Water and Sanitation in First Nation Communities: Legal Principles

Anishinaabe Nibi Inaakonigewin

Anishinaabe nibi inaakonigewin

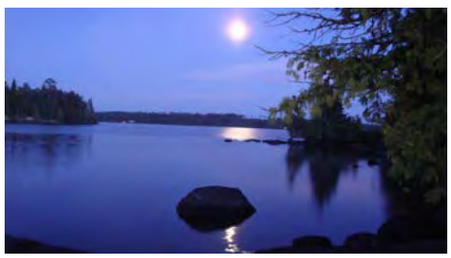
Anishinaabe (Ojibway) people have ways of understanding the world, in part through complex legal systems that draw on sacred and customary forms of law. Relationships and responsibilities guide this understanding.

Indigenous laws, which vary among Indigenous nations, are recognized as part of the fabric of the Canadian legal system.

By understanding our relationships to other living things, we work towards achieving our mino-biimaadiiziiwin (individual and collective well-being). Anishinaabe nibi inaakonigewin (our water law) is an instrumental part of understanding the source of that well-being.

"Anishinaabe law isn't so much about rights but responsibilities to all of Creation." Elder Peter Atkinson

We better understand inaakonigewin through our ceremonies, songs, language and storytelling. Our law is more than a set of rules that govern our lives but is rather a way of life. The Anishinaabe way of life is centered on relationships that give rise to rights, obligations and responsibilities. Rights, obligations and responsibilities are exercised both individually and collectively by Anishinaabe.



More than ownership and management: caring for the spirit

Most municipal, provincial and federal laws consider water from the perspective of rights of allocation, management and ownership. Anishinaabe nibi inaakonigewin acknowledges that the water itself has a spirit and that we must look after that spirit.

Through the lens of Anishinaabe law, we can redefine and reconsider our relationships to water, particularly the individual and collective processes of decision-making and management of water resources. This encourages taking up our responsibilities to water in working towards mino-biimaadiiziiwin..

"Water is so significant… I am so fortunate to understand the value of the water… It is the last natural resource we Anishinaabe have to stand up for. It is precious." Elder Florence Paynter

Collective responsibilities to water?

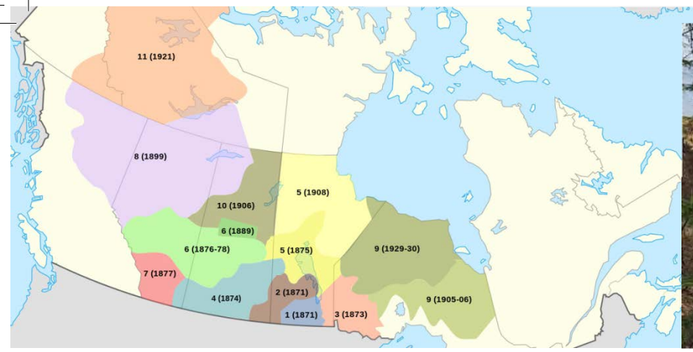
Some of the common themes or principles that are shown through stories, songs, teachings and the Anishinaabe language are:

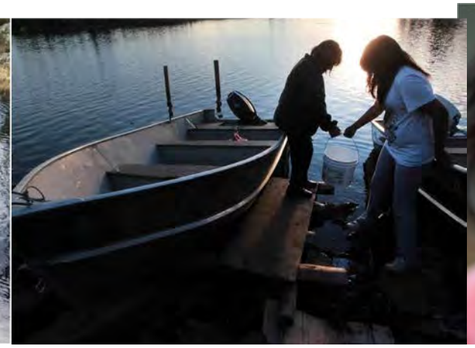
- Water is life
- Water has a spirit
- We must respect the water
- We do not "own" the water
- Water has a duality - it can give life but it can also take away life
- Water is sacred and healing
- Women are responsible for the water
- Water can suffer and it needs a voice to speak on its behalf

"We have to create more understanding among people. That's our job." Elder Charlie Nelson

Additional Resources

- Aimée Craft, *Anishinaabe Nibi Inaakonigewin Report* (2014)
- Lea Foushee & Renee Gurneau, *Sacred Water: Water for Life* (1981)
- John Borrows, *Canada's Indigenous Constitution*. (2010)





Water Rights and the Numbered Treaties

The treaty relationship

Eleven treaties covering most of the Prairie provinces and parts of B.C., Ontario and the Territories were entered into by Indigenous leaders and the Crown in the late 1800s and early 1900s. These treaties are often referred to as the "numbered treaties."

Treaties are meant to endure "as long as the sun shines, the river flows and the grass grows."

First Nations and Canadian governments have very different ideas about the nature of the treaty relationship. Indigenous people see treaties as agreements about relationships—the handshake between the Queen's commissioner and leaders of Indigenous nations—to share land and resources. This ongoing relationship requires continuous attention. In contrast, Canadian governments view treaties as "proofs of purchase" or large-scale land transfers with few strings attached.

Water rights in the numbered treaties

While the oral versions of numbered treaties affirm that waterways are important for travel, sustenance and maintaining the nations' Indigenous ways of life, most of the English versions do not specifically mention water, other than using waterways as boundaries of treaty areas.

The promise of reserves suitable for supporting First Nation communities implicitly protects an adequate water supply. Treaties also contemplate First Nation peoples continuing well-established agricultural practices and adopting new ones. Agriculture requires access to water.

Numbered treaties also protect the right to live off the land. Hunting and fishing rights would be meaningless without protection of the natural home of fish and game. Thus, even by the restrictive Canadian governments' approach to treaties, First Nations' water rights were retained when they entered into the numbered treaties.

"Treaties are sacred promises and the Crown's honour requires the Court to assume that the Crown intended to fulfil its promises." Badger case, SCC, 1996

Various statutes dealing with water rights were passed by Canadian governments prior to 1982, the year the Constitution was amended to give constitutional protection (s.35) to existing Aboriginal and treaty rights. While these statutes had an effect on Aboriginal and treaty water rights, none of these laws express a clear and plain intention to extinguish rights protected by treaties.

Duty to consult

The Crown has a duty to act honourably and to consult and accommodate where a proposed action might adversely affect the excercise of a treaty or Aboriginal right. The Supreme Court of Canada has made it clear that if a government is contemplating taking up lands for development, it must first determine the impact the project might have on the exercise of treaty rights, including rights to hunt, fish and trap. Potential effects must be communicated to affected First Nations and the government must work with First Nations to substantially address their concerns before a project is authorized.

Not every use of the land by the Crown will constitute an infringement of treaty rights. However, if taking up land leaves First Nations with no meaningful right to hunt, fish or trap in their territories, they can sue for treaty infringement. Court cases have stated that if an infringement of treaty rights is shown, the government can justify its infringement in order to reconcile the interests of First Nations with "broader public interests."

For more information

- Grassy Narrows First Nation v. Ontario (Natural Resources), Supreme Court of Canada 2014
- Aimée Craft, *Breathing Life into the Stone Fort Treaty*, 2013
- Leroy Little Bear, *Aboriginal Paradigms: Implications for Relationships to Land and Treaty Making* (2004)
- Treaty Relations Commission of Manitoba
- *Gakina Gidagwi'igoomin Anishinaabewiyang (We Are All Treaty People): Treaty Elders Teachings Volume IV*

Essential Services of Reasonable Quality

Section 36 of the Constitution Act, 1982

Many First Nation people are familiar with section 35 of the Constitution Act, 1982. This section "recognizes and affirms" Aboriginal rights, including treaty rights, in Canada. As part of the Constitution of Canada, section 35 expresses the supreme law of Canada and therefore governments cannot unilaterally take away from Aboriginal rights.

In contrast, most Canadians are unaware of section 36. Unlike section 35, which has been considered by the Supreme Court of Canada in numerous cases since 1982, section 36 has almost never been considered by courts. But like section 35, this section is also the supreme law of Canada.

36. (1) … the government of Canada and the provincial governments are committed to
(a) promoting equal opportunities for the well-being of Canadians;
(b) furthering economic development to reduce disparity in opportunities; and
(c) providing essential public services of reasonable quality to all Canadians.

Obligation to provide services

What other public service could be more essential than the provision of clean water and adequate wastewater systems? Yet report after report has acknowledged that water and wastewater systems in many First Nation communities are seriously deficient. In 2016, more than 100 First Nation communities in Canada were under drinking water advisories. Many of these communities have been under boil advisories for more than a decade.

Many homes in the Island Lake area of Manitoba still have no taps or toilets.

Having reviewed the history, case law and academic commentary on section 36, it is our view that the Canadian and provincial governments' failure to ensure access to safe drinking water and adequate wastewater systems in some First Nation communities may be a breach of governments' constitutional commitments to provide "essential public services of reasonable quality to all Canadians." We think there is a reasonable probability of success should a First Nation bring a claim against the federal and provincial governments for failing to meet this commitment.

Taking action

Tsuu T'ina Nation and three other First Nations have sued the government of Canada over the state of their drinking water. These First Nations are asking the court to declare that the Canadian government has violated its constitutional obligations (s.36) and to order it, under the court's ongoing supervision, to take the necessary steps to address this breach.

For more information

- Department of Indian and Northern Affairs Canada, *National Assessment of First Nations Water and Wastewater Systems: National Roll-Up Report Final* by Neegan Burnside (2011)
- Tsuu T'ina Nation, Sucker Creek First Nation, Ermineskin Cree Nation, & Blood Tribe Statement of Claim against the Attorney General of Canada, Fed. Court File No. T-1429-14.
- Manitoba Keewatinowi Okimakanak Inc. v. Manitoba Hydro-Electric Board (1992) Man Court of Appeal

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International Law on Water and Sanitation

International law on drinking water and sanitation

The United Nations General Assembly passed a resolution in 2013 recognizing access to water and sanitation as a human right that is essential for the full enjoyment of life and all human rights. This resolution complements recognition of the right to water in other international instruments such as the Declaration on the Rights of Indigenous Peoples and the International Covenant on Economic, Social and Cultural Rights (ICESCR). This resolution, together with other political commitments made by governments around the world, may have crystallized the human right to water and sanitation as international customary law.

Respect, protect, fulfil

If international treaties or customary law recognize a human right, such as the human right to water and sanitation, all governments including the federal, provincial and territorial governments in Canada, are obliged to:

- Respect the right. Governments cannot do anything that may interfere with the enjoyment of the right to water.
- Protect the right. Governments must prevent others from interfering with access to domestic water.
- Fulfil the right. Governments must take active measures to allow the full enjoyment of the right to drinking water and sanitation.

How are these obligations enforced?

National Plans
Governments must adopt a national water strategy and plan of action that ensures access to the minimum essential amount of domestic water and adequate sanitation on a non-discriminatory basis.

Canada does not have a national water strategy or a plan of action.

Reporting
Governments are expected to monitor the extent of the realization of the right to water and are required to report to the United Nations on progress toward achieving that right. Civil society groups are encouraged to make their own reports and comment on the official government reports. A human rights framework also requires governments to consult with vulnerable and marginalized populations.

The UN Committee on Economic, Social and Cultural Rights recently reviewed Canada's compliance with the ICESCR. Noting the poor state of water and sanitation systems in Indigenous communities, it urged Canada "to live up to its commitment to ensure access to safe drinking water and to sanitation for the First Nations while ensuring their active participation in water planning and management. In doing so, [Canada} should bear in mind not only indigenous peoples' economic right to water but also the cultural significance of water to indigenous peoples."

Judicial Enforcement
People—or organizations on their behalf—who are denied the right to water can ask domestic courts or international tribunals for orders forcing governments to respect, protect and fulfil their right to water and sanitation.

The Indigenous community of Xákmok Kásek brought an action against the government of Paraguay. The community was forced to live on land that did not, among other things, have water distribution services. The health of the community suffered. In 2010, a court ordered Paraguay to immediately provide certain services, including clean drinking water and installation of an adequate sanitary system.

For more information

- UN General Assembly Resolution 68/157 (2013)
- Bates, "The Road to the Well: An Evaluation of the Customary Right to Water" (2010), 19 (3) *Review of European Community and International Environmental Law*, 285.
- Meier et al, "Implementing an evolving human right through water and sanitation policy," 2013, 15 *Water Policy*, 116.
- Xákmok Kásek Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 214 (Aug. 24, 2010).

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