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British Columbia's New *Water Sustainability Act* – Waiting for the Details

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The British Columbia Legislature gave third and final reading, without any amendments, to *Bill 18 - 2014*, BC's new *Water Sustainability Act* ("the Act"), on April 29 2014. *Bill 18 – 2014* is the long awaited overhaul of the water management and allocation regime in B.C. After a thorough four year process involving a discussion paper, a policy proposal, consultation with stakeholders, and a proposed legislative framework there are only a few surprises and disappointments in *Bill 18 - 2014*. This summary provides a short overview of the lengthy bill, some 142 sections, with a focus on the pro-environment provisions, a strong statement about no compensation for changing existing water rights, governance approaches, continued reliance on provincial administration and thus resources, and no recognition of aboriginal water rights. It is a summary provided for information only and not a comprehensive analysis of the impact of the bill and changes to the existing *Water Act*, R.S.B.C. 1996, c. 483. It should not be relied on as legal advice. The version of the law the legislature passed at third reading can be found here.

Overall, as an environmental lawyer and someone who teaches water law I am pleased with the legislation. I will be so bold as to say that, on its face, *Bill 18 - 2014* is the best piece of environmental legislation introduced in B.C. in more than a decade. However, the innovative provisions for environmental protection cannot be read without significant caution as all the details and standards for environmental performance will be developed through regulation. In short, *Bill 18 – 2014* provides the possibility for excellent provincial action but that promise has not yet been realized simply by modernizing B.C.'s water law. There is also continued reliance on the same structure of colonial water law, namely the first in time, first in right priority of water rights and the administrative discretion of the provincial government to make orders and acct as the enforcement vehicle for using water properly, which heaps more responsibility onto an already leaking provincial administrative system. Finally, there is no recognition of aboriginal rights to water, nor a mechanism by which those interests can be brought into the water balance in the province absent litigation or First Nation-specific negotiation with the province through the treaty process. Some of the structure, particularly environmental, is there, but the devil will be in the details of regulation and resources for implementation.

1. The More Things Change…

The fundamental structure of colonial water regulation and management in B.C. has not changed with the new Act, the features of which are set out in a general way in this section. The provincial Crown asserts ownership over water (s.5), and diverting water without a licence is prohibited (s.6) except in limited circumstances for fire suppression, domestic use and mineral prospecting. Licences are attached or appurtenant to land or "works", which means that only specific types of water users may obtain licences (s.9). These qualified entities are:

- An owner of land or a mine;
- A holder of a power utility permit (a certificate of public convenience and necessity);
- A local government;
- The governments of B.C. or Canada;
- An organization administering Crown land or a mine on Crown land;
- Water districts established by provincial law; and
- BC Hydro.

The right to use water is limited to the purposes set out in section 2 of the Act. Licence holders may only use water for conservation, domestic, industrial, irrigation, land improvement, mineralized water, mining, oil and gas, power, storage and waterworks purposes. Licenced users must make "beneficial use" of the water (s.30) but if they fail to do so for three years their rights may be cancelled (s.94). Licence holders must pay for their use of water if required by regulation (s.125). Schedule A of the current Water Regulation BC Reg. 204/88 sets out water rates in B.C.

The right to divert water under a licence is subject to more senior or older water licences in the same stream or connected hydrology (s.22). This means that older licences to use water take precedence over newer water licences in the same stream or area of hydrological connectivity. This is the principle of prior appropriation or more commonly known as "first in time, first in right". In addition, although rights to use water under licence are often viewed as subject only to the right of more senior water rights holders to take water, all authorizations to use water are not finite and unchanging. They are subject to (s.8):

- The *Water Sustainability Act* (and previously the *Water Act*);
- Regulations under the Act;
- Terms and conditions contained in the licence or authorization;
- Orders of various provincial water manager staff such as the comptroller of water rights, water managers and water engineers; and
- Other licensees whose licences take precedent i.e. other licensees who acquired the right to use water at an earlier date.

Finally, approvals are required for making changes in and about streams (s.11).

These principles are the basic foundation of western water law in the Canada and the United States, and have been roundly critiqued. They create the perception of fixed rights to use water essentially forever, if there is no expiry date on the licence, and they do not account for water values such as basic flows for ecology and recognition of aboriginal rights to water. Subject to the two critiques set out below – that aboriginal rights to water are not recognized and there is continued reliance on provincial administration with little indication of movement towards watershed-based approaches – the *Water Sustainability Act* admirably addresses the shortcomings of western water law and creates the possibility of a somewhat adaptable regime.

2. Attention to the Environment

Bill 18 - 2014 brings ecology and groundwater into decision making for water management in B.C. and ties land use decisions to their impacts on water and the riparian and instream environments.

Groundwater Regulation and Protection
As expected, groundwater users will be licenced and regulated over time. People are prohibited from diverting water from an aquifer without a licence [s.6(1)], however those who are currently diverting water from an aquifer may continue to do so but must apply for a licence when required (s.140). Cabinet may make regulations for groundwater and it is anticipated they will require, initially, the licencing of large groundwater users in certain areas.

Many of the continuing approaches of the water management regime now include aquifers or diverting groundwater. For example, under section 5 the Crown asserts that the property to water in both streams and aquifers is vested in the Crown, and reservations of water under section 39 may occur for both streams and aquifers.

Sections 48-63 of the Act address wells and groundwater protection and largely reproduce existing provisions in the *Water Act* aimed at regulating how wells are installed, who digs wells, and protecting wells from contamination. Of note is the expanded prohibition on introducing foreign matter into a well. Subject to some exceptions, section 59 specifies that no contaminant or other matter or substance that causes or is likely to cause a significant adverse impact on the quality of the water in, or the existing uses of water from, a well, aquifer or stream may be introduced into a well.

Consideration of Instream Flows
Except for decisions exempted by regulation, decision makers must consider the environmental flow needs of a stream when evaluating a water licence application for a stream or aquifer (s.15). The decision maker must determine, following regulations, the environmental flow needs of a stream, and can require an applicant to provide information, reports and assessments to be considered. The Minister may make regulations respecting environmental flow needs, including prescribing methods of determining the environmental flow needs of a stream [s.127(1)(o)].

Protection for Aquatic Ecosystems and Fish
In addition to what were known as “section 9 permits” (permits to make changes in and about streams – now found at s.11 of *Bill 18 – 2014*), now at section 11, there are specific provisions for protecting riparian areas, aquatic ecosystems and fish. Some of these sections are incorporated from the *Fish Protection Act*, S.B.C. 1997, c.21, such as the designation of sensitive streams, and they are helpful to have all in the primary water law.

New definitions in section 1 include:

- "aquatic ecosystem" means living organisms and their life processes dependent on the natural environment of a stream;

- "critical environmental flow threshold" means the volume of water flow below which significant or irreversible harm to the aquatic ecosystem of the stream is likely to occur; and
- "environmental flow needs" means the volume and timing of water flow required for proper functioning of the aquatic ecosystem.

Sections 16 and 17 allow decisions makers to require mitigation measure on streams and sensitive streams if the diversion and use of water, or changes in and about a stream are likely to have significant adverse impact on the water quality, quantity or aquatic ecosystem of a stream or aquifer, a stream channel or other uses of water from the stream or aquifer.

Finally, the comptroller may make critical environmental flow protection orders (s.87) if the minister has made a declaration of significant water shortage (s.86). This order has precedence over water rights [s.22(9)]. This order is final and may not be appealed to the Environmental Appeal Board. Likewise, if the minister considers that the flow of water in a specified stream is or is likely to become so low that the survival of a population of fish in the stream may be or may become threatened, the minister may make an order respecting the diversion, rate of diversion, time of diversion, or use, including storage and time of storage, of water from the specified stream, or a specified aquifer hydraulically connected to the stream, regardless of the precedence of water licences (s.88).

Attention to Water When Making Land Use Decisions

The provincial cabinet (Lieutenant Governor in Council) is broadly empowered to make regulations for water protection. Called "water objectives", the intent is for decisions makers who grant licences and other permissions for land to consider the impact of those decisions on water, which includes for streams and aquifers. For example, under section 43, for the purposes of sustaining water quantity, water quality, and aquatic ecosystems in and for BC, Cabinet may make regulations:

- Establishing water objectives for a watershed, stream, aquifer or other specified area or environmental feature or matter;
- Specifying factors and criteria to apply for evaluating the impacts of a land use or resource use proposal on the established objectives; and
- Respecting measures to address impacts of such proposals on the objectives.

The regulations may require that a public officer consider water objectives making a specific decision in law. It is important to note that while the creation of water objectives has possibly wide-ranging application and effect, the record of using such objectives in the regulation of forestry in BC has not been a success.

There are other small ties to land use decisions that may have a significant impact on water and land use. For example, in section 127(1)(h) the Minister may make regulations limiting the number of dwellings on a single parcel that may be provided with water for domestic purposes.

Definition of Beneficial Use and Attention to Efficiency
The requirement for putting water to beneficial use now comes with a definition in section 1: "beneficial use" in relation to a use of water under an authorization means using the water (i) as efficiently as practicable, (ii) in accordance with applicable regulations, and (iii) for the water use purposes, in the manner and in the period or at the times authorized by the authorization. This means that when required to make a beneficial use declaration (s.30), a water licensee will have to show some kind of efficiency of use.

Altogether this suite of tools for considering ecology and environmental flows in making decisions about water licences and the use of water at any time in the year from any stream or aquifer gives the provincial government fairly extensive authority to control how much water is taken and under what circumstances, for example if there is a drought. Coupled with the "no compensation" rule explained below there is considerable flexibility in the water allocation regime for ensuring that using water meets current ecological conditions.

3. No Compensation for Changes to Existing Water Rights (almost)

One longstanding debate in the water community is how to deal with existing water rights in times of shortage and climate change where there is likely simply less water to go round during the summer months. In the Western United States and Australia the approach often has been to provide monetary compensation to water rights holders who are required to cut back on diverting water due to concerns for the environment, or to retire water rights altogether. The Canadian approach to rights to use a natural resource, which is what a water licence provides, and property rights is to allow the government to restrict their use through regulation without compensating the rights holder. This is prevalent in land use law, for example through zoning that prohibits a wide range of uses on most properties, and the "no compensation" principle is codified in section 914 of the B.C. *Local Government Act*.

This regulatory approach – restricting how rights are exercised without compensation – was never explicit in water law in Canada. However, *Bill 18 – 2014* adopts this Canadian principle and is very clear that there will not be any compensation for changes to water rights (s.121). This was my primary submission last fall on the proposed legislative framework for the new legislation.

The "no compensation" language reads, in part:

> Except as otherwise provided in this Act or by regulation, no compensation is payable by, and no legal proceedings may be commenced or maintained against, the government or any other person for or in relation to loss or damages arising from an effect on… rights under a licence or use approval…resulting under the provisions of this Act, the regulations or an order from…the change in precedence of water rights, a restriction or prohibition on the exercise of rights, or a change or the imposition of new terms and conditions on an approval.

There are, of course, two exceptions to this no compensation for changes to water rights rule. Cabinet may make regulations respecting the payment of compensation by the government

(s.134), and if a water sustainability plan submitted to the minster recommends a significant change to a licence or drilling authorization, the plan must contain a detailed proposal recommending responsibility for compensating the licensee or drilling authorization holder [s.74(2-3)]. Section 64 defines "significant change" to mean a change, whether mandatory or voluntary, that would significantly reduce the quantity of water a licence is authorized to divert, result in significantly different works required under a licence, or cancel a drilling authorization.

While these exceptions have the ability to considerably weaken the flexibility in reallocating and reducing water use, this "no compensation" principle is correct in law. If applied robustly it can facilitate an adaptive management approach to water management. Several new or modified approaches to water governance in the Act also support the possibility of adaptive watershed-based management.

4. Governance Approaches

Bill 18 – 2014 has added more detail to water planning, now called water sustainability plans, and introduced some fundamental changes to water governance that bring the use of licensed water under additional review and scrutiny.

Water Sustainability Plans
The Act augments the current ability to undertake water management plans under Part 4 of the *Water Act*. Called water sustainability plans, sections 64 to 85 establish a comprehensive regime whereby the province can make an order to establish a local water planning process for an area or proposed development (s.65) if the plan will assist in preventing or addressing conflicts between water users or the needs of water users and environmental flow needs, risks to water quality or aquatic ecosystem health, or will identify restoration measures in relation to damage aquatic ecosystems. The intent is to have a watershed- or issue-defined process where interested parties, including local governments, the provincial government, water users and First Nations, can come to an agreement about most aspects of water. Plans are not limited to water allocation but may consider water quality, drought planning, water sharing, changes to existing licences, and anything else set out in the terms of reference. The responsible person preparing the plan has the authority to require water users to provide information about their water use and to gather data as needed (s.72).

The provincial cabinet may enact regulations to accept a water sustainability plan and make it binding (s.75), and may, specifically:

- Restrict or prohibit a specified use of land or natural resources, or an activity;
- Amend the terms and conditions of water licences;
- Reduce the maximum rate of diversion of water under licence;
- Alter, install, repair or replace works or adopt more efficient water use practices;
- Dedicate a specified quantity of water in a stream or aquifer for agriculture; and
- Restrict or prohibit activities relating to groundwater (ss. 78-83).

The ability of water sustainability plans to codify negotiated agreements on water management in a particular place offers exciting possibilities for watershed-based approaches in the vastly

different hydrological areas of B.C. They enable the development of innovative solutions that respond directly and uniquely to the socioecological and economic realities of water in a region, and have the potential to be more responsive than the current provincial scale of water management. Outstanding questions about water planning are how these processes can be triggered, what resources the province will put towards their development, and what types of local organizations may obtain jurisdiction to implement parts of the plan.

Special Interest in Agriculture
Water for agriculture is acknowledged in the Act as an important interest that may warrant specific attention in certain watersheds. Water sustainability plans may designate "dedicated agricultural water", also known as agricultural water reserves (s.82). This allows the water sustainability planning process to prioritize or establish unique rules to water for agriculture, which will be particularly useful when considering how reductions in water use will be handled through drought planning and management.

Decreasing Water Allocations Through Licence Review and Water Sustainability Planning
Another key approach that contributes to flexibility and adaptability under the new Act is the ability to review and amend licences, as well as reduce water diversions through water sustainability plans. If notified anytime after thirty years from the date the Act comes into force most license holders must submit to a review of the terms and conditions of their licence (s.23). The licensee can be required to submit a range of information to the review process including a water conservation audit. The decision maker may review the terms and conditions of a licence taking into account:

- The best available technology in respect of water use efficiency and water conservation;
- Best practices in respect of water use efficiency and water conservation;
- Any increase in knowledge respecting actual stream flow or aquifer conditions;
- The effects of climate change;
- The licensee's beneficial use of the water;
- The use, operation or maintenance of works; and
- Other prescribed factors.

The decision maker may amend the terms and conditions of the licence for more efficient use of water by, for example, reducing the amount of water diverted under the licence. Water sustainability plans may also reduce water taking under licence by regulation (s.79).

While these governance approaches give the provincial government considerable flexibility in adapting the water allocation regime, it is important to note that these governance and management approaches rely on the existing province-centric administrative regime for water in B.C., which, in addition to lacking recognition or a process to recognize aboriginal rights to water, are the *Water Sustainability Act*'s primary shortfalls.

5. Continued Reliance on Provincial Administration and Resources

The biggest weaknesses of *Bill 18 – 2014*, and ultimately what keeps me from making bold pronouncements about its effectiveness, is the heavy reliance on regulations that will be

developed in the future and the same administrative enforcement regime of orders that rely on provincial action. All the specific ecosystem standards, like environmental flows, will be contained in regulations so we cannot assess their future effectiveness. It will be many years of participating in the development of regulations and watching their implementation before we can make any pronouncements about the ecological impact of the new law.

In addition, the same reliance on a provincial apparatus of making orders and evaluating licence applications is contained in *Bill 18 – 2014*. This provincial administration is showing signs of weakness, as described in several Environmental Appeal Board decisions in the past five years.[1] Continued reliance on this administrative structure absent new resources and watershed-specific governance structures will result in failure of the new law. This is particularly concerning when watershed-specific hydrological conditions require rapid and short-term action, and there is a critical need to develop credible and defensible data on hydrological regimes across the province.

The province-centric regime is also fundamentally called into question when one considers aboriginal water rights that burden the Crown's assertion of ownership and are unquantified in the existing licence allocation regime.

6. No Indigenous Water Rights or Recognition of Aboriginal Rights

The provincial government had an opportunity to acknowledge existing and outstanding aboriginal rights and title to water as part of an accounting of the water balance in the province, and to establish processes by which aboriginal water rights could be negotiated as part of the hydrological balance in a region or traditional territory. Currently some First Nations hold water licences, some through the federal Crown, and also have some minor water allocations established under treaty, such as the Nisga'a Nation. Aside from treaty First Nations water reservations (s.40) resulting from negotiating a treaty with the province and asserting aboriginal water rights through litigation, there is no ability in *Bill 18 – 2014* to daylight the oldest water rights in the province – indigenous water rights – and begin to reconcile them with the colonial water apparatus under the *Water Act* and upcoming *Water Sustainability Act*.

Further analysis is required to determine whether water sustainability plans could be used to negotiate aboriginal water rights as part of a watershed-based agreement.

In conclusion, the *Water Sustainability Act* (*Bill 18 - 2014*) is an exciting start to a new era of water management law in B.C. and, indeed, Canada. However, most of the work of developing ecological standards in regulation still remains so continued vigilance and participation on the part of water-involved organizations is important. In addition, if there are no new resources for administering the *Water Sustainability Act* and water planning then the existing leaks in the system will continue to grow and the new legislation will fail. I look forward to the final enactment of the *Water Sustainability Act* and its innovative implementation.

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[1] See, for example, *Fulford Creek Holdings Ltd. and Gauthier v Assistant Regional Water Manager* 2010-WAT-009(a) & 2010-WAT-010(a) (five years between beneficial use declaration and enforcement in an over-allocated stream); *Sanders v. Assistant Regional Water Manager* 2009-WAT-002(a) (Appeal Board accepts applicants water flow data over that of the Ministry); and *Helmer v Assistant Regional Water Manager* 2009-WAT-017(a) (cooperative effort needed to solve serious issues).