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British Columbia's *Water Sustainability Act* – A New Approach to Adaptive Management and No Compensation Regulation

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The British Columbia Legislature gave third and final reading to *Bill 18 - 2014*, B.C.'s new *Water Sustainability Act* ("the Act"), on April 29, 2014 as the long awaited overhaul of the water management and allocation regime in B.C. As someone who teaches both municipal and water law I am pleased with the legislation. I have been so bold as to say that the Act is the best piece of environmental legislation introduced in B.C. in more than a decade. Of particular interest, in this age of if not climate change then more extreme weather events that typically involve precipitation in its liquid or frozen forms, is the way the Act strives towards an adaptive approach to water management and thus water rights. Under the new law licences issued in perpetuity will be subject to regional water sustainability plans that can reduce water diversions (ss 64-85) and subject to having their terms and conditions reviewed anytime after thirty years from when the Act comes into force (s 23). This spectre of changing water rights may hasten a new era of water use as decision makers may amend the terms and conditions of a licence for more efficient use of water or water conservation, and may take into account the following factors when reviewing licence terms and conditions:

- 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.

This attention to multiple ways by which water entitlements can be altered over time is fascinating in the context of provincial Crowns that assert their ownership or regulatory jurisdiction over natural resources and their longstanding grappling with the concept of adaptation in law. Law strives towards fixed entitlements to natural resources and we can see this impulse very clearly in water licences issued in perpetuity. The original intent in providing certainty of water use was for land owners and owners of works to be able to rely on a specific

amount of water in priority to those who acquired rights to use water after they did. This reliance provided certainty of the ever important water input for investment.

However, the natural environment and hydrology change over time and those entitlements to use water may need to be altered. Indeed, 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 simply less water to go around 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 from taking water, even over the short term, due to concerns for the environment, or to retire water rights altogether. See, for example, *Tulare Lake Basin Water Storage District v United States*, 49 Fed Cl 313 (2001), one of the original cases where the court found that forced reductions in water use due to flow requirements for endangered species were a physical taking of private property in the United States.

This is also the approach taken in Alberta under the *Water Act*, RSA 2000, c W-3 where the presumption is compensation for changes to water rights, subject to a contrary intention expressed in regulations. Not only do the terms of a deemed licence authorizing water rights prior to 1999 take precedence over the *Water Act* itself (see s18(2)(b)), but s 158(1) explicitly requires compensation to water licensees when the Director amends, suspends or cancels licences for conservation purposes. The changes to licences are authorized under various sections of the *Water Act* if an adverse effect on the aquatic environment occurs and it was not reasonably foreseeable at the time the licence was issued (see, for example, s 54(2)).

This granting of explicit property rights in a flowing and changing resource is an awkward legal and policy choice, one that is contrary even to how we treat land, which is arguably the category of property that is granted the most firm legal status as property. Of surprise to many landowners, the Canadian approach to land use is to allow governments to restrict virtually all use of land by, for example, zoning regulation without compensating the rights holder. This "no compensation" principle is codified in s 914 of the B.C. *Local Government Act*, RSBC 1996, c 323 and s 621 of the Alberta *Municipal Government Act*, RSA 2000, c M-26 which essentially state that no compensation will be paid for changes in the value of land caused by specified decisions made under a land use bylaw or permitting function. It is only when regulation takes away virtually all incidents of private ownership that the regulation will be found to be improper.

These "regulatory takings" or regulatory expropriations are few and far between in Canada. Although we hear about successfully argued "takings" cases in the U.S. Courts, in Canada a court has never found land use regulation to result in a regulatory expropriation. See *Mariner Real Estate Ltd v Nova Scotia (Attorney General)* 1999 CanLII 7241 (NSCA) for an excellent discussion of this area of law and *Canadian Pacific Railway Co v Vancouver (City)* [2006] 1 SCR 227, 2006 SCC 5 for the most recent Supreme Court of Canada discussion in the land use context. Courts have awarded compensation for loss of mineral rights upon the creation of a park (*R v Tener*, [1985] 1 SCR 533; *Casamiro Resource Corp v British Columbia (Attorney General)*, 1991 CanLII 211 (BCCA)) or for the removal of all economic viability including goodwill (*Manitoba Fisheries Ltd v The Queen*, [1979] 1 SCR 101).

Returning to the context of water and contrary to some international trends in water law, with the *Water Sustainability Act* the B.C. legislature has explicitly adopted this "no compensation"

principle (s 121), and created a variety of ways to adapt water entitlements as hydrology and the natural environment changes.

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 (s 121).

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 in respect of 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)).

While these exceptions have the ability to considerably weaken the flexibility with which water reallocation and reduction in water use will occur, this "no compensation" principle is correct if we apply our high tolerance in Canadian law for regulation. If fully applied this new approach could allow B.C. to take an adaptive approach to water management that recognizes hydrological and environmental changes over time. Like regulation in the land use context, water licensees will be required to get used to water regulation in the public interest that may change water entitlements based on ecosystem needs as we adapt to a new normal of climatic fluctuations. As uncomfortable as uncertainty of rights are to us in law, the Act brings a refreshing approach to future climatic unpredictability. Most productive will be the watershed-specific conversations that will result in unique water sharing arrangements and a balancing of interests when flows wane.

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