

Perspectives

<p>Western Law</p> <ul style="list-style-type: none"> - Water is reserved to the Crown as part of the commons - Water rights can be allocated to private interests - Rights may be ranked in priority - Certainty and efficiency drive policy 	<p>Indigenous Law</p> <ul style="list-style-type: none"> - Water is giver of life, sacred trust - Cannot be owned, must be shared - No one interest or use is paramount, all must be considered respectfully - Obligations to protect for present and future generations establish limits on use/prohibit misuse
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Treaty Context

<p>Western</p> <p>Treaties were a means by which Aboriginal title could be 'surrendered', peaceful relationships established, and new economies could be developed through settlement and trade.</p> <p>... and Her Majesty the Queen hereby agrees with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping, and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the Country acting under the authority of Her Majesty, and saving excepting such tracts as made be required or taken up from time to time for settlement, mining, lumbering, trading, or other purposes.</p> <p>-Written Text, Treaty Eight</p>	<p>Indigenous</p> <p>Treaties are evidence they Aboriginal people are distinct and autonomous as they negotiated the terms on which non-Aboriginal settlement and development could occur on the continent on the basis of peaceful co-existence.</p> <p>"What I do understand is that we were to share the land with other people who were the white people. That was the purpose of the treaty, I think, since there were going to be more white people, to share the land with them."</p> <p>Francis Bruno, Aboriginal elder, in R. Daniel, <i>The Spirit and Terms of Treaty Eight</i></p>
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Common Intentions of the Parties

"The promise that this livelihood would not be affected was repeated to all the bands who signed the Treaty. Although it was expected that some white prospectors might stake claims in the north, this was not expected to have an impact on the Indians' hunting rights...one commissioner...stated: "We are just making peace between Whites and Indians - for them to treat each other well. And we do not want to change your hunting. If Whites should prospect, stake claims, that will not harm anyone."

Commissioner Laird told the Indians that the promises made to them were to be similar to those made with other Indians who had agreed to a treaty. Accordingly, it is significant that the earlier promises also contemplated a limited interference with Indians' hunting and fishing practices."

R. v. Badger, [1996] 1 S.C.R. 771 at 55-56

"If the time comes that in the case of a particular Treaty 8 First Nation "no meaningful right to hunt" remains over its traditional territories, the significance of the oral promise that "the same means of earning a livelihood would continue after the treaty as existed before it" would clearly be in question, and a potential action for treaty infringement, including the demand for a Sparrow justification, would be a legitimate First Nation response."

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), 2005 SCC 69 at 48

Common Intentions of the Parties

As interpreted by the Supreme Court, the Treaty relationship provides treaty Nations with the following guarantees:

- A right to earn a livelihood, and to freely choose among commercial and subsistence hunting, fishing and trapping, agriculture or wage labour.
- The right to maintain their distinctive way of life and culture;
- The right to retain control over wildlife resources, expressed as promises of non-interference with their hunting practices;

Attributes of Aboriginal Water Rights in Canadian Law

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| <ul style="list-style-type: none"> □ Title <ul style="list-style-type: none"> □ Ownership of waterbeds = exclusive use of water contained therein □ Foreshore and <i>ad filium</i> rights □ Jurisdiction over water subject to Aboriginal title. | <ul style="list-style-type: none"> □ Rights <ul style="list-style-type: none"> □ Paramount use □ Riparian rights □ <u>Protective limits</u> arising from the nature of aboriginal and treaty rights – depend on sufficient quality/quantity of water for livelihood |
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Infringements of Aboriginal Water Rights

Prima Facie infringements:

- Approvals of water uses which diminish or degrade water sources required for livelihood within the entire treaty area;
- Allocations of water flowing through a reserve which result in alterations in rate, quantity, or quality of water necessary to fulfill the potential of reserve lands (ie through modern agriculture)

Future Directions



Water Policy Directions

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| <ul style="list-style-type: none">□ Western□ Securing and defining existing allocations□ Dealing with scarcity through competitive markets□ Self-regulation by users□ Reducing regulatory oversight | <ul style="list-style-type: none">□ Indigenous□ Achieving self-determination and control over development□ Restoring/maintaining cultural identity□ Maximizing benefits□ Minimizing impacts□ Respecting future generations |
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Reconciliation?

NWT Legislature Right To Water Motion (20-15(5)):

...this Legislative Assembly recognizes that all peoples have a fundamental human right to water that must be recognized nationally and internationally, including the development of appropriate institutional mechanisms to ensure that these rights are implemented;

AND FURTHER that this Legislative Assembly recognizes that this right includes access to water bodies for purposes of harvesting, travel and navigation, and mechanisms to prevent or seek redress for any action that may affect these rights;

AND FURTHERMORE that this Legislative Assembly recognizes that this right must take precedence over the use of water for industrial and commercial purposes;

AND FURTHERMORE that this Legislative Assembly endorses the application of the precautionary approach in all management decisions or actions that may affect the quality, quantity or natural rate of flow of water within the basin;

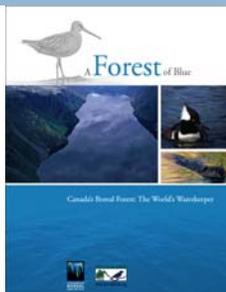
AND FURTHERMORE that this Legislative Assembly urges all parties to complete and implement comprehensive watershed management and land use plans as soon as possible in order to safeguard water sources and maintain ecosystem integrity across the basin .

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Elements of a solution

- Recognition of Aboriginal water rights and the development of appropriate institutional mechanisms to ensure that these rights are implemented, with powers of redress and compensation.
- Precautionary limits on water use, based on ecosystemic and community needs and adaptive to changing climatic conditions, with onus of proof on industrial users to show that proposed use is sustainable under a range of flow conditions.
- Comprehensive watershed management and land use planning, based on protection as a first priority before making sustainable allocations for other uses.
- Multi-jurisdictional co-operation accords based on mutual responsibilities/shared objectives to ensure that waters remain clean, abundant and productive for all time.

Upcoming Report: A Forest of Blue



402 - 30 Metcalf Street
Ottawa, Ontario K1P 5L4
(613) 230-4739 www.borealcanada.ca
