Aboriginal Water Rights in Canada

Outline

- The question?
  - Do aboriginal communities (reserves) have distinctive rights in relation to water, or are they simply subject to the relevant provincial\territorial water rights regimes? Nature? Extent?
  - What sorts of rights are we talking about?
  - How confident are we?
- What is the relevance of provincial law?
- The source of distinctive rights (and duties)?
  - Treaty rights
  - Aboriginal title
  - Aboriginal rights
  - The Crown's duty to consult and accommodate
  - The Crown's fiduciary duty
  - Modern land claim agreements & other agreements
  - British Columbia

What types of rights?

- Rights to what?
  - Quantity
  - Priority
  - Purpose (& appurtenance?)
  - Infrastructure (storage and delivery mechanisms)
  - Quality
  - eIFN
  - Right not to have lands flooded
  - Right to have water of sufficient quantity & quality that can carry on traditional activities (economic & spiritual)
  - Consultation & accommodation re water management decisions
  - A flowing resource – implications?
- Human right to water

September 13, 2007, Tsuu T'ina Nation Statement of Claim

1. A declaration that the Plaintiffs have a Treaty water right to appropriate water from the Elbow River, Fish Creek and all other water courses and all sources of ground water, within, adjacent to, and in the vicinity of the Reserve in quantities that are sufficient to meet the Plaintiffs' reasonable economic, residential, governmental, recreational, domestic and cultural needs, both now and in the future.

3. A declaration that the Plaintiffs have a Treaty water right to sufficient quantities and quality of water in the water courses and water bodies of the Treaty No. 7 region to sustain their Treaty rights to hunt, fish and trap.

6. A declaration that the Plaintiffs' Treaty water rights have priority over all statutory grants, permits, licenses granted under the *North-west Irrigation Act*, the *Water Act* and all predecessor legislation.

Continued

8. A declaration that the *Water Act* and all predecessor legislation enacted by the Province of Alberta since 1930 do not apply to all water resources within and adjacent to the boundaries of the Plaintiff's Reserve in accordance with the doctrine of interjurisdictional immunity.

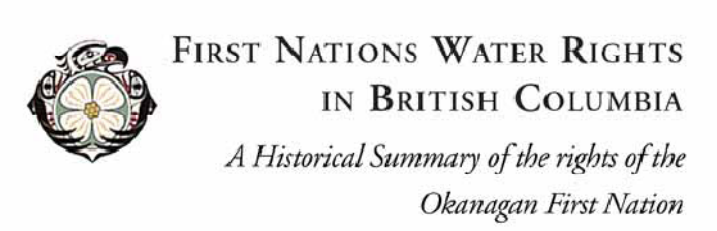
10. A declaration that the Plaintiffs possess a Treaty, Aboriginal and inherent right of self-government in relation to the use, allocation and management of water resources, water courses and water bodies within and adjacent to the boundaries of the Reserve, including, at least, the authority to permit or prohibit the use of water for commercial, industrial, agricultural, recreational, and domestic purposes on the Reserve.

12. A declaration that the Plaintiffs possess Aboriginal rights to water.

How confident are we?

- There is very little that is certain in Canadian aboriginal law & even more so in this area
- No decided cases
  - Some litigation initiated (e.g. Piikani; Harper Ranch)
  - Some literature including Bartlett (1988)
- Certainty is most likely to come through agreements (but informed by an understanding of rights – which may require litigation to establish)

The relevance of provincial laws



- First Nations do have water licences under provincial laws
- Can the province define the nature and extent of aboriginal water rights?

The application of provincial laws

- Division of powers: two questions
  - Can a province make a law?
  - Is the law applicable?
- The province can certainly pass the *Water Act* & other resource legislation
  - It cannot pass a law extinguishing aboriginal title, rights etc
- It cannot make a resource statute apply to "lands reserved for Indians"
  - What are "lands reserved for Indians"?
  - *Delgamuukw* (1997); *Tsilhqot'in Nation* (2007)
  - Section 88 of the IA does not make a provincial law apply to "lands reserved"

Can a province infringe?

- The source of the language of "justifiable infringement": s.35 and *Sparrow*
- Better view
  - A province cannot infringe because any law that impairs an aboriginal right, title or treaty right will be "inapplicable" (unless made applicable by s.88 IA)
- But
  - Dicta in *Delgamuukw* that a province can infringe
  - The SCC has to resolve
  - Implications if can? Justifiable?

Conclusion # 1

- Provincial governments cannot conclusively determine the nature and content of reserve rights or aboriginal rights to water.

Treaty rights

- No historic treaty in Canada specifically recognizes an aboriginal right to water
- Can we imply a right to water? And if so how much?
  - US Winters Doctrine, Milk River, priority, PIA
- Recent Canadian cases on treaty interpretation
  - *Marshall*, a negative covenant implied a right
  - *Mikisew Cree*, Crown can take up lands but must consult and maybe substantive limits
  - *Saanichton Marina*, right to fish enjoins marina project

Conclusion # 2

- In an appropriate case a Canadian court will endorse a version of *Winters*
- When a treaty provides that lands shall be set aside for a reserve and it is expected that the lands will be used for agricultural purposes, then the treaty will also be interpreted as reserving a right to water & with a priority based on the date of the treaty & for the full irrigable acreage

Aboriginal title

- Canadian law does recognize the concept of an aboriginal title: *Calder* (1973)
- *Delgamuukw*
  - The *content* of aboriginal title can be summarized by two propositions: first, that aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures; and second, that those protected uses must not be irreconcilable with the nature of the group's attachment to that land.
  - Must include a right to water but:
    - Aboriginal title difficult to prove (*Marshall & Bernard*)
    - Would not be easy to determine scope (quantity & priority) of a water right associated with title

Conclusion # 3

- Experience to date suggests that it is difficult to establish an aboriginal title but:
  - an aboriginal title must include rights to water but will be difficult to quantify
  - Aboriginal title lands are lands reserved and provincial resource laws are therefore inapplicable to such lands

Other sources of rights?

- Aboriginal rights
  - Particular use rights; integral to distinctive culture; *Van der Peet*; *Sappier & Grey*
- Riparian style rights
  - Right to have water undiminished in quality, quantity & flow
- Interjurisdictional style rights
  - International law recognizes a principle of equitable utilization & duty to negotiate
- Modern land claim agreements
- Other agreements?
  - E.g. Piikani agreement; proposed Siksika\Bassano Agmt

Piikani Agreement, 2002

- Settlement of comprehensive water rights litigation & dispute re Oldman dam
- Parties are Piikani, Alberta & Canada
- $64.3 million dollars
  - Plus $800,000 pa by Alberta (for use of headworks?)
- Piikani entitled to 35,000AF diversion
  - Implemented through Bow, Oldman ad South Saskatchewan River Basin Water Allocation Order
  - Priority is date OC filed (2007); Crown will explore "equitable distribution in time of shortage"
  - Storage & headworks provided by Oldman dam
  - Agreement still very controvertial

Other sources of duties

- Fiduciary duty
  - Hard to see as a source of water rights but may be the basis of a duty to protect lands from flooding etc
  - *Guerin*, *Osoyoos IB v. Oliver*
- Duty to consult & accommodate
  - The threshold? Very low, *Haida Nation*
  - Who has the duty?
  - *Tsuu T'ina First Nation v. Alberta* [2008] ABQB 547
  - Who has to decide? EABs etc

British Columbia

- Bankes, "The Board of Investigation & the Water Rights of IRs in BC, 1909 to 1926" (1991)
- The position is very complicated!!
  - No treaties (except T8 and Douglas Treaties)
  - The T of U did not mention water rights
  - The Railway Belt Transfer gave water rights to the feds (Burrard Power)
  - The Indian Reserve Commissioner did make water records but in general terms and to the extent that they had authority to do so
  - The Mckenna-McBride Commission ducked the issue of water rights
  - Provincial water records a mess until Board of Investigation

British Columbia (continued)

- The province took a hard line
  - Water rights entirely dependent on provincial law
  - IRC had no jurisdiction to create water rights
  - IRC records only effective to the extent recorded by Indian Agents (and priority depended on that date of filing rather than IRC record of prior use)
  - Board of Investigation gave effect to this provincial position
  - Did pass *Indian Water Claims Act 1921* which recognized some additional filings
- Courts no more sympathetic
- Federal government never fully exploited its control over Railway Belt lands
- Many provincially recorded rights lapsed between interim and final licences (impression?)

ndbankes@ucalgary.ca

Columbia Inter-tribal fisheries commission seeks review of IJC order re GC