

Why we need to talk about “unvested water” in BC

By Donna Forsyth & Mike Wei, April 2022

Vesting of water is one of five challenges and gaps that Donna Forsyth and Wei, retired senior civil servants in the Ministry of Environment, suggest being front-and-centre in the next round of government priorities.

EDITOR’S NOTE:

This article by Donna Forsyth and Mike Wei is what they describe as a “deeper dive” into one of the five challenges they identified in their March 2022 submission to the provincial government.

The opinions expressed are those of the authors and do not necessarily reflect the opinions of the Partnership for Water Sustainability or any of its partners. We are sharing the article via Waterbucket eNews as a public service in the broader interest of contributing to a balanced conversation about water resource management in BC.

*The mechanism for bringing these priorities forward is the current consultation process for the **Discussion Paper on Watershed Security Strategy and Fund**. It has identified 10 desired outcomes. Donna Forsyth and Mike Wei believe that addressing the five challenges and gaps would bring the Water Sustainability Act to the next level which they call “WSA 2.0”. In the article that follows, they elaborate.*

So, what is vesting?

In a nutshell, “vesting” is the legal concept that has historically been used to establish the government’s authority to write the laws that govern water use in BC. This means that any use of water that is unvested remains outside of those provincial laws.

Arguably, vesting also provides the government with the authority to regulate activities for protecting the aquatic environment, conserving the water resource, in addition to protecting the use of that water by those who hold water rights. Vesting would also provide authority to ensure the safety of our drinking water.

Implications for the Watershed Security Strategy when water is unvested

In our March 2022 submission to the Province¹, we specifically raised the issue of the impacts of unvested water on the success of the [Watershed Security Strategy](#) and on the future of water protection and management in BC.

In responding to the invitation from the Province, our intention was to prioritise the conversation around vesting, starting with the lack of fairness resulting from the different rules for the use of unvested versus vested water.

Context

Vesting establishes government’s authority to write the laws that govern water use.

¹ https://waterbucket.ca/wcp/wp-content/uploads/sites/6/2022/04/PWSBC_Living-Water-Smart_Water-Sustainability-Act-2.0__2022.pdf

Since the historical concept of “right of capture”² would apply for users of unvested water, the only rule that currently applies is that the water must be captured before it becomes vested by entering a “stream” or percolating into the ground to become groundwater as defined in the [Water Sustainability Act](#) (WSA).

An example is use of water for fracking: We also noted that the lack of regulatory authority over unvested water has already resulted in the business of private water sales to oil and gas operators for fracking. The water being sold is primarily from hundreds of dugouts constructed on farmland in northeast BC³.

Government has provided guidance⁴ on the use of water from dugouts for agricultural purposes such as watering livestock and has acknowledged that the water being sold from these dugouts is likely a mixture of both vested and unvested water.

Consequences when water is outside the authority of the WSA: Despite the message that water licences are required for private water sales as soon as any water in the dugout is vested, the administrative and technical nightmare of establishing what water is vested has undermined any enforcement of these requirements.

There is neither the capacity nor the information needed to establish the proportion of vested water being sold. So, as a result, this water has effectively become a “cash crop” and farmland is being turned into dugouts.

Not only does the use of unvested water sit outside of the authority of the WSA, maintaining the status quo around vesting means that there will be many other situations where the line between vested and unvested water will need to be determined.

What this means for the Watershed Security Strategy: The need to determine where the line is between vested and unvested will create difficulties for both the implementation of the WSA tools and the [Watershed Security Strategy](#) process.

One of the most critical challenges for the strategy will be that unvested water users may be perfectly entitled to ignore both the [Watershed Security Strategy](#) process and attempts to restrict their water use using Water Sustainability Plans or other tools under the WSA could be challenged. Also, there could be challenges to any tools meant to encourage and regulate water conservation such as through rainwater harvesting and storage.

What This Means

Unvested water users can ignore the Watershed Security Strategy process.

² https://waterbucket.ca/wcp/wp-content/uploads/sites/6/2022/04/Legality-of-Rainwater-Harvesting_Katie-Duke_2014.pdf

³ https://waterbucket.ca/wcp/wp-content/uploads/sites/6/2022/04/Report-on-Managing-Dugouts_Jim-Mattison_2017.pdf

⁴ <https://waterbucket.ca/wcp/wp-content/uploads/sites/6/2022/01/Guidance-on-Farm-Water-Storage.pdf>

Implications of the “vesting gap” for other water-related legislation

In addition to the these limits on the WSA and the [Watershed Security Strategy](#) processes, we also raise the important issue of the potential impacts of this jurisdictional gap for other water-related legislation in BC. This has led us to ask three questions.

Context for Three Scenarios

The stated purpose of Donna Forsyth and Mike Wei in posing three scenario-type questions is to inform and prompt conversations about the implications inherent in the questions.

Their goal is to ensure that all parties involved in processes that involve water and water legislation understand vested versus unvested concepts, and their operational implications.

The authors stress that this article is not meant to provide the answers to all three questions. They also note that some answers will be much clearer than others.

Question One: Do the restrictions on bulk water transport apply to unvested water?

As we noted in our submission in response to the [Discussion Paper on Watershed Security Strategy and Fund](#) it is likely that none of the tools in the WSA apply to unvested water.

The [Water Protection Act](#) (WPA) was brought into force in the 1990’s to protect BC’s water resource by restricting the bulk transport of water out of the province.

Groundwater was vested in a provision of the [Water Protection Act](#), presumably to ensure that the rules of bulk water transport put into place would clearly apply to groundwater, despite the fact that licences for groundwater use were not yet required under the Water Act.

The [Water Protection Act](#) provision for vesting groundwater was later rolled up into the WSA, so now the vesting provisions are in one place, in s. 5 WSA. While the rest of the [Water Protection Act](#) remains in place and limits the transport of vested water out of the province, these restrictions may not apply for unvested water.

Given the importance of protecting and conserving water in BC, it is necessary to at least discuss whether the [Water Protection Act](#) applies to unvested water. If not, we believe the risk of being unable to restrict the transport of unvested water outside of BC must be assessed.

Question Two: Can the users of unvested water for drinking water be protected and can their suppliers be regulated?

We also wonder if the authority to regulate drinking water is also tied to the province’s general authority over water under the WSA. If the province does not have authority over unvested water, the use of rainwater and other unvested water would also be outside the jurisdiction of the [Drinking Water Protection Act](#).

In the future, the construction of cisterns for water supply to communities in water stressed areas could become the norm. Thus, the authority to regulate the use of this water for drinking water under the [Drinking Water Protection Act](#) may be questioned.

Question Three: Can local governments and municipalities enforce bylaws that apply to unvested water?

In general, local governments and municipalities get their authority through the delegation of specific authorities from the province. It is not clear whether the limits on the provincial jurisdiction over unvested water would impact the authority for municipal bylaws around drainage and rainwater capture now or in the future.

By extension we also ask whether the [Modern Land Use Planning](#) process and any legislation developed to implement that process can apply to activities around unvested water.

Going forward, the government will need to also assess the risk of maintaining the current gap in its authority resulting from unvested water and the impact of this limitation on its ability to implement climate change adaptation strategies.

Synopsis of perceived risks of vesting all water in British Columbia

Next, we comment on two counter arguments to our concerns about the operational implications of unvested water in BC.

Argument #1 - “We cannot and should not try to regulate every drop of water”

Vesting all water does not mean the use of every drop will or needs to be regulated.

Under the vesting umbrella, activities can be exempted. In contrast, activities around unvested water cannot be restricted, no matter what their impacts.

This concern is a red herring, and it has certainly not prevented other jurisdictions from vesting all their water as shown in Table 1. Laws can be developed to exclude certain activities that are brought in under the vesting umbrella.

Examples of these exclusions are already in BC’s water legislation. Division 4 of the [Water Sustainability Regulation](#) lists exempted activities that would otherwise require a water authorization under the WSA.

These provisions exclude the normal requirements for those activities but still allow the government to act where there is risk of significant impact.

The Watershed Security Strategy represents an opportunity to enhance the authority to protect and manage water.

Risks associated with unvested uses of water: In contrast, activities around unvested water cannot be restricted and impacts to the environment or to other water users cannot be addressed, no matter how significant they become.

Bringing the unvested water into provincial authority clearly would enhance the authority to protect and manage water. Not bringing unvested water into the equation will completely remove it from the regulations and processes being developed going forward.

In addition, keeping some of the water unvested retains the current administrative and technical nightmare of trying to prove whether every drop of water is vested in order to establish the government's authority over it.

What authorities do other jurisdictions have over water?

Table 1 provides the vesting provisions for the provincial and territorial jurisdictions in Canada.

To summarise, it appears that vesting of all water is common in other Canadian jurisdictions with the exception of BC, Prince Edward Island and Newfoundland-Labrador where only groundwater and surface water in watercourses appear to be vested.

Argument #2 - First Nations will object to bringing more water under BC's colonial laws

Much has happened in the 10 years since the "request for legislation" for the WSA was approved by the government in 2012. Since then, [United Nations Declaration on the Rights of Indigenous People](#) (UNDRIP) was adopted and the BC [Declaration on the Rights of Indigenous People Act](#) (DRIP) legislation was passed. In addition, the government's **"Action Plan for implementing UNDRIP"** was released in March 2022.

We believe the opportunity to move forward together has never been greater. The process of moving forward will be unnecessarily complicated if colonial laws only cover part of the water. Instead, providing certainty with BC's provincial laws and the jurisdiction of the current laws can assist the future conversations around both colonial and indigenous laws governing water in the future.

The opportunity to move forward together has never been greater.

A closing perspective on why the laws of BC need to be assessed for impacts from lack of authority over unvested water

Starting with the WSA, we believe there is clearly a need to assess the impact of retaining the current status of unvested water in BC. We have highlighted a number of other key pieces of legislation, as well as government initiatives, that could also be impacted by the current jurisdictional gap in the law.

Rippling consequences when there is a jurisdictional gap:

At the very least, there are impacts to the implementation of the WSA. In our judgment, the [Watershed Security Strategy](#) processes will therefore be vulnerable due to the lack of authority and the resulting lack of participation of those using unvested water.

Worse, the gap in jurisdiction may affect other legislation, such as restrictions around bulk water transport where unregulated harvesting of snowmelt, rainwater and overland flow, could allow significant volumes of unvested water to be removed from the province.

Seizing the once per decade opportunity: The [Discussion Paper on Watershed Security Strategy](#) process provides us all with the opportunity to discuss WSA 2.0 which would include amending the Act to address the lack of jurisdiction over unvested water in BC.



Table 1 – Summary of Across-Canada Research on Vesting of Water Use

Canadian Jurisdiction - Act	Date	Water defined	Vesting
British Columbia – Water Sustainability Act	2016	“Stream”, “groundwater” and “aquifer” are defined; “water” is not defined.	5 (1)The property in and the right to the use and flow of all the water at any time in a stream in British Columbia are for all purposes vested in the government, except insofar as private rights have been established under authorizations. (2)The property in and the right to the use, percolation and flow of groundwater, wherever groundwater is found in British Columbia, are for all purposes vested in the government and are conclusively deemed to have always been vested in the government except insofar as private rights have been (a)established under authorizations, or (b)deemed under section 22 (8) [precedence of rights]. (3)No right to divert or use water may be acquired by prescription.
Alberta – Water Act	2021	“water” means all water on or under the surface of the ground, whether in liquid or solid state;	3(2) The property in and the right to the diversion and use of all water in the Province is vested in Her Majesty in right of Alberta except as provided for in the regulations.
Saskatchewan – The Water Security Agency Act	2019	“water” means ground water or surface water;	38(1) The property in and the right to the use of all ground water and surface water is, and is deemed always to have been, vested in the Crown.
Manitoba – The Water Rights Act	2022	"water" means all water on or below the surface of the ground;	S2 Except as otherwise provided in this Act, all property in, and all rights to the use, diversion or control of, all water in the province, insofar as the legislative jurisdiction of the Legislature extends thereto, are vested in the Crown in right of Manitoba.
Ontario – Water Resource Act	2021	“waters” means a well, lake, river, pond, spring, stream, reservoir, artificial watercourse, intermittent watercourse, ground water or other water or watercourse;	29 (1) For the purposes of this Act, the Minister has the supervision of all surface waters and ground waters in Ontario.
Quebec – Act to Confirm the Collective Nature of Water Resources and to Promote Better Governance of Water and Associated Environments	2021		1. Being of vital interest, both surface water and groundwater, in their natural state, are resources that are part of the common heritage of the Québec nation.
New Brunswick – Clean Water Act	1989	“water” includes (a) flowing or standing water whether on or below the surface of the earth, and (b) the ice of any body of water;	9 The control of all water within the confines of the Province is declared to be, and to have been at all times past, vested in the Crown in right of the Province and no right to use or divert water can be acquired by prescription.
Nova Scotia – Water Resources Protection Act and Environment Act	2000’ 1994- 95	"water" means all surface water or groundwater and, for greater certainty, includes such water in the form of ice (Water Resources Protection Act) “water resource” means all fresh and marine waters comprising all surface water, groundwater and coastal water; (Environment Act)	S103 (of the Environment Act) Notwithstanding any enactment, or any grant, deed or transfer made on or before May 16, 1919, whether by Her Majesty or otherwise, or any possession, occupation, use or obstruction of any watercourse, or any use of any water by any person for any time whatever, but subject to subsection 3(2) of the Water Act, every watercourse and the sole and exclusive right to use, divert and appropriate any and all water at any time in any watercourse is vested forever in Her Majesty in right of the Province and is deemed conclusively to have been so vested since May 16, 1919, and is fully freed, discharged and released of and from every fishery, right to take fish, easement, profit à prendre and of and

			from every estate, interest, claim, right and privilege, whether or not of the kind hereinbefore enumerated, and is deemed conclusively to have been so fully freed, discharged and released since May 16, 1919.
Prince Edward Island – Water Act	2021	“water” includes liquid and frozen water in a watercourse or wetland or that is groundwater; “water resources” means groundwater, water in watercourses, water in wetlands or water derived from groundwater sources, watercourses or wetlands;	S3. The control of the water resources within the jurisdiction of the province is declared to be, and to have always been, vested in Her Majesty in right of the province, and no right to use, divert or withdraw water from the water resources can be, has been, or ever could have been, acquired by prescription.
Newfoundland – Water Resources Act	2017	"body of water" means a surface or subterranean source of fresh or salt water within the jurisdiction of the province, whether that source usually contains liquid or frozen water or not, and includes water above the bed of the sea that is within the jurisdiction of the province, a river, stream, brook, creek, watercourse, lake, pond, spring, lagoon, ravine, gully, canal, wetland and other flowing or standing water and the land occupied by that body of water; "water" means all water located in or derived from a body of water; "water resources" means all bodies of water within the jurisdiction of the province; S6 A reference in this Act to surface water shall be considered to include a reference to groundwater.	9. (1) The property in and the right to the use and flow of water in a body of water in the province are for all purposes vested in the Crown, and a right to divert or use water or a body of water shall not be acquired by prescription.
Yukon – Waters Act	2003	“waters” means any inland water, whether in a liquid or frozen state, on or below the surface of the land.	3(1) The Commissioner has the administration and control of all rights in respect of water in Yukon...
Northwest Territories - Northwest Territories Act	2014	waters means any inland waters — whether in a liquid or frozen state — that are on or below the surface of lands that are situated in the onshore.	52 (1) All rights in respect of waters belong to Her Majesty in right of Canada. 52 (3) The Commissioner has the administration and control of all rights in respect of waters and may exercise those rights or sell or otherwise dispose of them and may retain the proceeds of the disposition.
Nunavit – Waters Act	2014	"waters" means water under the administration and control of the Commissioner, whether in a liquid or frozen state, on or below the surface of land.	2(2) This Act applies to the use of waters and the deposit of waste in waters.