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# First Nation Water Rights & The Duty to Consult and Accommodate

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for

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# What is the Duty About?

The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*. This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people.



# The Duty and Claimed Rights

To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the “meaningful content” mandated by the “solemn commitment” made by the Crown in recognizing and affirming Aboriginal rights and title: *Sparrow, supra*, at p. 1108. It also risks unfortunate consequences. When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable.

*(Haida para. 33)*



# The Duty and Claimed Rights

Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate. The content of the duty, however, varies with the circumstances, as discussed more fully below. A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties. ... Difficulties associated with the absence of proof and definition of claims are addressed by assigning appropriate content to the duty, not by denying the existence of a duty.

*(Haida para. 37)*



- 1. Its about reconciliation** – arises from Crown control of resources (water).
- 2. Reconciliation prevents the hollowing out of resource rights** - must be something left.
- 3. Claimed rights can trigger the duty to consult and accommodate** – blanket denial of the duty is antithetical to reconciliation



# Is Reconciliation Probable?

“The position of the Crown in right of Alberta is that such alleged [Treaty] water rights ... if they ever existed, were extinguished by competent legislation of, and executive action by, the Crown in right of Canada.”

*\*[Water Management in Alberta, Challenges for the Future, Background Paper Volume 3, Aboriginal Water Issues (“Aboriginal Water Issues”)*

August 14, 1991]



# Is Reconciliation Probable?

“The Crown in right of Alberta further takes the position that by the provisions of the *[NRTA]*, the water rights and rights to river beds passed to Alberta along with the constitutional jurisdiction over such rights. Such rights are now subject to the provisions of the *Alberta Water Resources Act* [ *Water Act* ].... .”

\*[*Water Management in Alberta, Challenges for the Future, Background Paper Volume 3, Aboriginal Water Issues* (“*Aboriginal Water Issues*”) August 14, 1991]



# What's in a Position?

- Alberta's position informs its approach:
  - No Duty to Consult or Accommodate regarding Treaty water rights. Inconsistent with Alberta's *Consultation Policy*.
  - Refuses to discuss the potential strength of Treaty water rights claims – dishonourable?
  - Willing to dedicate significant financial resources to opposing Treaty water rights.
  - *Consultation Policy* – no acknowledgement of the duty to consult and accommodate w/r to claimed Treaty rights.
  - No political will to explore negotiated interest-based solutions in good faith.
- **BC Position:** (*Halalt*) Aboriginal title water claim and on-reserve groundwater claim were “weak”. Crown owns and has jurisdiction over all water in the province s.2 *Water Act* .



- What is being claimed?:
  - Right to use on-reserve surface water and groundwater and adjacent surface water for community institutions, housing, fisheries, agriculture and commercial development, etc.
  - Right to govern local water resources.
  - Right to sufficient water quantity and quality off-reserve to sustain Treaty hunting, fishing and trapping rights.
  - Right to be *meaningfully* consulted about key water management decisions that potentially impact reserve lands and off-reserve Treaty rights.



# Treaty Water Rights

- What is the basis for Treaty water rights?:
  - Honour of the Crown – reserve lands a core Treaty obligation – intention to create a new way of life/economy.
  - Necessarily Incidental Rights – rights to water resources on reserve lands are required to fulfill the promise of reserve lands. Conservation rights off-reserve are required to sustain Treaty hunting, fishing and trapping.
  - Granting of Reserve Lands –
    - “Common intention”
    - Groundwater
    - Riparian rights
    - Reserve surveys



# Cracks in the Water Rights Dam

- *Claxton (BCCA)*
  - Right of access to water necessarily incidental to Treaty fishing rights.
- *Pasco (BCSC)*
  - Riparian rights arise from reserve lands “serious issue to be tried”
- *Peigan (ABQB)*
  - Motion to strike Treaty water rights case denied.
- *Tsuu T’ina and Samson (ABCA)*
  - Treaty water rights challenging but not “dubious or peripheral claim”
- *Halalt (BCSC) (under appeal)*
  - First Nation has an arguable claim to groundwater on reserve lands and provincial law cannot expropriate that interest.



# Cracks in the Water Rights Dam

- McLachlin C.J. in *R. v. Van der Peet*, [1996] 2 SCR 507 wrote in dissent, but not on this point, that Aboriginal title includes “right to use the land and adjacent waters” for livelihood (paras. 227, 269, 271, 275)
- Could only be deprived thereof on terms that would ensure a replacement for the livelihood that their lands, forests and streams provided (para. 272) – i.e.- reserve lands in Numbered Treaties.
- *Delgamuukw* and *Guerin* (cited in *Halalt*) suggest that “Indian title” in reserves is analogous to Aboriginal title: “right to exclusive use and occupation of the land” or beneficial interest



# Cracks in the Water Rights Dam

- *Ballantyne Cree Nation v. Sask.* – Case is in its early stages. Statement of Defence filed by Saskatchewan denies Treaty water right but admits the First Nation’s riparian rights arising from reserve lands.
- Academic Commentary
  - Statt on Treaty 8 Water Rights
  - Bartlett
  - Nigel Bankes
  - Monique Ross



# Extinguishment: Clear and Plain?

- “[T]he **failure to recognize** an aboriginal right, and the failure to grant special protection to it, do **not constitute the clear and plain intention necessary to extinguish the rights**”: *R. v. Gladstone*, [1996] 2 S.C.R. 723, paras. 36, 148-149 (*Gladstone*); See also *R. v. Adams*, [1996] 3 S.C.R. 101 at paras. 32-33.
- “There **must be ‘strict proof of the fact of extinguishment’** and evidence of a clear and plain intention on the part of the government to extinguish treaty rights”: *Badger*, para.41.
- **Rights cannot be “casually extinguished”, there must be evidence that Parliament directed “its attention to the extinguishment”** of the right: *Hamlet of Baker Lake v. Minister of Indian Affairs*, [1979] 3 C.N.L.R. 17, [1980] 1 F.C. 518 (F.C.T.D.) at para.119.



# Extinguishment: Clear and Plain?

- When deciding whether a Treaty right is extinguished, the Court must consider that: Treaties are sacred in nature; the honour of the Crown is always at stake so Treaties must be interpreted in a way preserves the integrity of the Crown; “the **onus of proving extinguishment of a treaty or aboriginal rights has been extinguished lies upon the Crown**”: *Badger*, paras. 41-42.
- **Provincial law cannot extinguish Treaty and Aboriginal rights:** *Delgamuukw*, paras.173 & 183; *Simon*, paras. 52-57. (See *Halalt* )



## *Three strikes:*

### *1. Northwest Irrigation Act, 1895*

- *Vested all surface water in federal Crown*

### *2. Constitution Act, 1930 (NRTA)*

- *1938 amendment transferred Canada's ownership of surface water to AB.*

### *3. Provincial Water Legislation*

- *1960's amended to assert ownership of groundwater*

\* *Halalt* found that legislative history in BC was likely insufficient to have extinguished First Nation water rights (para 561)



# *North-west Irrigation Act*

- No mention of reserve lands, Indian bands, Treaties, etc.
- Parliamentary records contain no mention whatsoever of Indian reserves or water rights.
- Sections 5 and 6 offer some protection to water rights arising from “agreement or undertaking” existing prior to the Act.



# Constitution Act, 1930

- Only transferred ownership of **surface water (did not address groundwater)** from Canada to Alberta, but subject to:
  - 1938 NRTA amendment says the transfer of water was subject to terms of NRTA (1930), and specifically made an exception for “**all such interests in or rights to use of water....**”
  - **Section 1** of NRTA says the transfer from Canada to Alberta was “**subject to any ... interest other than that of the Crown ....**”
  - Section 10: “**All lands included in Indian reserves** within the Province ...shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province....”



# Constitution Act, 1930

- *Re Stony Plain Indian Reserve* – Alberta Court of Appeal (1982)
  - Interpreting s.1 of the NRTA the Court found that the transfer of Crown title “***does not abrogate the Indian interest in reserve lands nor the federal government's right to administer such lands.***”
  
- *Aseniwuche Winewak Nation* – Alberta Court of Queen’s Bench (2001) commented that:
  - Control and administration of Indian reserve lands has always been vested in the Federal government. The *Natural Resources Transfer Agreements* affirmed such control and administration. ...**The degree of federal government control and administration of reserve lands is essentially unchanged from that declared in 1876 ...**



- Province lacks jurisdiction
- No assertion of ownership of groundwater in statute, federal or provincial, until the 1960s.
- **Provincial law cannot extinguish Treaty and Aboriginal rights:** *Delgamuukw*, paras.173 & 183; *Simon*,. 52-57.
- *Tsuu T'ina and Samson: Crown advanced no arguments in relation to extinguishment.*



# Accommodating Treaty Rights

- “the process of accommodation of the treaty right may be resolved by consultation and negotiation....”: *R. v. Marshall* (2), [1999] 3 S.C.R. 533, at para. 22
- **Reconciliation** is not possible without “consultation and negotiation” – what is Alberta doing or willing to do?



# Is Reconciliation Possible?

- Interest based solutions are practical and doable:
  - 1990s *Water Act* amendments to accommodate claims of common law water rights by ranchers and farmers.
  - How much water? 47 First Nations' reserves. Drops required to address water needs.
  - First Nations make repeated efforts to seek interested-based solutions that are met with Alberta's ideological agenda.
- Benefits:
  - Public purse not used to pursue ideological agenda over practical solutions.
  - Sound base for growth and development of First Nations.
  - Increased certainty for resource sector.



# Alberta's "Solution" – BC Next?

## ALBERTA WATER MARKETS

- Buy water license to use on reserve water.
- "Crown reservations":
  - Reserves the remaining "unallocated" water in "over allocated" basins.
  - Gambling with future supply - 6 out of 69 and 1 out 3 - not great odds
  - "Ain't worth shit" – Dave McGee, Senior Water Policy and Implementation Manager with Alberta Environment
  - Legislative control over First Nations water use on reserve lands
- Set water allocation limits without any reference to First Nation water needs.
- Water Needs Assessments – negotiation of a lesser amount.
- Requirement to surrender Treaty rights for water licenses.

## BC WATER MARKETS:

- Policy proposal in Dec. 2010 recommended water markets, greater control over groundwater and only



# The Percy Report (AB)

- Recommends:
  - Extending water market to all key basins.
  - Streamlining regulatory oversight.
  - Extending water allocation system/markets to deal with groundwater and surface water same rules.
- Was the Percy review a missed opportunity:
  - Assembly of Treaty Chiefs asked Premier for an opportunity to meet with Percy panel and make submission.
  - Assembly of Treaty Chiefs have extended an invitation to Alberta to explore solutions as part of overall plan to amend the *Water Act*.
  - Alberta Response: Inaction, silence, and indifference.



# NOT LEGAL ADVICE

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