Indigenous Water Governance

Introduction: How do Indigenous fit into Canada’s governing policies, and how can governance over water be achieved?

Lecturer: Paul Levine
Geography: Environment & Sustainability
University of British Columbia: Land Acknowledgement

“This panel acknowledges that we are gathered today on the traditional, ancestral, unceded territory of the Musqueam people.”

Koby Michaels. (2015). The Ubyssey
How tensions with Indigenous evolved through Canada’s nation-building:

**Early Colonial Diplomacy**
- Treaty of Albany (1701)
- Peace and Friendship Treaties (1713 - 1779)
- The Royal Proclamation (1763)

**British Colonial Era**
- Robinson Treaties (1850s)
- Douglas Treaties (1850 - 1854)

**Early Confederate Canada**
- British North America Act (1867)
- Indian Act (1868 - 1876)
- Treaties 1-7 (1871 - 1877)
- Treaties 8-11 (1899 - 1921)

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Summaries of Pre-1975 Treaties. aandc.gc.ca

- The 1973 Policy
- The 1981 Policy
- Section 35 of the Constitution Act (1982)
- The 1986 Policy
- The BC Treaty Process
  - The British Columbia Treaty Commission (1992)
- The 1993 Policy
- The Inherent Right Policy (1995)
- The Interim Policy (2013)

## Modern Treaty Making: 1970s - Present

**Negotiation vs. Litigation.**

<table>
<thead>
<tr>
<th></th>
<th>Legal System</th>
<th>Socio-political</th>
<th>Economic</th>
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<tbody>
<tr>
<td>Negotiation</td>
<td>Out of court settlements.</td>
<td>Cooperative dialogue on reconciliation.</td>
<td>Cheaper for both sides.</td>
</tr>
<tr>
<td>Litigation</td>
<td>More than likely Supreme Court of Canada ruling.</td>
<td>Conflict and polarization between citizens.</td>
<td>Heavy cost for both the Indigenous community, the government, and the taxpayer.</td>
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# Modern Treaty Making: 1970s - Present

- **Comprehensive Land Claims vs. Specific Land Claims.**

<table>
<thead>
<tr>
<th>Process</th>
<th>Advantages</th>
<th>Limitations</th>
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<tbody>
<tr>
<td><strong>Comprehensive</strong></td>
<td>Constitutionally protected negotiations between Crown and Indigenous over resources, finance, and local government.</td>
<td>Policies and legislature have made Comprehensive Land Claims an important socioeconomic boost for Indigenous.</td>
</tr>
<tr>
<td><strong>Specific</strong></td>
<td>Addresses the grievances in outstanding treaty obligations not met by the Crown or the Indigenous (self-) government.</td>
<td>The model was supposed to be a timely way for the Crown to come up with negotiations and settlement with claims (6 years).</td>
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How the current framework looks through a historical geographic lens.

1. Historical treaties in pre-Canada in the beginning were sought for good faith and peace in the regions of settler-colonialists and Indigenous groups.

2. Confederation and the Indian Act gave the Crown regulatory power over Indigenous groups which restructured political organization of self-governing First Nations, and rights of Indigenous peoples were extinguishable under common law and not protected by the constitution.

3. The numbered treaties were a major part of nation-building and settling the west.

4. The Modern Treaties presently takes into account that: aboriginal rights become enshrined in the constitution, the honour of the Crown, and the ability to Litigate and Negotiate on Specific and Comprehensive Land Claims.
Water Governance in Canada: A proven obstacle.

Historical policies have been transformed through litigation and negotiation and First Nations communities do have consultations on environmental concerns.

Water remains in provincial and some federal jurisdictions. The policies that operate at different levels of government contradict themselves a lot. Riparian, FITFIR, Civil Code, or Prior Appropriation are all implemented in different provinces.

On top of the regulatory confusion, Aboriginal rights have not been fully agreed upon. Ongoing comprehensive and specific land claims may prove to be an impactful argument to push the conversation in the future.


Aboriginal vs. Indigenous Law

1. Names and Their Significance
2. Aboriginal Title to Land
3. Indigenous Legal Traditions
4. The Law and Water

Lecturer:
Robyn Wilson
These are some of the terms used in this presentation:

The term “Aboriginal” was first used in the Constitution Act in 1982 as a catch-all term that includes “the Indian, Inuit, and Métis peoples of Canada”

“First Nations” only refers to peoples who are officially known as “Indian” under the Indian Act

“Indigenous”, like the term Aboriginal, includes First Nations, Inuit, and Métis peoples, but can be used colloquially
Names and Their Significance

“Status” is a title created by the federal government and applies to “Indians, and lands reserved for the Indians” (Constitution Act, 1867)

“Indian Affairs” is a group of government employees who compile lists of status Indians and determine which programs and services they are eligible for

“Band” is another administrative category for organizing and labelling Indigenous peoples. Bands can include status and non-status Indians

These terms were not chosen with input from Indigenous peoples, but they have fought to have many definitions for these terms revised to better reflect the people they seek to represent
Indigenous Legal Traditions

Indigenous laws are the legal systems created by Indigenous peoples long before contact

“Indigenous knowledge relies on personal experience and feelings, rather than external authority,” (Henderson 2002)

Indigenous lawyers have to balance the traditional knowledge and law practices of their community AND the eurocentric legal systems that exist in Canada.
Indigenous Legal Traditions

There are assumptions that Indigenous legal systems are not that different from European/Canadian legal systems as they seek to solve similar interpersonal problems.

Why is this problematic?

Assumes that Indigenous legal systems are all the same and seeks to reduce the validity of cultural differences between Indigenous communities.

It also presumes that Indigenous law is only valid when it can be fit within the context of European/Canadian law.
Aboriginal Title to Land

The Supreme Court of Canada has recognized that Indigenous title to land existed before contact, and not as a result of European laws or other acts.

Indigenous communities established legal systems and oral contracts with other Indigenous communities to determine claims to land.

So why, despite this acknowledgement and awareness, have Indigenous titles to their land not been respected?
Aboriginal Title to Land

Many European ideologies have been used to justify the theft and re-assignment of Indigenous land, and by proxy, the ability to govern water on their land.

Doctrine of Discovery: Romanus Pontifex - gave Europeans the justification to take land and develop it, based on the belief that Indigenous communities were not exploiting the land and using to its “full potential” (Vowel 2016)

Since the colonization of Canada, “Canadian courts have not required proof of specific Aboriginal laws and customs” (McNeil 1997)
The Law and Water

Canada has actively fought against the assertion that water is a basic human right (Harnum 2010) likely to cover up how Indigenous communities have been denied access to water and the ability to manage it within their land.

When Indigenous lawyers are asked to participate in discussions regarding water management, they are expected to work within the Canadian legal system, and non-Indigenous spaces, which forces them to concede their knowledge as lesser.

Indigenous communities are treated as stakeholders rather than an established government negotiating with another
United Nations and International Organizations on Indigenous Water Rights

By: Libia Niyodusenga
Indigenous People

- Indigenous people have traditionally maintained their land and water resources sustainably.
- There is a global consensus that indigenous people are losing their rights to land and water.
- States and governments are responsible for this loss.
- Privatization movement (land and water) as a motivation to large scale takeovers.
- Water pollution and increased investment in water intensive industries increases water demand.
- Legal pluralism.
- The problem of unsafe water exist in both rural and urban settings (Reserves).

Obviously, safe and acceptable water is water that is clean, free from harmful substances like micro-organisms and chemicals, and suitable for domestic and personal use.
Legality

Legal instruments can be viewed into two parts:

1. Legally binding international and domestic treaties/agreements or declaration (requires implementation)

2. Composed of soft law that provide guidance on the future development of law.
The UN recognize that there is an urgent need to respect and promote indigenous rights. They are convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs. Recognizing that the situation of indigenous peoples varies from region to region and from country to country, they state that this declaration is not legally binding but it creates a moral argument for indigenous peoples.
United Nations Declarations

- Article 8 states shall provide effective mechanisms for prevention of any action which has the aim or effect of dispossessing them of their lands, territories or resources
- Article 18 Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

- Article 25- Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.
- Article 26- Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. States shall give legal recognition and protection to these land, territories and resources according with respect to culture and traditions
- Article 27 indigenous people shall be compensated for lands, territories and resources they traditionally owned which have been confiscated, taken, used, occupied or damaged without their free, prior and informed consent. But the question remains how do you measure polluted lakes and rivers damages?
- Article 32.2 state shall consult and cooperate in good faith with indigenous peoples to get a free and informed consent
International Covenant on Civil and political rights (ICCPR) 1966

- Article 6 - The right to life also provides a possibility to protect the right to water.

- Article 15 states that everyone has the right to take part in cultural activities and for some cultural activities water forms an important part of their cultural life. Sacred water bodies.

- The 1966 International Covenant on Economic, Social and Cultural Rights - this Covenant implicitly includes the right to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses of water.
International Labor Organization Convention

- Indigenous peoples’ lands should be legally recognized, demarcated and protected. States should also recognize the traditional water management systems.

- Legally binding document
International Convention on the Elimination of All Forms of Racial Discrimination

- Racial discrimination

- List of legislations and remedies
Chapter 26 - Protection of indigenous lands against unsound environmental practices and other activities that indigenous peoples would find culturally or socially inappropriate.
Rule shopping and inconsistencies

- Rule shopping:

Inconsistencies:

1. Different agreements and different bodies are involved
2. States may opt out
3. No opportunity to redress the rights
4. When is consent required (ILO)
5. Human right to water is disputed
6. Many states did not vote for ILO conventions
7. Agreements are symbolic participation to some
Case Study: Canada - First in Time, First in Right

1. First in Time, First in Right system (FITFIR)
2. Implications for indigenous peoples under FITFIR system
3. The changing water law regime in British Columbia: new Water Sustainability Act

- Water rights vary between Canadian provinces
  - 4 approaches
    - prior allocation, public authority, riparian rights, or civil code

Lecturer:
Crystal Ka Wai Ma
Prior allocation

= the system for allocating water rights is more commonly referred to as First in Time, First in Right (FITFIR)

- Was originally implemented with the onset of colonial settlement
- A government-controlled system: licences - earliest date and time = the first right (prior) use of water
- In times of water shortage, the older licensees have the right to take their entire allocation before other licensees
  - Example: 1930 vs 1960 priority date
- Based on the principle of “beneficial use”
- In Western provinces of British Columbia, Alberta, Saskatchewan, and Manitoba, and to some extent in Nova Scotia
- Why problematic?

Implications for indigenous peoples under FITFIR system

Indigenous peoples were undeniably the first users of water across Canada (First in Time) ≠ the first rights-holders

Example in BC: Similkameen River

- Uncertainty in water access
  - Experience water scarcity, drought (First Nations Summit, 2013:1)
- Being ignored for long time
  - Legislation has made no mention of indigenous rights to water
- Led to litigation
  - Example in BC: in the early 1900s, the provincial government did not consistently grant Indigenous peoples the most senior water rights in quantities that would secure their continued livelihoods

Changing water law regime in British Columbia: new Water Sustainability Act (WSA)

- The basic principles of the First in Time, First in Right (FITFIR) system are maintained in the new Water Sustainability Act, but introduces some modifications.

- WSA is problematic for indigenous peoples because:
  - fails to explicitly recognize Indigenous peoples as the First in Time’ senior water rights holders
  - falls short of responding to the many issues and questions that Indigenous communities and organizations have raised about water licensing
  - does not address the topic of Aboriginal rights and title to water
  - fails to address the historical colonial systems that privilege government ownership and management over traditional indigenous law

Water Security and an Indigenous Right to Water in Canada

Tessa Moffat

Water Security in Reserve Communities

- Reserve communities frequently face ‘drinking water advisories’
  - At any given time, 12%-13% of reserve communities are under a DWA\(^1\)
  - 90 times more likely to be without piped water than rest of Canada\(^2\)

- Jurisdictional bureaucracy of colonial systems
  - Federal vs. Provincial responsibility and enforceability

- Legacy of colonialism
  - Disproportionate response to Walkerton e. Coli outbreak\(^3\)

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3. Chambers, 290
Health and Livelihood Implications

- **Health Impacts**
  - Infant mortality rate up to 4 times higher\(^4\)
  - Spread of communicable disease and preventable death, H1N1 in Manitoba\(^5\)

- **Economic Impacts**
  - Unequal impacts on livelihoods, uneven playing field
  - Serious advisories can require interruption or evacuation of communities

- **Environmental knowledge**

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4. Chambers, 290
5. Boyd, 96
Water as a Human Right

● Constitutional Responsibility
  ○ Canadian Constitution does not recognize access to safe water as a human right
  ○ s. 1, 7, and 15 of *Canadian Charter of Rights and Freedoms*, section 36 of *Constitution Act, 1982*\(^6,7\)

● Logistical limitations
  ○ Budgetary considerations and, politics of self-government

● Failure to act
  ○ Reserves are not afforded the same protection as other communities in Canada

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6. Boyd, 82
Solving Persistent Issues

- An Indigenous right to water
- Importance of local context
  - Logistical issues do not excuse governmental inaction
- Moving forward - short-term and long-term solutions
  - Co-governance
  - Indigenous governance
  - Transitional governance

A Latin American Lens

The Ecuadorian and Bolivian cases:

- Indigenous groups in Latin America and their Cosmology
  - Definition
  - Geographies

- Water rights and sovereignty of indigenous groups.
  - Legal System: Ecuador's and Bolivia's Constitution
  - Customary Law System of Indigenous Peoples
  - Legal Implication of Communal Ownership

- Neo Liberal Development and indigenous water conflict.

  - Free Prior and Informed Consent
How to define indigenous people?

Indigenous communities, peoples and nations are those which having a historical continuity with pre-invasion and pre-colonial societies that develop on their territories, consider themselves distinct from other sectors of the societies now prevailing those territories, or parts of them.

Self Determination becomes one of the central pillars in the identification of indigenous groups.

UNDRIP: Article 25,32
ILO 169 : 15 16

Both reassure Indigenous Peoples’ rights over freshwater resources are owned ab origine and protected under international law lex specialis.

Why is this important in the context of Latin America?
Many of the indigenous community’s cosmologies embrace the human existence as an intertwined relation with all entities of this world. Water is one of such entities that is present and valorated in the everyday life. For many kechwa communities and other Andean cultures water is a central aspect of their communities.

In the andean indigenous communities, particula the Quechua communities there is a different approach to conceptualizing what water management is. There is no such thing as conservation, management, governance or administration of water. The communal approach is based on an intimate relation to water that acknowledges the fundamental essence of water. In spanish they called it “La Crianza del Agua” which translates into breeding. This implying that water is alive and embraced on the everyday life of this communities. (ABA- Ayacucho 2014 p41)

Some rituals in the andean region include the ritual of ‘Para apay’ in dry years, second is the breeding and ceremonial festivity of ‘Yarqa Aspiy’, third is Puquio Waqaychay (protection and conservation of puqiales) and forth is the breeding of ‘Yaku qayaq’ (water mother plants)

(ABA-Ayacucho 2014).
2) Water rights and sovereignty of indigenous groups.

International Rights

UNDRIP: Article 25,32  ILO 169: Article 15,16

Both reassure Indigenous Peoples’ rights over freshwater resources are communally owned and protected under international law United Nation Declaration of Indigenous Rights.

Bolivia, Colombia, Ecuador, and Peru have all taken initiative towards their agreement to international human law:

(a) The Charter of the Organization of American States, giving rise to the jurisdiction of the Inter-American Commission on Human Rights (IACHR) over those countries with respect to recommendations of a general nature and pertaining to individual cases

(b) The American Declaration of the Rights and Duties of Man

(c) The American Convention on Human Rights. They have also accepted the contentious jurisdiction of the Inter-American Court of Human Rights to take up cases of noncompliance with the obligations enshrined in the American Convention.
New Constitution of Ecuador 2008

Article 12
The human right to water is essential and cannot be waived. Water constitutes a national strategic asset for the use by the public and it is inalienable, not subject to a statute of limitations, immune from seizure and essential for life.

Article 314
The State shall be responsible for the provision of the public services of drinking and irrigation water, sanitation.

The State shall ensure that public services and the provision thereof observe the principles of obligation, generality, uniformity, efficiency, responsibility, a universality accessibility, regularity, continuity and quality. The state shall take steps to ensure that the prices and fees of public services are equitable, and shall establish the monitoring and regulation thereof.

New Constitution of Bolivia, 2009

Article 373
Water constitutes a fundamental right for life, within the framework of the sovereignty of people. The State shall promote the use and access to water on the basis of principles of solidarity, complementariness, reciprocity, equity, diversity and sustainability.

Article 374
The State shall protect and guarantee the priority use of water for life. The State has the duty of managing, protecting, controlling and planning the appropriate use and sustainable management of water resources, of social participation, and ensuring access to water for all its inhabitants. This law establishes the conditions and limitations for all uses.
Ways to acquire water rights for peasants/indigenous person through state recognition.

1) A water-usage rights concession, granted by the state administration.
2) Historical and socio-territorial rights: entitlement to water for the inhabitants of the socio-territory to which the water source belongs riparian rights and prior appropriation rights (based on first come).
3) Transfer of water rights from one rightholder to another through sale, inheritance, marriage, barter, or donation.
4) Acquisition of water rights by force: coercive expropriation water rights by power groups. Appropriated rights have not always received state backing, though often they have. It is very common, however, for them to become institutionalized and legitimized in local proceedings, within prevailing power structures.
5) Users investment of their own resources to build or rehabilitate irrigation facilities, thereby creating water rights.

| Table 1. Water legislation concepts in Andean countries (adapted from Hendriks, 2004) |
|-----------------------------------|----------------|----------------|----------------|----------------|
| Legal concepts                    |                |                |                |                |
| Water control                     | National resource for public use | State-regulated resource, privatized control | National resource for public use | State property |
| Role of state                     | State weak in regulating water, in practice favoring local law or powerful elite | State guarantees proper functioning water rights market (in practice prioritizing economic interests) | State seen as responsible for regulating use and guaranteeing infrastructure | State seen as responsible for water regulation, distribution and local management |
| Origin rights                     | Historical documents/use (often accessory to land-rights) | Register/Auction of undeclared water | Given by state/local practice | Given by state/local practice |
| Priority water use                | Yes            | No             | First drinking water and agriculture | First drinking water and agriculture |
| Transfer rights                   | Yes            | Yes            | No              | No             |
| Time frame                        | Depends        | Indefinitely   | No              | State can revoke |

Formal Law and Local Water Control in the Andean Region: A Fiercely Contested Field
Hugo De Vos, Rutgerd Boelens & Rocio Bustamante
Indigenous own governability.

Customary Law. Pluralism systems.

- Indigenous water right in Ecuador and Bolivia is based on the communal regime within the context of legal pluralism from which indigenous water right should be framed. The communal regime expresses itself as sets of rules that are enacted through the social dynamic of cultural community.

- Relying on legal pluralism leads to self-government as a necessary institutional framework. When states recognize indigenous customary law through the incorporation of the United Nations declaration of indigenous rights articles 25 and 32 on their own framework of governance. The constitution of Ecuador is a good example that reflects the Ecuadorian state’s incorporation of indigenous cosmologies into its own constitution. It is the first country to grant right to nature. The recognition of indigenous customary law allows for a strong legal framework to recognize indigenous water right.
3) Neo-Liberal Development and indigenous water conflict.

1. Free Trade Agreement
   - Opening of Latin American Resources

2. Implications of FTA with a Free Prior and Informed Consent
   - Many multinational corporations do not create proper consultation before extractivism

3. Challenge to the idea of communal regime.
Case Study: New Zealand’s Maori and the Whanganui River
Background: New Zealand and the Maori

- NZ originally inhabited by Polynesians 750 years ago before colonization by the British in 1788
- Huge losses of Maori population due to disease and introduction of weapons
- Treaty of Waitangi signed in 1840
  - Differences between the English and Maori version
  - Maori gained rights of British subjects but were not treated as such
  - Maori kept rights to their land but Britain gained sovereignty
- Late 19th century: New Zealand Wars
  - Many disputes over land ownership
Current Laws for Maori Rights

- New Zealand signed onto UNDRIP in 2010
- Formation of the Waitangi Tribunal in 1975 allows Maori to challenge state decisions based on the framework of the Waitangi Treaty
- Resource Management Act (1991)
  - Neoliberal policy designed to facilitate economic growth
  - Defines water as a publicly-owned resource; only the state can manage it
- Chieftainship over land written into the Treaty of Waitangi allows co-governance in many cases
  - Co-governance not always effective and efficient, such as the case of Lake Ellesmere
Bill 129-2 (2017): the Whanganui River

What is it?

- Bill 129-2 grants “personhood rights” to the Whanganui River: from the mountains to the sea, its tributaries and all its physical and metaphysical elements
  - The river is a legal person and has all the rights, powers, duties, and liabilities of a legal person
- Two people nominated to speak for and act on behalf of the river
  - To promote and protect the health and well-being of the river, to perform landowner functions with respect to land vested in the river under legislation
  - One representative nominate by the Maori, one by the state
Predictions for Bill 129-2

● What will this legal framework accomplish?
  ○ Prevents future developments of the river, unless the Maori are in full support of them
  ○ Preserves the natural qualities of the river and help maintain its ecosystems and organisms
  ○ Allows the Maori to continue their cultural practices freely
  ○ Provide increased inclusion and participation of indigenous communities within governments allowing more contribution of their cultural knowledge

● Drawbacks
  ○ Inefficiency of co-governance
  ○ Potential for slowing of economic development
Applications to Canada

- In many ways, New Zealand is a good analog to Canada in terms of indigenous rights and law
  - Both have large indigenous populations that were greatly impacted by colonialism with ongoing struggles in current society for rights and recompense
  - Both have recognition of land rights/title, self-governance rights, upholding of historic treaties, signing of new treaties, recognition of cultural rights, recognition of customary law, guarantees of representation/consultation in central government, and distinct indigenous status
  - Both have partial support for UNDRIP and partial affirmative action
- Bill 129-2 represents a progressive approach to indigenous rights
  - Other countries like India, Bolivia, Ecuador and others have already adopted it
- In Canada, a similar legal framework would provide First Nations with proper pull in governmental decisions
  - Eg. Site C Dam on the Peace River
Questions

1. Do you think personhood rights for geographic features such as rivers and mountains will be effective in promoting sustainability? Should Canada adopt similar legal frameworks?

2. In your opinion, does the potential for such legal frameworks to slow down economic development and create legal stalemates outweigh the cultural and environmental benefits they can provide?

3. While the First in Time, First in Right system deals directly with issues of water scarcity in a first-come, first-serve basis, it does not do well at providing equitable access to water for everyone. Do you think it is equitable? If not, what is the more equitable way to deal with issues of water scarcity?

4. Do you think that it is possible to work under a communal law regime that accepts pluralism in its framework for management and decision making?

5. Do you think it is possible to incorporate multinational extractive industries in indigenous territories while maintaining indigenous rights to water and land?

6. What role should multinational corporation play in the protection of indigenous rights to land and water?