July 2006)

Taskin v. Turkey, 42 EHRR (2006) 50

Tatar v. Romania [2009] ECHR, Application no. 67021/01

Wernhoff v Germany (1979) 1 EHRR 55.

Zammit Maempel and Others v. Malta [2011] ECHR 1964

UNHRC Communications

Apirana Mahuika et al. v. New Zealand, Communication No. 547/1993, U.N. Doc. CCPR/C/70/D/547/1993 (2000).

E. H. P. v. Canada, Communication No. 67/1980, U.N. Doc. CCPR/C/OP/1 at 20 (1984)

J.G.A. Diergaardt (late Captain of the Rehoboth Baster Community) et al. v. Namibia, Communication No. 760/1997, U.N. Doc. CCPR/C/69/D/760/1997 (2000).

Lubicon Lake Band v. Canada, Communication No. 167/1984 (26 March 1990), U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990)

Moriana Hernandez Valentini de Bazzano v. Uruguay, Communication No. 5/1977, U.N. Doc. CCPR/C/OP/1 at 40 (1984).

Mrs. Vaihere Bordes and Mr. John Temeharo v. France, Communication No. 645/1995, U.N. Doc. CCPR/C/57/D/645/1995 (1996).

Ms. Yekaterina Pavlovna Lantsova v. The Russian Federation, Communication No. 763/1997, U.N. Doc. CCPR/C/74/D/763/1997 (2002).

Poma Poma v Peru Communication No. 1457/2006 U.N. Doc. CCPR/C/95/D/1457/2006

Inter-American Court of Human Rights Cases and Commission Reports

Ache Indians v. Paraguay IACHR Case 1802, OEA/Ser.L/V/II.43, doc. 21, corr. 1 (1977)

Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs. IACHR Series C No 185 (2008)

Saramaka People v. Suriname, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, 131

Communities of the Maya People (Sipakepense and Mam) of the Sipacapa and San Miguel Ixtahuacán Municipalities in the Department of San Marcos, Guatemala IACHR PM 260-07 (2010)

Grand Chief Michael Mitchell v. Canada, Case 790/01, Report No. 74/03, Inter-Am. C.H.R., OEA/Ser.L/V/II.118 Doc. 70 rev. 2 at 160 (2003).

Hul'qumi'num Treaty Group v Canada Report No 105/09 Petition 592-07 Admissibility (30th October 2009) 17

Mayagna (Sumo) Awas Tingni Community v Nicaragua Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001)

Maya Indigenous Communities of the Toledo District Case IACHR 12.053, Report No. 40/04 (Merits) (2004)

Mercedes Julia Huenteao Beroiza et al. v. Chile IACHR, Report n. 30/04, Petition 4617/02, Friendly Settlement (11 Mar. 2004)

Sawhoyamaya Indigenous Community v Paraguay Case 0322/2001, Report No. 12/03, Inter-Am. C.H.R., OEA/Ser.L/V/II.118 Doc. 70 rev. 2 at 378 (2003)

Xakmok Kasek Indigenous Community v Paraguay Case 0326/01, Report No. 11/03, Inter-Am. C.H.R., OEA/Ser.L/V/II.118 Doc. 70 rev. 2 en 390 (2003).

Yakye Axa Indigenous Community v Paraguay Case 12.313, Report No. 2/02, Inter-Am. C.H.R., Doc. 5 rev. 1 (2002).

Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs. IACHR Series C No. 125 (2005)

Case of the Yakye Axa Indigenous Community v. Paraguay, Inter-American Ct. of H.R., Judgment of June 17, 2007

Yanomami Case, Case 7615, Inter-Am. C.H.R. Res. No. 12/85, OEA/Ser.L/V/II.66, doc. 10, rev. 1, 24 (1985)

International Court of Justice Cases

Nuclear Tests Case (Australia v. France) I.C.J. Reports 1974

Books

Alston, P. Goodman, R. and Steiner, H. '*International Human Rights in Context: Law, Politics, Morals*' (OUP, Oxford, 2007) 3rd Edition

Anaya, J.S. *The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era* in Charters, C. and Stavenhagen, R. (eds.) *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (International Working Group for Indigenous Affairs, 2009)

Anderson, M.R. *Human Rights Approaches to Environmental Protection: An Overview* in Boyle, A. and Anderson, M.R. (eds.) *Human Rights Approaches to Environmental Protection* (Clarendon Press, Oxford, 1996)

Anderson, R.B. *Economic Development Among the Aboriginal Peoples of Canada: The Hope for the Future* (Captus Press Inc. Concord, Ontario, 1999)

Anton, D.K. and Shelton, D.L. *Environmental Protection and Human Rights* (Cambridge University Press, Cambridge, 2011)

Baderin, M.A. and Ssenyonjo, M. *Development of International Human Rights Law Before and After the UDHR* in Baderin, M.A. and Ssenyonjo, M. (eds) *International Human Rights Law: Six Decades after the UDHR and Beyond* (Ashgate Publishing, Farnham, 2013)

Bakker, P. *A Language of Our Own: The Genesis of Michif, the Mixed Cree-French Language of the Canadian Metis* (Oxford University Press, Oxford, 1997)

Berry, S. and Brink, J. *Aboriginal Cultures in Alberta: Five Hundred Generations* (University of Alberta Press, Edmonton, 2004)

Boyd, D.R. *The Right to a Healthy Environment: Revitalizing Canada's Constitution* (University of British Columbia Press, Vancouver, 2012)

Boyd, D.R. *Unnatural Law: Rethinking Canadian Environmental Law* (University of British Columbia Press, Vancouver, 2011)

Brems, E. *Human Rights: Universality and Diversity* (Martinus Nijhoff Publishers, Dordrecht, 2001)

Brems, E. *The Margin of Appreciation Doctrine of the European Court of Human Rights: Accommodating Diversity Within Europe* in Forsythe, D.P. McMahon, P.C. (eds.) *Human Rights and Diversity: Area Studies Revisited* (University of Nebraska Press, Lincoln, 2003)

Bushnell, I. *Captive Court: A Study of the Supreme Court of Canada* (Mc-Gill Queen's Press, Montreal, 1992)

Calloway, C.G. *'The Scratch of a Pen: 1763 and the Transformation of North America (Pivotal Moments in American History)'* (OUP USA, New York, 2007)

Calliou, B. *1899 and the Political Economy of Canada's North-West: Treaty 8 as a Compact to Share and Peacefully Co-Exist* in Cavanaugh, C.A, Payne, M, and Wetherell, D.G. (eds.) *Alberta Formed, Alberta Transformed, Volume 1* (University of Alberta Press, Edmonton, 2006)

Carter, S and Hildbrandt, W. *A Better Life With Honour* in Cavanaugh, C.A, Payne, M, and Wetherell, D.G. (eds.) *'Alberta Formed, Alberta Transformed, Volume 1'* (University of Alberta Press, Edmonton, 2006)

Cavanaugh, C.A, Payne, M, and Wetherell, D.G *Looking Back on Alberta History : Reflections in a Rear-View Mirror* in Cavanaugh, C.A, Payne, M, and Wetherell, D.G. (eds.) *Alberta Formed, Alberta Transformed, Volume 1* (University of Alberta Press, Edmonton, 2006)

Charters, C. *Reparations for Indigenous Peoples: Global International Instruments and Institutions* in Lenzerini, F. (ed.) *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford University Press, Oxford, 2008)

Churchill, R. *Environmental Rights in Existing Human Rights Treaties* in Boyle, A. and Anderson, M.R. (eds.) *Human Rights Approaches to Environmental Protection* (Clarendon Press, Oxford, 1996)

Clark, P.R. *Tribal Names of the Americas: Spelling Variants and Alternative Forms, Cross-Referenced* (McFarland and Company Inc, Jefferson, 2009)

Clarke, T. *Tar Sands Showdown* (James Lorimer and Company Ltd. Publishing, Ontario, 2008)

Craven, M. *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Clarendon Press, Oxford, 1998)

Daschuk, J. *Clearing the Plains: Disease, Politics of Starvation, and the Loss of Aboriginal Life* (University of Regina Press, Regina, 2013)

De Hert, P. *A Human Rights Perspective on Privacy and Data Protection Impact Assessments* in Wright, d and de Hert, P *Privacy Impact Assessment* (Springer, London, 2012)

Diller, J. *Securing Dignity and Freedom Through Human Rights: Article 22 of the Universal Declaration of Human Rights* (Martinus Nijhoff Publishers, Dordrecht, 2012)

Donnelly, J. *Universal Human Rights in Theory and Practice* (Cornell University Press, New York, 2003) 2nd Edition

Dorough, S. *The Significance of the Declaration on the Rights of Indigenous Peoples and Its Future Implementation* in Charters, C. and Stavenhagen, R. (eds.) *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (International Working Group for Indigenous Affairs, 2009)

Dupuy, P-M.and Vinuales, J.E. *The Challenge of 'Proliferation': An Anatomy of the Debate* in Romano, C.P.R. Alter, K.J. and Shany, Y (eds) *The Oxford Handbook of International Adjudication* (Oxford University Press, Oxford, 2013)

Eide, A. *Economic, Scoial and Cultural Rights as Human Rights* in Claude, R.P. and Weston, B.H. (eds) *Human Rights in the World Community: Issues and Action* (3rd Edition, University of Pennsylvania Press, Philadelphia, 2006)

Finkel, A. *The Fur Trade and Early European Settlement* in Finkel, A. 'Working People in Alberta: A History' (Athabasca University Press, Edmonton, 2012)

Flanagan, T. Alacantha, C. and Dressay A.L. *Beyond the Indian Act: Restoring Aboriginal Property Rights* (Mc-Gill Queens University Press, Montreal, 2010)

Galabuzi, G-E. *Equalizing Social and Cultural Rights: Approaches to Equity Across Ethnic and Racial Groups* in Heyman, J and Cassola, A. (eds.) *Making Equal Rights Real: Taking Effective Action to Overcome Global Challenges* (Cambridge University Press, Cambridge, 2012)

Gilbert, J. *Indigenous Peoples' Land Rights Under International Law: From Victims to Actors* (Transnational Publishing, Ardsley, 2006)

Hilderling, A. *International Law, Sustainable Development and Water Management* (Eburon Academic Publishers, Delft, 2004)

Hogg, P.W. *Canada Act 1982 Annotated* (Carswell, Toronto, 1982)

Hogg, P.W. *Constitutional Law of Canada: Student Edition* (Carswell Thomson Professional Publishing, Scarborough, Ontario, 1999)

Iacobucci, F. *Judicial Review by the Supreme Court of Canada Under the Canadian Charter of Rights and Freedoms: The First Ten Years* in Beatty, D.M. (ed.) *Human Rights and Judicial Review : A Comparative Perspective* (Kluwer Academic Publishers, Norwell MA, 1994)

Ives, J. '13001 Years Ago' in Cavanaugh, C.A, Payne, M, and Wetherell, D.G. (eds.) *'Alberta Formed, Alberta Transformed, Volume 1'* (University of Alberta Press, Edmonton, 2006)

Jarvenpa, R. and Brumbach, H.J. *Circumpolar Lives and Livelihood: A Comparative Ethnoarchaeology of Gender and Subsistence* (University of Nebraska Press, Lincoln, 2006)

- Joyal, S. *Conclusion: The Senate as the Embodiment of the Federal Principle* in Joyal, S. (ed.) *Protecting Canadian Democracy: The Senate You Never Knew* (Mc-Gill Queen's Press, Kingston, 2003)
- Kambel, E-R. *The Rights of Indigenous Peoples and Maroons in Suriname* (International Working Group for Indigenous Affairs, 1999)
- Kebec, P. *REDD+: Climate Justice of a New Face of Manifest Destiny Lessons Drawn From the Indigenous Struggle to Resist Colonisation of Ojibwe Forests in the Nineteenth and Twentieth Centuries* in Abate, R.S. and Kronk, E.A. (eds.) *Climate Change and Indigenous Peoples The Search for Legal Remedies* (Edward Elgar Publishing, Cheltenham, 2013)
- Leib, L.H. *Human Rights and the Environment: Philosophical, Theoretical and Legal Perspectives* (Martinus Nijhoff Publishers, Dordrecht, 2011)
- Levant, E. 'Ethical Oil: The Case for Canada's Oil Sands' (McCelland and Stewart, Toronto, 2010)
- Lucas, A. *Security of Title in Canadian Water Rights* (Canadian Institute of Resources Law, Calgary, 1990)
- Magocsi, P.R. (ed) *Encyclopaedia of Canada's Peoples* (University of Toronto Press, Toronto, 1999) 43 Maine, H. *International Law* (John Murray, London. 1888)
- Matsui, K. *Native Peoples and Water Rights: Irrigation, Dams, and the Law in Western Canada* (McGill-Queens University Press, Montreal, 2009)
- Marsden, W. *Stupid to the Last Drop: How Alberta is Bringing Environmental Armageddon To Canada (and Doesn't Seem to Care)* (Random House, Toronto, 2007)
- Menghistu, F. *The Satisfaction of Survival Requirements* in Ramcharan, B.G. (ed.) *The Right to Life in International Law* (Martinus Nijhoff Publishers, Dordrecht, 1985)

- Morantz, T.E. *The White Man's Gonna Getcha: The Colonial Challenge to the Crees in Quebec* (Mc-Gill Queen's University Press, Montreal, 2002)
- Morse, B. *Indigenous Rights as a Mechanism to Promote Environmental Sustainability in*
 Westra, L. Besselmann, K. and Westra, R *Reconciling Human Existence with Ecological Integrity* (Earthscan, London, 2008)
- Morse, B.W. *Peoples of Canada and Their Efforts to Achieve True Reparations* in Lenzerini, F. (ed.) *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford University Press, Oxford, 2008)
- Morse, S. and McNamara, N. *Sustainable Livelihood Approach: A Critique of Theory and Practice* (Springer Science and Business Media, Dordrecht, 2013)
- Newman, D.G. *Africa and the United Nations Declaration on the Rights of Indigenous Peoples* in Dersso, S.A. (ed) *Perspectives on the Rights of Minorities and Indigenous Peoples in Africa*. (Pretoria University Law Press, Pretoria, 2010)
- Nickel, J. 'Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights' (University of California Press, Oakland, 1987)
- Nikiforuk, A. *Tar Sands: Dirty Oil and the Future of a Continent* (2010, Vancouver, Greystone Books)
- Penikett, T. *Reconciliation: First Nations Treaty Making in British Columbia* (Douglas and McIntyre, Vancouver, 2006)
- Petkova, B. *Three Levels of Dialogue in Precedent Formation at the CJEU and ECtHR* in Dzehtsiarou, K. Konstaninides, T. Lock, T. and O'Meara, N. (eds.) *Human Rights Law in Europe: The Influence, Overlaps and Contradictions of the EU and the ECHR* (Routledge, Oxon 2014)

Ramcharan, B.G. *The Concept and Dimensions of the Right to Life* in Ramcharan, B.G. (ed.) *The Right to Life in International Law* (Martinus Nijhoff Publishers, Dordrecht, 1985)

Riddell, A. *New Perspectives on Connecting Human Rights and International Environmental Law* in Sancin, V. *International Environmental Law: Contemporary Concerns and Challenges* (GV Založba, Ljubljana, 2012)

Rodriguez, J.P. *The Louisiana Purchase: A Historical and Geographical Encyclopedia* (ABC-CLIO Inc, Santa Barbara, 2002)

Russell, P.H. Knopff, R. and Morton, T. *Federalism and the Charter: Leading Constitutional Decisions* (Mc-Gill Queen's Press, Montreal, 1989)

Saul, B. Kinley, D. and Mowbray, J. (eds) *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials*. (Oxford University Press, Oxford, 2014)

Schabas, W. *The Abolition of the Death Penalty in International Law* (3rd Edition, Cambridge University Press, Cambridge, 2002)

Scott, D.E. Scott, S. Dixon, K. Okoko, J.M. and Dixon, R. *Indigenous Principals' Perspectives on Leadership Development* in Slater, C.L. and Nelson, S.W. *Understanding the Principalship: An International Guide to Principal Preparation* (Emerald Group Publishing, Bingley, 2013)

Shelton, D. *Remedies in International Human Rights Law* (Oxford University Press, Oxford, 2006)

Shelton, D.L. *The Present Value of Past Wrongs* in Lenzerini, F. (ed.) *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford University Press, Oxford, 2008)

Shelton, D. *Human Rights and the Environment: Substantive Rights* in Fitzmaurice, M. Ong, D. M. and Merkouris, P. *Research Handbook on International Environmental Law* (Edward Elgar Publishing, Cheltenham, 2010)

- Smith, C.M. and Passelac-Ross, M.M. *Defining Aboriginal Rights to Water in Alberta*. (Canadian Institute of Resources Law, Calgary, 1990)
- Snyder, R. Williams, D. and Peterson, G. *Culture Loss and Sense of Place in Resource Valuation: Economics, Anthropology and Indigenous Cultures* in Jentoft, S. Minde, H. and Nilsen, R. *Indigenous Peoples: Resource Management and Global Rights* (Eburon Academic Publishers, Delft ,2003)
- Schabas, W. *The Abolition of the Death Penalty in International Law* (3rd Edition, Cambridge University Press, Cambridge, 2002)
- Sweeney, A. 'Black Bonanza: Canada's Oil Sands and the Race to Secure North America's Energy Future' (John Wiley and Sons, Toronto, 2010)
- Taylor, P. *Ecological Approach to International Law: Responding to the Challenges of Climate Change* (Routledge, London, 1998)
- Timoney, K.P. *The Peace-Athabasca Delta: Portrait of a Dynamic Ecosystem* (University of Alberta Press, Edmonton, 2013)
- Tladi, D. *Sustainable Development in International Law: An Analysis of Key Environmental Instruments* (Pretoria University Law Press, 2007)
- Vasak, K. *Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of law to the Universal Declaration of Human Rights*. UNESCO Courier 30:11, November 1977
- Vaughan, F. *Judicial Politics in Canada* in Howe, P. and Russell, P.H. *Judicial Power and Canadian Democracy* (McGill-Queens University Press, Kingston ,2001)
- Vrdoljak, A.F. *Reparation for Cultural Loss* in Lenzerini, F. (ed.) *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford University Press, Oxford, 2008)

Webb, J. and Stevenson, M.G. *Just another stakeholder? First Nations and Sustainable Forest Managements in Canada's Boreal Forest* in Burton, P.J. Messier, C. Smith, D.W. and Adamowicz, W.L. *Towards Sustainable Management of the Boreal Forest* (National Research Council of Canada, Ottawa, 2003)

Weiss, E.B. *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* (Transnational Publishers, United Nations University, 1989)

Academic Articles

Bakker, S. Van Den Berg, M. Duzenli, D. and Radstaake, M. '*Human Right Impact Assessment in Practice: The Case of the Health Rights of Women Assessment Instrument (HeRWAI)*' (2009) 1(3) *Journal of Human Rights Practice* 436

Bassan, D. 'The Canadian Charter and Public International Law: Redefining the State's Power to Deport Aliens' (Fall 1996) 34(3) *Osgoode Hall Law Journal* 583

Beeston, M.P. van Elteren, J.T. Slejkovec, Z. and Glass, H.J. 'Migration of arsenic from old tailings ponds- A case study on the King Edward Mine, Cornwall UK.' (2008) 108(1) *Environmental Research* 28

Brown, J. 'Noms et metaphores dans l'historiographie metisse: anciennes categories et nouvelles perspectives' [2008] 37 *Recherches amerindiennes au Quebec* 7

Buppert, T. and McKeehan, A. 'Free, Prior and Informed Consent: Empowering Communities for People-Focused Conservation' (2014) *Harvard International Review* 35(3) 48.

Cattaneo, C. 'Fort McKay Aboriginals Take 'Good with the Bad' of the Oil Sands' (*Financial Post*, 22nd March 2013) <http://business.financialpost.com/2013/03/22/fort-mckay-aboriginals-take-good-with-the-bad-of-the-oil-sands/?__lsa=c179-ec8b> Accessed 30th July 2014.

- Collins, L.M. and Murtha, M. 'Indigenous Environmental Rights in Canada: The Right to Conservation Implicit in Treaty and Aboriginal Rights to Hunt, Fish, and Trap' (2010) 47 *Alta. L. Rev.* 959.
- de Beco, G. '*Human Rights Impact Assessments*' (2009) 27 *Netherlands Human Rights Quarterly* 139
- Dyer, S.J, O'Neill, J.P, Wasel, S.M. and Boutin, S. 'Avoidance of Industrial Development by Woodland Caribou' [2001] 65 (3) *The Journal of Wildlife Management* 531
- Friedman, T. 'The First Law of Petropolitics' *Foreign Policy* (Washington, May/June 2006) <http://www.ituassu.com.br/oil_fp2.pdf> Accessed 20th January 2011
- Goecke, K. 'The Case of *Angela Poma Poma v. Peru* before the Human Rights Committee: The Concept of Free Prior and Informed Consent and the Application of the International Covenant on Civil and Political Rights to the Protection and Promotion of Indigenous Peoples' Rights (2010) 14 *Max Planck Yearbook of International Law* 337
- Harnum, J. 'Deriving the Right to Water from the Right to Life, Liberty and Security of the Person: Section 7 of the Canadian Charter of Rights and Freedoms and Aboriginal Communities in Canada' (2010) *Review of European Community and International Environmental Law* 19 (3)
- Harrison, J. '*Human Rights Measurement: Reflections on the Current Practice and Future Potential of Human Rights Impact Assessment*' (2011) *Journal of Human Rights Practice* 3(2) 162
- Huseman, J. and Short, D. 'A Slow Industrial Genocide: Tar Sands and the Indigenous Peoples of Northern Alberta' (2012) 16(1) *International Journal of Human Rights* 216
- Jerry v. DeMarco, "The Supreme Court of Canada's Recognition of Fundamental Environmental Values: What Could Be Next in Canadian Environmental Law?" (2007), 17 *Journal of Environmental Law & Practice*. 159.

- Kavanagh, R.J. Frank, R.A. Oakes, K.D. Servos, M.R. YOug, R.F. Fedorak, P.M.
MacKinnon, M.D. Solomon, K.R. Dixon, G. and Van Der Kraak, G. 'Fathead minnow (Pimephales promelas) reproduction is impaired in aged oil sands process-affected waters' (2011) 101(1) Aquatic Toxicology 214
- Kendrick, A. Lyver, P.O.B. and K'e, L 'Denesoline (Chipewyan) Knowledge of Barren-Ground Caribou (*Rangiferus tarandus groenlandicus*) Movements' (June 2005) 58 (2) Artic 175
- Lixinski, L. 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law' (2010) 21(3) European Journal of International Law 585
- Loukis Loucaides, 'Environmental Protection through the Jurisprudence of the European Convention on Human Rights' (2005) 75 British Yearbook of International Law 249
- Lutig, S. & Parkes, D. '*Where do we go from here?*' (2002) 15(4) Herizons 14
- Magraw, D and Baker, L. 'Communities and Human Rights: Community Based Property Rights and Prior Informed Consent (2007) 35 Denver Journal of International Law and Policy 413
- Mahoney, M.C. and Michalek, A.M.' A meta-analysis of cancer incidence in United States and Canadian native populations.' (1991) 20(2) International Journal of Epidemiology 323.
- Manfredi, C.P. 'Appropriate and just in the Circumstances:'Public Policy and the Enforcement of Rights under the Canadian Charter of Rights and Freedoms' (1996) 27 The American Political Science Review 4
- Manus, P. 'Sovereignty, Self Determination, and Environment Based Cultures: The Emerging Voice of Indigenous Peoples in International Law.' (2000) 23(4) Wisconsin International Law Journal 553

Marshall, E. 'OPEC Prices Make Heavy Oil Look Profitable' (1979) 204 *Science*, New Series 4399

Potes, V. Passelac-Ross, M and Bankes, N. *Oil and Gas Development and the Crown's Duty to Consult: A Critical Analysis of Alberta's Consultation and Practice*. (2006)

<<http://science.ucalgary.ca/iseee/files/iseee/14-oil-and-gas-development-and-the-crownts-duty-to-consult.pdf>> Accessed 30th July 2014

Schneider, R.R, Hauer, G, Adamowicz, W.L. and Boutin, S. (2010) 'Triage for conserving populations of threatened species: The case of woodland caribou in Alberta' 143(7) *Biological Conservation* 1603

Smiley, D. 'The Case against the Canadian Charter of Human Rights' (1969) 2 *Canadian Journal of Political Science* 3

Snyder, J. 'Five Aboriginal Firms Find Success on the Oil Sands' (*Alberta Oil Magazine*, 3rd March 2012) <<http://www.albertaoilmagazine.com/2012/03/rising-up/>> Accessed 30th July 2014.

Tarlton, C. D. 'Symmetry and Asymmetry as Elements of Federalism: A Theoretical Speculation' (1965) 27 (4) *The Journal of Politics* 861

Timoney, K.P. and Ronconi, R.A. 'Annual Bird Mortality in the Bitumen Tailings Ponds in North Eastern Alberta, Canada' (2010) 122(3) *The Wilson Journal of Ornithology* 569.

Tracz, B.V, LaMontagne, J.M, Bayne, E.M. and Boutin, S. (2010) 'Annual and monthly range fidelity of female boreal woodland caribou in response to petroleum development' 30 (1) *Rangifer* 31

Upasana, K. 'Indigenous Peoples' Right To Free, Prior, and Informed Consent In The Context Of State-Sponsored Development: The New Standard Set By *Sarayaku v. Ecuador* And Its Potential To Delegitimize The Belo Monte Dam' (2013) *American University International Law Review* 29(1) 165

Van Ert 'Using Treaties in Canadian Courts' (2000) 38 *Canadian Yearbook of International Law* 3

Wasser, S.K, Kleim, J.L, Taper, M.L, and Lele, S.R. 'The influences of wolf predation, habitat loss, and human activity on caribou and moose in the Alberta oil sands' (2011) 9(10) *Frontiers in Ecology and the Environment* 546

Ward, T. 'The Right to Free, Prior and Informed Consent: Indigenous Peoples' Participation Rights in International Law' (2011) 10(2) *Northwestern Journal of International Human Rights* 54

Xanthaki, A. '*Indigenous Rights in International Law over the Last 10 Years and Future Developments*' (2009) 10 *Melbourne Journal of International Law* 27.

Newspaper and Media Articles

Canwest News Service. 'Native rights declaration inconsistent with legal tradition: Strahl' (2007) <<http://www.canada.com/nationalpost/news/story.html?id=23df9769-3423-4f43-b828-a755725c2719&k=23677>> Accessed 30th July 2014.

Henton, D. 'Dead ducks in a tailings pond – how it happened' *The Edmonton Journal* (2010) <<http://www.edmontonjournal.com/business/Dead+ducks+happened/3177628/story.html>> Accessed 25th June 2010.

Tait, C. 'Syn crude triples number of dead ducks in tailings pond' *The Financial Post* (2009) <<http://www.financialpost.com/story.html?id=1448397>> Accessed 20th June 2010.

McCarthy, S. '“Ethical oil” and sparks war of words between Ottawa, Saudis.' *The Globe and Mail* (2011) <<http://www.theglobeandmail.com/news/politics/ethical-oil-ad-sparks-war-of-words-between-ottawa-saudis/article4256682/>> Accessed 30th July 2014

Wente, M. 'The Great Oil-Sands Cancer Scare' *The Globe and Mail* (2014) <<http://www.theglobeandmail.com/globe-debate/the-great-oil-sands-cancer-scare/article17685139/>> Accessed 30th July 2014.

Brooymans, H. and Farrell, J. 'Syn crude faces scrutiny after ducks land on toxic pond' *The National Post* (2008) <<http://www.nationalpost.com/news/story.html?id=482931>> Accessed June 28th 2010

Governmental Reports

Aboriginal Affairs and Northern Development Canada, *Report of the Royal Commission on Aboriginal Peoples* (Supply and Services Canada, Ottawa, 1996)

Aboriginal Affairs and Northern Development Canada *Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples* (2010) <<http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>> Accessed 30th July 2014

Alberta Cancer Board, *Cancer Incidence in Fort Chipewya, Alberta 1995-2006* (2009) <<http://www.albertahealthservices.ca/rls/ne-rls-2009-02-06-fort-chipewyan-study.pdf>> Accessed 30th July 2014

Alberta Energy Regulator *Having Your Say at an AER Hearing* (2013) <<http://www.aer.ca/compliance-and-enforcement/enerfaqs/enerfaqs-hearing#howmany>> Accessed 30th July 2014.

Alberta Energy Resources Conservation Board, *Annual Oil and Gas Statistics*, Calgary, 1979.

Ayles, G.B. Dube, M and Rosenberg, D. *Oil Sands Regional Aquatic Monitoring Program (RAMP) Scientific Peer Review of the Five Year Report (1997-2001)*, 14 <http://www.andrewnikiforuk.com/Dirty_Oil_PDFs/RAMP%20Peer%20review.pdf> Accessed 30th July 2014

Alberta Environment. *Glossary of Reclamation and Remediation Terms Used in Alberta 7th edition* May 2002 <<http://environment.gov.ab.ca/info/library/6843.pdf>>. Accessed 30th July 2014.

Alberta Environment Fisheries and Oceans Canada *Water Management Framework: Instream Flow Needs And Water Management System For The Lower Athabasca River* , February 2007, 31.

<http://environment.alberta.ca/documents/athabasca_rwmf_technical.pdf> Accessed 30th July 2014.

Alberta Environmental Monitoring Panel, *A World Class Environmental Monitoring, Evaluation and Reporting System for Alberta The Report of the Alberta Environmental Monitoring Panel* (2011) <<http://environment.gov.ab.ca/info/library/8381.pdf>> pp.76. Accessed July 30th 2014.

Alberta Government *Lower Athabasca Regional Plan 2012-2022*. Approved August 22nd 2012.

<<https://www.landuse.alberta.ca/Documents/LARP%20Lower%20Athabasca%20Regional%20Plan%202012-2022%20-%20Approved%20-%202012-08.pdf>> Accessed 30th July 2014.

Alberta Government, *Oil Sands Environmental Management: Quick Facts* (2013)

<http://www.oilsands.alberta.ca/FactSheets/Quick_Facts_FSht_85x11_Nov_2013_Online.pdf> Accessed 30th July 2014

Alberta Health Services, *Appendix I Fort Chipewyan Update Feb 7 2014*

<<http://www.albertahealthservices.ca/poph/hi-poph-surv-cancer-appendix-i-fort-chip-2014-02-07.pdf>> Accessed 30th July 2014

Environment Canada, *Water Survey of Canada: Water Level and Streamflow Statistics: Athabasca River Below McMurray* (2012)

<http://www.wsc.ec.gc.ca/staflo/index_e.cfm?cname=flow_daily.cfm> Accessed 30th July 2014

Government of Alberta, *'Water for Life'* (2009)

<<http://environment.gov.ab.ca/info/library/8236.pdf>> Accessed 2nd April 2012

Government of Canada: Department of Natural Resources, *Oil Sands: A strategic resource for Canada, North America and the world market: Tailings Ponds* (Natural Resources Canada, Ottawa, 2011)

Government of Canada, *Government of Canada Response to Alberta's Draft Lower Athabasca Regional Plan* (2011) <<https://www.ec.gc.ca/pollution/EACB8951-1ED0-4CBB-A6C9-84EE3467B211/GoC%20LARP%20Response%20Jun1.pdf>>. Accessed July 30th 2014

National Energy Board *Canada Energy Pricing Trends 2000-2010* (2011) <<http://www.nbe-one.gc.ca/clf-nsi/archives/rnrgynfimt/prcng/cndnrgprcngtrndfct2011/cndnrgprcngtrndfct-eng.html>> Accessed 30th July 2014.

National Energy Board of Canada; *Canada's Oil Sands: Opportunities and Challenges to 2015* National Energy Board of Canada (Calgary, June 2006)

Parliament of Canada *Our Country, Our Parliament*
<http://www.parl.gc.ca/About/Parliament/Education/OurCountryOurParliament/html_booklet/division-powers-e.html> Accessed 30th July 2014

Transport Canada, *Wildlife Control Manual.: Deer and other Ungulates* (2011)
<<http://www.tc.gc.ca/eng/civilaviation/publications/tp11500-sectioni-sectioni2-1774.htm>>
Accessed 18th April 2011

Official Publications Not Available In Hard Copy in the United Kingdom

Alberta Geological Survey, *Alberta Oil Sands* (2013)
<http://www.ags.gov.ab.ca/energy/oilsands/alberta_oil_sands.html> Accessed 30th July 2014.

Alberta Oil Magazine. *Syncrude Canada pioneers unique land reclamation in oil sands*. 1st October 2009 <<http://www.albertaoilmagazine.com/2009/10/back-to-life/>> Accessed July 30th 2014.

Argonne National Laboratory, Energy Systems Division, *Consumptive Water Use in the Production of Ethanol and Petroleum Gasoline* (2009)

<<http://www.osti.gov/scitech/biblio/947085>> Accessed July 30th 2014

Assembly of First Nations. *Canadian Human Rights Act Applies to First Nations Governments* May 2011 <<http://www.afn.ca/index.php/en/news-media/current-issues/canadian-human-rights-act-applies-to-first-nation-governments-on-june->> Accessed 30th July 2014.

Athabasca Chipewyan First Nation and Misikew Cree First Nation, *Environmental and Human Health Implications of the Athabasca Oil Sands for the Mikisew Cree First Nation and Athabasca Chipewyan First Nation in Northern Alberta Phase Two Report*.

<<https://intercontinentalcry.org/wp-content/uploads/2014/07/Executive-Summary-Fort-Chipewyan-Env-Health-Report-July-2014-Media.pdf>> Accessed 30th July 2014.

Bayoumi, T and Muhleisen, M *Energy, the Exchange Rate and the Economy: Macroeconomic Benefits of Canada's Oil Sands Production*

<<https://www.imf.org/external/pubs/ft/wp/2006/wp0670.pdf>> Accessed February 20th 2015

Beaver Lake Cree *Statement of Claim against the Province of Alberta and the Attorney General of Canada*. 2008.

<<http://www.beaverlakecreenation.ca/upload/documents/statementofclaim.pdf>> Accessed 13th December 2011

Canadian Association of Petroleum Producers (CAPP), *Tailings Ponds* (2013)

<<http://www.capp.ca/environmentCommunity/land/Pages/TailingsPonds.aspx>> Accessed 13th July 2014.

Canadian Association of Petroleum Producers (CAPP), *Water Use in Canada's Oil Sands* (2010) <<http://www.capp.ca/getdoc.aspx?DocId=193756&DT=NTV>> Accessed 13th July 2014.

Canadian Intellectual Property Office *Patent CA 289058: Bituminous Sand Processing* (Issued 1929) <<http://brevets-patents.ic.gc.ca/opic->

cipo/cpd/eng/patent/289058/page/289058_20031129_description.pdf Accessed 15th February 2011 > Accessed 30th July 2014.

Environmental Defence '*Canada's Toxic Tar Sands Report by Environmental Defence*'
<http://environmentaldefence.ca/sites/default/files/report_files/TarSands_TheReport.pdf >
Accessed 15th February 2011

Environmental Defence, *11 Million Litres a Day: The Tar Sand's Leaking Legacy* (2008)
<<http://environmentaldefence.ca/reports/11-million-litres-day-tar-sands-leaking-legacy>>
Accessed 30th July 2014

Luensmann, P. on behalf of the U.S Department of Agriculture, U.S. Forest Service. *Rangifer Tarandus* (August 2014) <<http://www.fs.fed.us/database/feis/animals/mammal/rata/all.html>>
Accessed July 30th 2014.

National Geographic, *Satellite Views of Canada's Oil Sands Over Time* (2011) <
<http://news.nationalgeographic.com/news/energy/2011/12/pictures/111222-canada-oil-sands-satellite-images/>> Accessed 30th July 2014

Oberg, P. Rohner, C and Schmiegelow, F.K.A. *Responses of the Mountain Caribou to Linear Features in a West-Central Landscape* (2000)
<http://www.ualberta.ca/~fschmieg/Caribou/pdfs/Caribou_Responses%20to%20Lines.pdf>
Accessed 30th July 2014

Oil Sands Today, *Recovering the Oil* (2014)
<<http://www.oilsandstoday.ca/whatare oilsands/Pages/RecoveringtheOil.aspx> > Accessed 30th July 2014.

Parkland Institute. *Reclamation Illusions in Oil Sands Country*. 2009
<http://parklandinstitute.ca/post/story/reclamation_illusions_in_oil_sands_country/>
Accessed July 30th 2014.

Pembina Institute *Canadian Aboriginal Concerns with Oil Sands: A compilation of key issues, resolutions and legal activities*

<<https://www.pembina.org/reports/briefingnoteosfntoursep10.pdf>> Accessed February 20th 2015

Pembina Institute *Government Protects Oilsands Industry, Fails to Protect Athabasca River*

<<http://www.pembina.org/media-release/1384>> Accessed February 20th 2015

Pembina Institute *Troubled Waters, Troubling Trends: Technology and Policy Options to Reduce Water Use in Oil and Oil Sands Development in Alberta*. May 2006

<http://www.pembina.org/reports/TroubledW_Full.pdf> Accessed 30th July 2014.

Pembina Institute *Water Impacts* <<http://www.pembina.org/oil-sands/os101/water>> Accessed July 30th 2014. Alberta Government *Alberta's Oil Sands: Water*

<<http://www.oilsands.alberta.ca/water.html>> Accessed July 30th 2014

Respecting Aboriginal Values and Environmental Needs Trust (RAVEN Trust) *How You*

Can Help 2014 <<http://www.raventrust.com/beaverlakecree/howcanyouhelp.html>> Accessed 30th July 2014.

Royal Society of Canada. *Expert Panel Report on the Environmental and Health Impacts of Canada's Oil Sands Industry*. (December 2010)<[\[src.com/sites/default/files/pdf/RSC%20Oil%20Sands%20Panel%20Main%20Report%20Oct%202012.pdf\]\(http://rsc-src.com/sites/default/files/pdf/RSC%20Oil%20Sands%20Panel%20Main%20Report%20Oct%202012.pdf\)> Accessed 30th July 2014](http://rsc-</p></div><div data-bbox=)

The Cooperative *Save the Caribou: Stop the Tar Sands*. (2010) <[\[operative.coop/upload/ToxicFuels/docs/caribou-report.pdf\]\(http://www.co-operative.coop/upload/ToxicFuels/docs/caribou-report.pdf\)> Accessed 13th December 2011.](http://www.co-</p></div><div data-bbox=)

.Accessed 13th December 2011

Water Matters Society of Alberta, *Watered Down: Overcoming Federal Inaction on the Impact of Oil Sands Development to Water Resources* (2009) <<http://www.water-matters.org/pubs>> Accessed 30th July 2014.

Websites

Alberta Government, *US Economic Impact Oil Calculator* (2010)
<<http://www.oilsands.alberta.ca/USEconomicImpactOilCalculator.html>> Accessed 30th July 2014

Alberta Government, *History* <<http://alberta.ca/history.cfm>> Accessed 30th July 2014

Amnesty International and the Rainforest Action Network: <<http://www.amnesty.ca/our-work/issues/indigenous-peoples/the-lubicon-cree-ongoing-human-rights-violations>>
Accessed 30th July 2014

Amnesty International and the Rainforest Action Network: <<http://www.ran.org/royal-bank-canada-steps-away-tar-sands-support-first-nation-rights-0>> Accessed 30th July 2014

Athabasca University, Athabasca River Basin Research Institute (2014)
<<http://arbri.athabascau.ca/basin/>> Accessed 30th July 2014

Canada's Oil Sands Innovation Alliance <<http://www.cosia.ca/>> Accessed 30th July 2014.

Canadian Museum of History, *A History of the Native People of Canada: Volume II* (1000 B.C. to 500 A.D.)
<<http://www.historymuseum.ca/cmhc/exhibitions/archo/hnpc/npvol29e.shtml>> Accessed 30th July 2014

Clearwater Environmental Consultants. <<http://www.clearwater-environmental.com/>>

Extreme Energy Initiative *What is extreme energy?* <<http://extremeenergy.org/about/what-is-extreme-energy-2/>> Accessed February 20th 2015

Government of Alberta, Environment and Water Ministry, Water Webpage
<<http://environment.alberta.ca/01157.html>> Accessed 4th April 2012

Guidelines for completing the required Environmental Field Report component of an application for a license to extract oil sands in Alberta: <<http://esrd.alberta.ca/forms-maps-services/forms/lands-forms/guides-forms-completion/documents/EnvironmentalFieldReports-Instructions-SurfaceDispositions-May2008.pdf>> Accessed 30th July 2014.

Health Canada website: <http://www.hc-sc.gc.ca/fniah-spnia/promotion/public-publique/water-eau-eng.php#how_many> Accessed 4th April 2012

Human Rights Impact Resource Centre, *An Introduction to Human Rights Impact Assessment*
<<http://www.humanrightsimpact.org/hria-guide/overview>> Accessed February 20th 2015

National Energy Board of Canada <http://www.neb.gc.ca/clf-nsi/rnrgynfmntn/nrgyrprt/lnd/pprntnsndchllngs20152006/pprntnsndchllngs20152006-eng.pdf>
Accessed 15th February 2011

Statistics Canada, *2006 Canadian Census (2006)*
<<http://www12.statcan.ca/census-recensement/2006/dp-pd/hlt/97-558/pages/page.cfm?Lang=E&Geo=PR&Code=01&Table=1&Data=Count&Sex=1&Age=1&StartRec=1&Sort=2&Display=Page>> Accessed 30th July 2014

Suncor Energy *Wapisiw Lookout Reclamation 2010* < www.suncor.com/wapisiw > Accessed July 30th 2014.

U.S. Energy Information Administration <<http://www.eia.doe.gov/aer/txt/ptb0504.html>>
Accessed 15th February 2011

U.S. Energy Information Administration
<http://www.eia.gov/dnav/pet/pet_move_impcus_a2_nus_ep00_im0_mbb1_m.htm>
Accessed 20th January 2011.)

United Nations Treaty Collection Database. See:

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en Accessed 30th July 2014.

WRTG Economics *Crude Oil Prices* (2011)

<http://www.wtrg.com/oil_graphs/oilprice1947.gif> Accessed 30th July 2014

University of Alberta, *Cancer Incidence in Fort Chipewyan, Alberta*

1995-2006 (2009) <<http://www.ualberta.ca/~avnish/rls-2009-02-06-fort-chipewyan-study.pdf>> Accessed 30th July 2014