

Our Liquid Assets

Moving Alberta's laws toward treating water as a public resource

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Water is essential to all aspects of our society and is often undervalued. As a “resource” or “good,” water is the cornerstone of all other resource developments. If we claim to “own” it, it is likely only temporary ownership. It is a fluid and dynamic resource we all rely on and for this reason it is often characterized as “public resource.”

Summary of recommendations

How we treat water should reflect its value to our society for providing environmental goods as well as social and economic ones. This may be achieved by ensuring our laws treat water as a public resource and by incorporating principles of sustainability. The maintenance of water quality and quantity serve many public functions that are recognized in our laws, including:

- water use for private gain;
- navigation; and
- maintenance of a common pool resource in fisheries.

Where our legal system enables or empowers private interests to use water to the detriment of environmental sustainability or otherwise curtails legal options to address environmental harms, the nature of water management may be characterized as undermining the public interest in the resource.

The ELC recommends incorporating environmental law principles into Alberta legislation to ensure water is managed as a public resource and in a sustainable fashion. Incorporation of these principles can occur as follows:

1. Integrating substantive environmental criteria into the *Water Act* that act to constrain discretion around water allocations. These criteria will include:
 - a. A science based environmental base flow;
 - b. Identification and protection of species at risk;
 - c. Substantive water quality criteria as impacted by available flow and allocations.
2. Erring in favour of protection of the environment where information of environmental impacts from allocations is unknown.
3. Placing the burden of proof on an applicant for a diversion to illustrate that volumes, timing of diversions and return flow quality and quantity do not adversely impact the environmental criteria.
4. Creating a statutory planning and restoration system focused on the restoration and maintenance of aquatic habitat.

5. Ensuring that costs associated with maintaining water quality in return flows are borne by the polluter/user.
6. Integrating tools to minimize impacts of past allocations on aquatic health, including retroactive application of conditions on deemed licences.
7. Publishing reasoning around allocation decisions and addressing prescribed environmental criteria and principles of public trust and intergenerational equity.
8. Enabling legal participation in decision making by groups who can establish a genuine interest in environmental outcomes to ensure that decisions may be tested for their concordance with the public interest.

Do our laws treat water as a public resource?

A public resource is, as the name suggests, a resource that is thought of as belonging to the “public” as a whole or in common. The common law has recognized the public value of water in various ways and, in doing so, protects water resources from being used exclusively for private gain. Statutes, particularly the provincial *Water Act*, treat water as a public resource in some ways but in significant ways undermine management of the resource for broader public interest goals. It is the Environmental Law Centre’s view that these public interest goals must include environmental protection and sustaining our water resources and the biodiversity within it for future generations.

Common law linkages of fisheries and navigation

The English common law recognizes water as a public resource through aspects of recognizing riparian rights, rights to navigation and management of fisheries. Many of these rights were imported into Canada and have since been augmented.

Riparian rights, i.e., the right to divert and use water that ran past your property, did not grant rights exclusive of other users. It has been described as the right of a landowner “to have the water flow down to his land as it has been accustomed to flow, substantially undiminished in quantity and quality, subject to the rights other riparian owners to use the water, and to the public rights of navigation and floating.”¹ In this regard, riparian rights have been traditionally constrained by public rights of navigation and access to water (if they were a riparian owner). To undermine the rights of downstream users risked civil remedies being sought in court.

Similarly, rights to access and navigate navigable waters is a recognized public right. As noted by Justice La Forest in *Friends of the Oldman River Society v. Canada (Minister of Transport)*,²

The common law of England has long been that the public has a right to navigate in tidal waters, but though non-tidal waters may be navigable in fact the public has no right to navigate in them, subject to certain exceptions not material here. Except in the Atlantic provinces, where different considerations may well apply, in Canada the distinction between tidal and non-tidal waters was abandoned long ago; see *In Re Provincial Fisheries* (1896), 26 S.C.R. 444; for a summary of the cases, see my book on *Water Law in Canada*

(1973), at pp. 178-80. Instead the rule is that if waters are navigable in fact, whether or not the waters are tidal or non-tidal, the public right of navigation exists. That is the case in Alberta where the Appellate Division of the Supreme Court, applying the *North-West Territories Act*, R.S.C. 1886, c. 50, rightly held in *Flewelling v. Johnston* (1921), 59 D.L.R. 419, that the English rule was not suitable to the conditions of the province.

La Forest goes on to note that the passage of the *Navigable Waters Protection Act* permits the interference with the public right of navigation, thereby making a public nuisance lawful. It was further noted of “public right of navigation -- that it can only be modified or extinguished by an authorizing statute, and as such a Crown grant of land of itself does not and cannot confer a right to interfere with navigation; see also *The Queen v. Fisher* (1891), 2 Ex. C.R. 365; *In Re Provincial Fisheries*, *supra*, at p. 549, *per* Girouard J.; and *Reference re Waters and Water-Powers*, [1929] S.C.R. 200.”³

Similarly, fisheries have also been treated as a public resource, particularly in tidal waters. This concept was espoused by the Supreme Court of Canada in *Comeau’s Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*⁴ and reiterated in *Ward v. Canada (Attorney General)*⁵:

Canada’s fisheries are a “common property resource”, belonging to all the people of Canada. Under the *Fisheries Act*, it is the Minister’s duty to manage, conserve and develop the fishery on behalf of Canadians in the public interest (s. 43).

Suffice it to say the common property in fisheries and public rights of navigation are intricately linked with how water quantity and quality are managed. Notwithstanding this fact, the allocation system in Alberta has evolved in a fashion that is largely oblivious to these ties to other common law public resource rights. Undoubtedly this in part lies in the allocation of powers under the *Constitution* and the silos this creates, i.e. fisheries and navigable waters being governed by the federal government and property and resources being governed by the Provinces. Nevertheless, in light of constitutional principles such as paramountcy of federal legislation, one would think that greater consideration to common law public rights might pervade day to day provincial decision-making. Indeed, depending on the circumstances, provincial action that hinders public use of water ways for navigation and fishing may be challenged, as only the federal government is able to allow for “public nuisances” or limitations against historic public rights.

Water use: riparian rights meet Crown ownership

Provincial law says water is a Crown resource.⁶ It has been this way since the passage of the *Northwest Irrigation Act* by the government of Canada in 1894, prior to Alberta becoming a province. This *Act* supplanted the limitations inherent in the concept of water diversions being governed by riparian rights by making the Crown the owner and manager of the resource. Provincially, Crown ownership and management of surface waters took place in 1931 when the *Water Resources Act* (S.A. 1931, c. -71.) was passed. The current *Water Act* (as with preceding legislation) grants the Crown “property in and the right to the diversion and use of all water in the Province.”⁷

One might argue that, being Crown owned, water effectively becomes a public resource; that our government, as our elected body, is the embodiment of the public good. Yet individual decisions about management and treatment of our resource are not governed by four year election cycles. For

this reason it is important to delve further into whether the current *Water Act* treats water as a public resource.

The *Water Act* recognizes,⁸

... the need to manage and conserve water resources to sustain our environment and to ensure a healthy environment and high quality of life in the present and the future;and

...the shared responsibility of all residents of Alberta for the conservation and wise use of water ...

Again, these purpose statements in the legislation reflect that water is a public resource coming with shared responsibility. Yet in other regards, the public aspects of water management are undermined by the *Act*.

The *Water Act* maintains a level of riparian rights but significantly limits these rights in key respects. Specifically, the *Water Act* denies a remedy to riparian owners where the flow (which they may have historically accessed) or the ability to divert water is changed due to authorizations made under the *Act*.⁹

For licences granted for water diversions under the *Act* the treatment of water as a public resource is similarly remote. The *Water Act* licencing system grants the rights to divert water in a manner that empowers private rights over public rights. This system is brought forward from the original days of settling the west and gives those historic licence holders rights to water volumes over any right of licence holders who came later. The exception to this is for household purposes. This system is referred to as the prior allocation (or first in time first in right or “FITFIR”) system and is largely an anathema to treating water as a common or public resource. The licensee in the prior allocation system of Alberta need not even show that they are using the water in a beneficial fashion (as is required at common law in some U.S. states that have the prior appropriations method of allocating water). In this way, the common value of water is left to the whim of how a person decides to exercise their “papered” rights to divert and use a volume of water.¹⁰ This has more recently resulted in the practice of those with large allocations altering the purpose of their water licence to essentially become private brokers of water.¹¹

In this way, the *Water Act* promotes the public aspect of water, if at all, through a narrow “private” lens. It must be recognized that public benefits flow from private gain and the origination of the FITFIR system is driven by public policy outcomes (i.e. increased settlement and economic advancement). This is a narrow and outdated view of a common public resource.

Further, the *Water Act*, limits public participation in the government’s water allocation to those who are “directly affected” by the decision. This is typically narrowly applied by the government and the Alberta Environmental Appeals Board to mean those with an economic or property interest that may be impacted by the decision. In effect, the “directly affected” test for participating in these decisions relates to the protection of private rights rather than public rights. Again, this approach works on the assumption that the Crown, as representative of the people, fully understands and embodies the

public good in its decisions under the *Water Act*. The difficulty with this approach is that it lacks a mechanism to ensure government is accountable in its decisions to protect the broader public interest as it is hard to fathom that a specific water licencing decision would bring such a broad impact as to affect an election.

In undertaking allocation decisions the government is also directed by the *Water Act* to consider certain matters. Consideration of private interests (i.e. impacts on other licence holders) is mandatory, whereas environmental consideration is discretionary (except where an approved water management plan is in place). Even if environmental considerations are mandatory the discretion of the government remains unconstrained. In practice, this breadth of discretion may result (and the author would argue has resulted) in decisions that favour private interests over a broader public interest.

Finally, the *Water Act* indicates that the power and leverage granted to past senior licence holders will be maintained by deeming previously issued licences as valid licences under the Act and making the licences paramount to the legislation in the event of a conflict.¹² This, in effect, constrains government decisions that may be in the public interest in managing a resource the Crown owns.

Calls for recognition as a public resource

There have been calls for altering how we manage water to better reflect how it is a common resource. This comes in a range of approaches, from the volumetric payment for water used, i.e. a public royalty, to clear articulations of water management as a “common pool resource” to be managed as a public trust.¹³ There has also been the concept of treating water as a shared resource, in which annual budgets for water supply are determined and shares for water allocation are granted.¹⁴

This all leads us to the Government of Alberta’s consultation around water management, framed as the “Water Conversations.”¹⁵

Preserving our liquid assets: ELC recommendations for water management

The ELC recommends incorporating increased aspects of “public resource” management and shared governance in Alberta’s water management system by ensuring environmental law principles are embedded in legislation.

Environmental law principles, as espoused by academics and the judiciary, include:

- sustainability;
- precautionary principle;
- pollution prevention;
- polluter pays;
- addressing cumulative impacts;
- intergenerational equity; and
- public participation.

For further information see the ELC’s “Core Environmental Principles for Environmental Laws, Policies and Legal Processes.”¹⁶

Table 1 identifies how the current *Water Act* is failing to adequately incorporate environmental principles. The table is followed by recommendations to address this shortcoming.

Table 1: Environmental law principles and the *Water Act*

Principle	<i>Water Act</i> approach
Sustainability (bring a sustainable environment into the equation)	Allocation decisions are driven by private interests insofar as impacts on private licence holders is mandatory and consideration of environmental impacts is discretionary. Participation in decision making is limited to primarily private interests.
Precautionary principle	A precautionary approach is not a mandatory part of the legislation except where impacts on other users are concerned. (Arguably the closure of the South Saskatchewan basin to allocations shows a level of precaution, albeit late).
Pollution prevention	Pollution is not the focal point of the <i>Water Act</i> , although allocation decisions often involve impacts on surface water quality, either through return flows or reduced flows. There are no substantive provisions limiting allocation decisions based on impacts on water quality.
Polluter pays (internalizing environmental costs)	The user/polluter pays principle is not directly adopted by the <i>Water Act</i> (or the <i>Environmental Protection and Enhancement Act</i>).
Cumulative impacts	Decisions to manage around cumulative impacts exist but have been underutilized – (e.g. licences for water conservation objectives, Crown reserves).
Intergenerational equity	Recognized in the purpose of the Act but is fundamentally undermined by: <ul style="list-style-type: none"> • FITFIR; • Deemed licences; and • Lack of flexibility to deal with climatic/supply variability
Public participation	Directly affected parties can participate in decisions which have been interpreted to limit standing to those with private and primarily economic interests. This limits the submission and testing of evidence to competing private interests not the broader public interest.

ELC Recommendations

The ELC recommends amending the *Water Act* to incorporate the following:

1. Integrating substantive environmental criteria into the *Water Act* that act to constrain discretion around water allocations. These criteria will include:
 - a. A science based environmental base flow;
 - b. Identification and protection of species at risk;

- c. Substantive water quality criteria as impacted by available flow and allocations.
2. Erring in favour of protection of the environment where information of environmental impacts from allocations is unknown.
3. Placing the burden of proof on an applicant for a diversion to illustrate that volumes, timing of diversions and return flow quality and quantity do not adversely impact the environmental criteria.
4. Creating a statutory planning and restoration system focused on the restoration and maintenance of aquatic habitat.
5. Ensuring that costs associated with maintaining water quality in return flows are borne by the polluter/user.
6. Integrating tools to minimize impacts of past allocations on aquatic health, including retroactive application of conditions on deemed licences.
7. Publishing reasoning around allocation decisions and addressing prescribed environmental criteria and principles of public trust and intergenerational equity.
8. Enabling legal participation in decision making by groups who can establish a genuine interest in environmental outcomes to ensure that decisions may be tested for their concordance with the public interest.

¹ G. La Forest, *Water Law in Canada: The Atlantic Provinces* (Ottawa: Information Canada 1973) at page 206, as cited in *Neuman v. Parkland County*, 2004 ABPC 58.

² *Friends of the Oldman River Society v. Canada (Minister of Transport)*, 1992 CanLII 110 (SCC), [1992] 1 SCR 3, <<http://canlii.ca/t/1bqn8>> retrieved on 2012-09-05.

³ *Ibid.*

⁴ [1997 CanLII 399 \(SCC\)](http://canlii.ca/t/51vl), [1997] 1 S.C.R. 12.

⁵ 2002 SCC 17 (CanLII), [2002] 1 SCR 569, <<http://canlii.ca/t/51vl>> retrieved on 2012-09-04.

⁶ *Water Act* R.S.A. 2000, c. W-3, at s. 3(2).

⁷ *Ibid.*

⁸ *Ibid.* at s.2.

⁹ *Water Act* at s. 22(3).

¹⁰ There does exist the ability to add conditions to licences to require a level of respect for water and environmental outcomes. Previously issued licences often do not have the same types of conditions within them to ensure environmental outcomes for water are achieved. These legislative approaches, a combination of public ownership and management by way of private rights is common for a “common-pool resource” (See the work of Eleanor Ostrom). A common-pool resource can be described as a resource that is available to multiple individuals in common but the use or extraction of the resource by one individual is likely to impact on others.

¹¹ See for example *Hohloch v. Director, Southern Region, Environmental Management, Alberta Environment and Sustainable Resource Development, re: Eastern Irrigation District* (18 October 2012), Appeal No. 10-043-R (A.E.A.B.).

¹² *Ibid.* at s.18.

¹³ See for example, in Alberta, Parkland Institute, *Alternative Water Futures in Alberta*, (Edmonton: Parkland Institute 2011). Oliver M Brandes and Randy Christensen “The Public Trust and the Modern BC *Water Act*” Legal Issues Brief 2010-1 POLIS Water Sustainability Project.

¹⁴ See Water Matters and Ecojustice, *Share the Water: Building a Secure Water Future for Alberta* (2009), online: Water Matters <<http://www.water-matters.org/docs/share-the-water.pdf>>.

¹⁵ See Government of Alberta, *Our Water, Our Future, A Conversation with Albertans*, (Edmonton: Government of Alberta, 2013), online: Alberta Environment and Sustainable Resource Development <<http://environment.gov.ab.ca/info/library/8771.pdf>> and related materials at <<http://environment.alberta.ca/04132.html>>.

¹⁶ Environmental Law Centre, “Core Environmental Principles for Environmental Laws, Policies and Legal Processes”, February 2012, online: Environmental Law Centre <http://www.elc.ab.ca/Content_Files/Files/CoreEnvPrinciples.pdf>.