

Who's Minding the Water in Southern Alberta?

In previous writings for *LawNow*, I have noted the uncertain nature of governments' legal rights and duties with respect to lands and other natural resources that are deemed to be Crown (or, less frequently, public) resources. Water rights in Alberta provide still another example of this unsettled government role.

The province's water rights are articulated in the Alberta Water Act which declares that the "property in and the right to the diversion and use of all water" in Alberta is "vested" in the Crown in right of Alberta. This specific legislative declaration is relatively new (the Alberta Legislature adopted the Act in 1996 and it came into force in 1999), but it has deep historic roots, dating back to the 1894 Northwest Irrigation Act, which declared that these same rights were vested in the Crown in right of Canada. Ottawa transferred these rights to Alberta in the 1930s through the Natural Resource Transfer Agreement (and a subsequent amendment clarifying that the Agreement covered water).

While straightforward at first blush, this declaration raises a fundamental question of whether the province inherited its property in water as if it was a private individual inheriting private property — with no obligation to promote the public interest other than to avoid causing a nuisance to others — or whether the province received its ownership rights more as a steward or trustee of water resources on behalf of the public?

I suspect most lay people would instinctively choose the latter of these two scenarios, but Canadian legal scholars might be less certain. Even if scholars admitted the intuitive appeal of viewing Canadian governments as holding lands and other Crown resources as stewards or trustees for the public, scholars know that Canadian courts have historically been reluctant to recognize an official resource-related "public trust" doctrine like that which has generally been accepted by US courts. And, while Canadian courts refer to the "public interest" purpose of governments' resource management decisions, the courts generally tie that purpose to "public interest" mandates in specific resource management statutes rather than to some kind of more fundamental stewardship role inherent in governments' core proprietary and resource management rights.

Yet, even Canadian courts occasionally hint at these fundamental stewardship obligations. The Supreme Court of Canada recently referenced them in a case brought by the BC government seeking damages from a BC forest fire that was started and inadequately suppressed by a private timber company. In considering BC's claim, the Court concluded that Canadian governments could, in their capacity as holders of public rights in natural resources and the environment, invoke common law claims for compensation and injunctive relief for environmental damages (*British Columbia v. Canadian Forest Products Ltd.*, 2004). However, the Court's six-justice majority



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backed off from allowing such a claim in the case at hand. According to the majority, that claim raised “novel policy questions,” but the record was insufficient for the Court to address them because BC had pleaded and proven its case in the trial court strictly as a conventional landowner. The majority listed, as among these “novel” questions: “the Crown’s potential liability for inactivity in the face of threats to the environment” and “the existence or non-existence of enforceable fiduciary duties owed to the public by the Crown” for any such environmental threats. In raising these two questions, the Court essentially challenged legal scholars and practising lawyers to further explore the source and nature of any stewardship or fiduciary duties inherent in government ownership of natural resources.

This research is sorely needed in southern Alberta — more specifically the Alberta portion of the South Saskatchewan River Basin — to help assess the adequacy of the province’s response to the growing demands for and environmental threats from increasingly scarce water supplies. To date, the province has allocated substantial portions of the Basin’s natural river flows (75% percent of the Basin’s allocated water volume goes to irrigation districts alone) and most if not all of the larger allocations were issued without any expiration dates. (See Arlene J. Kwasniak, “Water Scarcity and Bursting Out of the Box,” *LawNow* 28:6, June/July 2004). The province is exploring various creative tools to accommodate increasing water demands, but within the context of its insistence on honouring all historic allocations. Because of these entrenched allocations, the province has admitted that it is impossible to ensure the kind of basin-wide river flow regimes needed for protecting the Basin’s aquatic environment.

These historic allocations are no doubt serving the interests of the irrigation districts and other allocation holders, but they are an anachronism from a public resource management and environmental protection standpoint. For these reasons, the province’s continuing support for these historic allocations is hardly the conduct one would expect if the government is supposed to be acting as a steward or trustee of the public’s rights in Alberta’s fresh water and of the public’s associated interest in protecting aquatic ecosystems.

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