Solving Water Conflict in Canada through Human Rights, Public Trust, and Community Planning

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Abstract

Many binaries characterize water including its 'framing' as property or commons versus commodity; public versus private; rights versus commodity. These binaries are also represented in legal principles of property, public trust, human rights, etc. By examining case studies of water conflicts in Canada, cultural framing and legal instruments are explored illustrating the tensions, contradictions, opposing binaries, and their ultimate resolution.
This research confirms the dialectic nature of water - one frame never exists in isolation but dialectic legal instruments are advanced and co-exist. Arguments are advanced at the margin, opening formal law, challenging historical rules of precedent making change.

Introduction

Canada has approximately twenty percent of the world's total freshwater reserves (although only around 6.5 to 7% are renewable) (Katz 2010). Many believe Canada's freshwater is abundant, however, in highly populated areas population and development have strained the resource and contributed to water conflict which may worsen in the future given climate change (Schindler and Hurley 2004). Although Canada has not experienced chronic water shortages experienced in other areas of the world, water has received increasing attention in the last decades in academic literature (Baker 2007), by non-government organizations (Brandes et al. 2008) and in relation to issues such as free trade (Ball 2012).

Some of the conflict comes from the growth of private sector involvement in water supply management. Anti-privatization groups (arguing for human rights) and alter-globalization activists promote alternative water governance models (centered on concepts such as the commons) oppose the delivery of water by the private sector (Bakker 2007). Often arguments over water are presented as binaries of public versus private, commons versus commodity, human rights versus commodity (Bakker 2007), or customers versus citizens as illustrated on Table 1. This paper reviews the legal and conceptual frame of water in Canada and argues that thinking of water in terms of these binaries limits our analysis of water issues. By identifying four frames (sui generis, common, public, and market good) and considering local context (service delivery model and

abundance versus scarcity), and use (community drinking water, industry deepens our understanding and consideration of water issues moving from water conflict to discussion.

Table 1 Dialectic Frames of Water

Concept	Commons	Private	Human Right	Citizen
Opposing Concept	Commodity	Public	Commercial Good	Customer

By examining two case studies – the 2016 Nestle water conflict in Ontario, and the 1990s Sun Belt Water trade issue of British Columbia, these frames, their local context, and water use characteristics confirm that the binaries are dialectics such that one never exists in isolation: for example, the human right to water exists with the commoditization of water. The framing of the conflict as evidenced by the discourse of the parties in the conflicts, and their legal arguments and instruments are outlined and analyzed. The conclusion is that the two cases illustrate aspects of the four binaries, and resolution of the 'conflict' ultimately occurs through public engagement and reflection.

Framing Water

Water can be framed in four ways (sui generis, commons, public good, and commodity) and aspects of each frame can bound in Canadian water law instruments.

Canadian water law is based on British common law. In the British common law water was common to all (*res communis*) until captured and used by riparian landowners subject to complex restrictions not impairing the right of downstream riparian owners (Benson and Bowden 1997). In Eastern Canada (Ontario for example) water was plentiful and this principle was adopted; although initially applicable pursuant to the North West Irrigation Act 1894, later, western Canada (British Columbia and Alberta) adopted a first in time, first in right scheme (Percy 1977). To ensure the equitable distribution of water, the federal government vested property in all water in the Crown and upon transfer to provincial governments in the 1930s of jurisdiction over water, this principle has been incorporated into provincial statutes (Benson and Bowden 1997). British common law principles of riparian water rights continue to exist (for example in Ontario and in relation to Treat Land Entitlement settlements in Saskatchewan)(ibid.). The taking of water (surface and groundwater) is then characterized by water licenses granting temporal bundles of water rights based on three models of property rights (common good, public good, market commodity) (Hurlbert 2009). The government agency management model regards water as a public good to be managed in the public interest, the user-based management model regards water as common property managed by water users with licenses or rights, and the market model regards water a private

property or as a commodity to be allocated and reallocated through private transactions (occurring in Alberta) (Hurlbert 2009). To this must be added the category of sui generis, a unique collective right of Canadian Aboriginal nature discussed below. The four categories are outlined on Table 2.

How water is governed corresponds to the construct of the property interest in water. For instance, a common interest is generally managed by a user based approach in a decentralized manner where decisions are made in a local context based on local participation of users accountable to one another. Water regarded as a public good is managed by government in an agency management model by a government crown corporation or ministry, with limited user participation, but some consultation. Lastly commercial goods are managed based on a market model dependent on market rules with participation only by water rights holders (Hurlbert 2009). The debate between commons /public good and commodity is often characterized on Table 2.

Opponents of the commercialization of water often allude to a human right to water (Gleick 1998) based on the non-substitutability of drinking water (as it is essential for life) and by justifying it because water is embedded in all the other human rights in which it is embedded (for example the right to food) (Bakker 2007). Of course, Sustainable Development Goal number 6, which aims to ensure access to water and sanitation for all (UN 2017). Bakker (2007) argues that a right to water doesn't foreclose involvement of private sector management or imply that water should be accessed for free (albeit an affordable baseline quantity of water should be available) (UNWWAP 2006). As Bakker (2007) argues, pursuing an anti-privatization campaign through a human right to water commits three strategic errors. It conflates property rights with human rights; fails to distinguish different types of property rights and service delivery models; and fails to foreclose the possibility of increasing private sector involvement in water supply. Indeed, a human right to water is arguably not incompatible with private sector involvement in water and sanitation. Effectively human rights principles are guideposts for regulation, monitoring and oversight. These principles are critical in private sector involvement in delivery of water and sanitation services (Murthy 2013).

However, Canada's municipal water systems are in a sad state of disrepair with needed upgrades estimated at $23 Billion (Wood 2015) and perhaps as much as $123 Billion (Zubrycki et al. 2011). Failure to recognize water as an economic good has historically undervalued the water resource contributing to strained infrastructure, and failure to conserve. Allowing a market for water incorporates environmental externalities through pricing, full-cost recovery and the reflection of water's true cost (including infrastructure, source protection, etc.) (Katz 2007).

Water is an imperfect public good because in its natural form (for example rainwater) it is non-excludable, but when in short supply it is rival in consumption (Bakker 2007). As drinking water, water is highly local in nature. In rural

Canada, many agricultural producers and small rural communities access groundwater (Warren 2013). Often community drinking water is managed as a common pool resource with community controlled mechanisms (ibid.).

Table 2 Commons, Public Good and Commodity

Principle	Sui Generis	Commons	Public Good	Commodity
	Non-excludable, inseparable, inalienable Water is part of Mother Earth, a spiritual entity, a resource and a source of life (AFN n.d.)	Non-excludable but rivalrous	Non-excludable and non-rivalrous	Excludable private property
Definition		Natural resources managed by a community or society rather than individuals (UN 1997)	Commodity or service provided without profit to all members of society (Oxford 2017)	Economic good
Pricing		Cost recovery	Free or lifeline	Supply and demand pricing
Regulation		Custom, practice, agreement, common property protocols (Ostrom 1990)	Command and control	Market rules
Goals		Social equity and livelihood		Efficiency and water security
Management		User based approach	Government agency approach	Market
Access		User based	Human right	Market participant
End user		User	Citizen	Consumer

Although there has not been a Supreme Court of Canada court decision specifically considering Aboriginal water rights, it is argued that existing Aboriginal rights which entitle Aboriginal people to make a moderate living, remain in traditional communities and preserve indigenous cultures inherently

protect a right to water (Phare 2009); one case settlement reflects this principle[1] It is argued that Aboriginal title is sui generis, or a unique collective right to the use of and jurisdiction over an ancestral territory (see Delgamuukw v. B.C. 1997) that can't be defined by Canadian common law concepts that fail to portray the underlying complexities of the reciprocal relationship of Aboriginal people to land (Hamar 1992).[2]

Water Conflict Case Studies

When water conflicts occur, aspects of each framing of water are evident. This proposition will be supported by case studies of the 1990 Snowcap/Sunbelt trade agreement dispute and the 2016 Ontario Nestle dispute.

Snowcap Waters Ltd. And Sun Belt – bulk water export

Snowcap Waters Ltd. Of Fanny Bay B.C. acquired one of six export licences for bulk water from the British Columbia (B.C.) government in 1990. The companies were to export water using tanker ships to California. However, public opposition resulted in the suspension of the licences and a moratorium on bulk water exports. In January, 1993, Snowcap and Sun Belt filed a lawsuit against the B.C. government claiming damages. A cash settlement was arrived at with Snowcap a few years later in 1996 but not with Sun Belt. In 1998 Sun Belt filed a notice of Intent to submit a claim to arbitration under Chapter 11, of NAFTA. The case is considered either inactive or withdrawn, depending on the source (McLaren 1998).

This was not the first bulk water export case of Canada. The North American Power and Water Alliance (NAPAWA) and the U.S. Army Corps of Engineers had proposed large infrastructure diversions in the late 1950s and early 1960s to divert freshwater from Canada south into the United States. A second proposal would have seen a dam built in James Bay preventing freshwater flowing into the saltwater of the Hudson Bay creating a large lake rivaling the Great Lakes. A large canal would then connect this new lake to the Georgian Bay and Lake Huron and delivering water to other parts of Canada and further south into the U.S. (Bourassa 1985). Both proposals were enormously costly, required nuclear power plants and had many environmental impacts. Several unsuccessful smaller bulk water export proposals also never achieved commissioning because of public protest. These include an Ontario water taking permit to withdraw 600 billion liters of water per year and ship it by tanker to Asia, a 2000 plan in

[1] Although one author believes it to be limited to traditional uses (Bartlett 1988). The Piikani Nation settled an aboriginal water right claim with Alberta after twelve years of litigation in 2002 receiving $64.3 million in settlement and among other things assured water supply of 37,000 acre feet per annum (Rush 2002).

[2] Because of the diversity of Aboriginal traditions, the remainder of the column is left blank as these multiple practices can't be conflated into the characteristic listed.

Newfoundland to take 500,000 cubic meters of water a week and ship it by tanker overseas (Cooper and Miller 1998; CBC News 1999).

Perhaps due to this long history of water export conflict, Canadian surveys have consistently found that at least two-thirds of Canadians are opposed to bulk water exports (Zubrycki et al. 2011). Perhaps it is the special heritage and sovereignty value Canadians attach to their water resources that has made them instinctively react negatively to the notion of making water in its natural state a tradable commodity (Pentland and Hurley 2007). However, Canadians believe a dangerous myth about Canada's inexhaustible water wealth (RBC 2016).

These water conflicts have highlighted the interplay of legal instruments and public sentiment. In relation to water exports, proponents argue that free trade agreements, specifically the General Agreement on Tariffs and Trade (GATT) and North American Free Trade Agreement (NAFTA) provide that water is a tradable commodity. Freshwater is included under section 2201 of the GATT defining all commodities that may be traded in the Harmonized Tariff Schedule. Further Article XI eliminating quantitative restriction might supersede provincial regulation of water resources opening commoditized water to international interests.[3] Similarly, Chapter 11 of NAFTA requires national treatment such that Canada accords the same rights to remove water to foreign investors as domestic investors, regardless of environmental damage or limitations on local population water supply needs. Investor state dispute settlement provisions in chapter 11 of NAFTA allow foreign investors to sue governments for loss of returns on investment because of policy measures to protect citizens or the environment. The Comprehensive Economic and Trade Agreement with the European Union is largely modeled after NAFTA. Internationally the fourth principle of the 1992 Dublin Statement on Water and Sustainable Development states that water has an economic value in all its competing uses and should be recognized as an economic good.

Concerns are raised of the impact of these provisions on domestic policy and their limitation on the state's ability to regulate water resources. Commercial interests could infringe on domestic investments, cause ecosystem damage and infringe on public water availability (Larsen 2011). The federal government takes the position that trade agreements do not apply to water in its natural state as it hasn't entered commerce or become a good subject to trade agreements (Jahansen 2001), at this point it is arguably 'sui generis'. In 1987 a new federal water policy was announced that stated the federal government would take all possible measures to prohibit the export of water by inter-basin diversion. This policy continues to exist. Tom McMillan, the then Minister of the Environment tabled in the House of Commons, Bill C-156, The Canada Water Preservation Act in August 1988. The Bill failed to receive full assent because of an election

[3] Albeit this is subject to Article XX of GATT allowing equitable (applying to both domestic and international trading partner) restrictions to protect human, animal or plant life or health.

Call in October 1988 during which the overarching debate was the issue of 'free trade' (Pentland and Hurley 2007: 174).

Although not legally binding, in 1993 Canada and NAFTA partners signed a joint statement that free trade created no rights to natural water resources (Alexandroff et al. 2008). In 1999 the Liberal government enacted a strategy to prohibit removal of bulk water from Canadian watersheds. The background to this was that in its natural state, water was an environmental issue and a common property (Johanesen 2001). Bulk water removal was the term because:

> …Taking a comprehensive approach to guarantee the security of our fresh water resources. Since the removal and transfer of water in bulk from its natural drainage basin or watershed can result in similar ecological, social, and economic impacts whether the water is destined for foreign markets, or for other destinations within Canada, this includes measures to prevent the bulk removal of water from major watersheds for any reason whether for domestic purposes or for export (Johansen 2001).

In 1999 Bill C-15 was passed amending the International Boundary Waters Treaty Act and banning bulk removal of water in the Great Lakes, St. Lawrence River, St. Croix and Upper St. John Rivers and Lake of the Woods. A provincial and federal accord was arrived at whereby all provincial-territorial levels of government prohibit bulk water removal (Zubrycki et al 2011).

However, bulk water withdrawals are allowed for industrial use without significant fees or charges and often very little environmental conservation reflecting the commodity frame of water (D'Allesio 2011). An argument that banning bulk water exports is an illegal trade barrier as it is differential treatment of foreign companies could force bulk water exports on Canada (ibid.). A senior Environment Canada official expressed the sentiment:

> Our land and water resources are the birthright of all Canadians. We do not sell water – even to Canadians – we only give a right to its use ..if Canada were to grant a right to the United States for the use of Canadian water we would never again regain its use unless a suitable alternative to water is found … there is no substitute for water (Clarke 2001: 171).

The public trust doctrine has been used in the U.S. to protect and restore public control over resources that had been conveyed to private interests, restoring to state and federal government the status of trustees for common resources. In Canada, the public trust doctrine has been used to recognize the public right of navigation of water and the public right to fish (Kidd 2006) and could be applied more broadly (DeMarco et al. 2005). The American public trust doctrine has been expanded to include a diversity of water resources such as bayous, streams, and large rivers for purposes more than just navigation and fishing

interests but also including use of sand beaches, protection of wildlife and even to limit water rights (and enable their appropriation) (Wilkinson 1989).

Nestle Waters, the Township of Centre Wellington, and the Middleton Well, Ontario

The more recent water conflict involving Nestle Waters in Ontario in 2016 illustrates that all four water frames are still part of the Canadian water discourse. In the summer of 2016 southern Ontario experienced severe drought (AAFC 2016) in the south-east corner including the community of Aberfoyle and the Township of Centre Wellington (the "Township). Nestle Waters, a bottled water company, the Ontario government, and the Township of Centre Wellington received public attention over a dispute over the purchase of the Middleton Well, as well as the renewal and pricing of Nestle's water taking permit. Nestle's Elora well is located in the Grand River watershed feeding into Lake Erie and situated on the traditional territory of the Six Nations of the Grand River, 11,000 of whom have no access to clean running water (Leslie 2016a).

Nestle wanted the Middleton Well as a supplemental well for future business growth[4] and had made a conditional offer. The condition was that a pump test be performed on the well that would test both water quality and quantity. The Township had concerns due to population growth and drought that its current water supply would not be sustainable and wanted a greater degree of control over water taking rights in the area (reflecting water as a common good). Upon learning of the competing bid, Nestle matched the Township's offer, dropped the condition of a pump test and completed the purchase of the well in a private transaction. Nestle then applied for a water taking permit for the purpose of conducting a pump test. This application was posted on the Ontario registry website and a comment period followed (Leslie 2016a).[5]

During the same period in the same region, Nestle's water taking permit in Aberfoyle expired in July 2016. The company was allowed to continue taking water while the application for renewal was being considered. The city of Guelph that falls within the same watershed raised concerns (CBC 2016). Arguably reflecting the frame of a public good, a public consultation period followed the application for a pumping test permit and ended in mid-November 2016 attracting 1,200 comments (McClearn 2016).

[4] Nestle's bottled water sales in NA exploded from $400 million (US) a decade ago to approximately $4 billion (McClearn 2016).

[5] In the late 1990s Ontario's water law was under scrutiny as a result of an inquiry over water quality (Walkerton) and several years of water shortages and conflicts in southern Ontario. It was acknowledged a more informed permit decision process was required, better monitoring and enforcement of permit conditions. Several weaknesses were identified at this time including the lack of meaningful stakeholder input into water allocation and the exemption of significant common law rights (prior to 1961)(Valiante 2004).

In response to this issue the Ontario Minister of Environment and Climate Change (OECC) proposed two new regulations, arguably reflecting water as a commodity. First a two-year moratorium was set on the issuance of water taking permits to bottled water companies. Second, the MOECC set out to review the price charged for water to bottled water companies (MECC 2016). In Ontario, the charge was $3.71 per million liters of water[6]; neighbouring Quebec charges $70, Newfoundland and Labrador charge $500 (Jones 2017). Ontario is now proposing a price of $503.71 (Ibid).

Amidst these developments media coverage highlighted the controversy. A multinational company taking water away from communities experiencing drought conditions was portrayed. The Ontario Premier, Kathleen Wynne, stated that the regulations were outdated and it was time to put community needs ahead of bottled water (Jones 2016). Writing to MOECC Premier Wynne asked that the rules for bottled water companies be reviewed in order to explore ways to ensure sustainability (Wynne 2016).

Proposed new regulations include several new procedural requirements and reflect water as a public good. A few are focused on more consultation with stakeholders and increased transparency through increased reporting and public disclosure and comment via a website. New technical requirements require increased monitoring, accounting for cumulative effects on the watershed or aquifer, and a contingency plan if trigger limits are achieved in relation to quantity. This plan includes mitigation measures to deal with unforeseen and unacceptable impacts that may occur due to water taking. All of these represent either a common or public good.

Conclusion

Climate change, combined with increasing demand and population growth in some areas of Canada is resulting in water conflicts. Responding to conflict with an expansive legal and public discourse analysis highlights the ubiquitous and difficult nature of water and water law. Water is labeled an 'uncooperative' commodity as it is characterized by multiple market failures in its supply and it is an imperfect public good as it is non-excludable, but rivaled in consumption (Bakker 2007). Solving water conflict simply in a water property frame fails to recognize its special characteristics and fundamental importance for human and planetary sustainability. Expanding the analysis to include international trade, bulk water, community water, and social context sheds light on the social and legal interplay and instruments reflecting this rich landscape.

By examining two case studies – the 2016 Nestle water conflict in Ontario, and the Sun Belt Water trade issue of British Columbia, these frames, their local

[6] This recovers about 1.2 percent of government's total water-quantity management costs (Leslie 2016b).

context, and water use characteristics confirm that the binaries are dialectics such that one never exists in isolation: the human right to water exists with the commoditization of water. The legal and political position of the parties, and their legal arguments and instruments illustrate that all four frames are represented and the actors and public discourse surrounding the conflict adopts aspects of each.

The conclusion that these two cases illustrate is that the presence of aspects of the four binaries all exists; resolution of the 'conflict' ultimately occurs within a discourse and policy instrument regime reflecting and balancing all four frames. This discourse occurs within the legal realm, the public media, and the government – public engagement process. Regulatory change involving public disclosure of water licensing requests (allowing for possible public consultations and discussions) allows for recognition and resolution of diametrically opposed framing of water rules.
People's arguments are reflected in legal instruments that public debate and consultation portray. By interrogating the natural conditions of water, the social dimensions and economic relations, resolution of conflicts is advanced. Ultimately the best legal instrument is the one that facilitates the debate and discussion.

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