

Book Review

Denying the Source, The Crisis of First Nations Water Rights,

by Merrell-Ann Phare

Merrell-Ann is a Canadian lawyer and author. She was also a founding Executive Director of the Center for Indigenous Environmental Resources, in Manitoba. In addition, she was a former Chief Negotiator with Government of the Northwest Territories in the negotiation of transboundary water agreements in the Mackenzie River Basin and in negotiating national and territorial parks. She has also worked to help First Nations across Canada with numerous environmental issues.

It is no longer a secret that many Indigenous communities in Canada experience a crisis in potable water access of some form. Their widespread lack of access to safe water receives ongoing national media attention, and yet there is little significant progress to address the causes of this national embarrassment remains. Indigenous communities tend to be omitted, or given lip-service, from the decision-making process, at all levels of municipal, provincial and federal governments. The province's view is that they own the water resources within provincial boundaries, resulting in Indigenous people having little input into how waters are used. Provincial laws do not recognize First Nations. All the while, demands for access to water resources that Indigenous people depend upon are increasing from the sectors of oil and gas, mining, ranching, farming and hydro-development, of which all require vast quantities of water, and each having its own negative influences. Although, the Canadian Courts have been instrumental to have clarified that Indigenous people have numerous rights to land and natural resources, including the right to be involved in decision-making, getting these rights remains a significant challenge.

Within the prologue of the book, the author highlighted the importance of the 2002 out-of-Court settlement with the Province of Alberta and the Federal government pertaining to the Piikani (Peigan) First Nations in SW Alberta. The out of Court settlement was essentially an admission of guilt by the governments that they did not adequately consult, nor accommodate the First Nation regarding the building the 1986 Oldman River dam, within their traditional territory. The Alberta government's policy on water rights was structured for 'first in-line' rights, which is still common in many jurisdictions in Canada. Merrell-Ann also clarified the important terminology with the title of Indigenous People, referring to this term as representing collective communities as a Nation with powers of self-determination, whereas the term Aboriginal refers to the legal label imposed on them and three separate distinctions of First Nation, Metis and Inuit. The author wrote about the importance of Traditional Ecological

Knowledge and that this valuable information needed to be embraced, collected and used in decision-making. She also wrote that water is broadly defined as all forms and tied to ecology.

Some inconvenient water truths were then revealed, by Merrell-Ann Phare, about the national Indigenous water tragedy on reserves. At that time in 2009, there were more than 110 First Nations communities are under water advisories, with some communities not able to drink their water for over 10 years. Sadly, in 2016, the situation of water advisories has not improved for First Nations. According to Phare, it was next to impossible to consider a situation where non-aboriginal Canadians would be exposed to such similar water conditions and thus clearly a double standard. The author also reported on the misconceptions of abundant federal funding for Indigenous communities, revealing that audits have indicated that only 65% of allocated budget are actually transferred to Indigenous administrations.

The history made with Indigenous people was at the core of the current problem. Here, the Canadian legal framework (and lack of legal framework for Indigenous people) was explained by the author. Phare commented, how the *Canadian Constitution (1887)*, which created Canada as a country, never mentioned the word 'water' or even the word 'Indigenous', but most devastating was how the Constitution stated, that 'Indians and reserves' were strictly under federal responsibilities and thus wards of the State. That past omission had resulted in a policy vacuum for Canada's water resources and Indigenous peoples. Phare also wrote, of how today, Canada still has no current national water policy, no enforceable standards for drinking water quality, no national policy of minimum standards on minimum flows.

In 1982, Canada took an important and positive turn towards Indigenous peoples through Section 35 of the *Constitution Act (1982)*, where Aboriginal rights to title and treaties were recognized and affirmed for the Metis, Inuit and First Nations. This recognition also meant the Indigenous people could now seek reconciliation of the past wrongs and finally have a seat at the proverbial table. However, as Phare wrote, the struggles remain as these Indigenous rights were really only recognized through a series of Court challenges and legal case law decisions. She referred to important game-changer stories and names like, Calder, Sparrow and Van der Pett case, of which these Court decisions established legal precedence to support pre-existing rights and to assert that these rights were never extinguished by the provinces.

Despite s.91(24) of the *Constitution Act (1867)*, giving fiduciary responsibilities over Aboriginal peoples. Phare wrote, that the same federal government is now their biggest opposition in the Courts and also how Canada's refusal to sign the UN Declaration on the Rights of Indigenous Peoples (2007) was so tragic. Indigenous rights should not be determined and challenged in the Courts, wasting money and time, wrote Phare.

What are water rights, asked the author, she stated that Indigenous water rights are really about the right to use water and described four source of these rights, There are some key points around this. 1) Inherent rights that were never given up, but remain very contested, as they

contrast Provincial powers and policy, 2) Protectionism of “necessarily incidental” resources that allows one to even exercise that right. This concept opens a Pandora’s box, as to what are exactly all these proxies of associations? Again, this is at odds of the Provinces, because they manage water for their own benefit, and not Indigenous peoples. Phare asserted, that this makes for an ethical argument of how water management approaches should be with those who are at the most at stake to lose. 3) The precedence made from the 1908 Winters doctrine, a legal judgment from Montana, USA. The Winter’s doctrine stated that Indigenous reserve lands include water rights by default. The Judge of the day, disagreed with the Plaintiff farmers, who claimed that they had prior rights because of the commons rule, “first in line – first in right”. The American Judge ruled that Indigenous peoples had a prior water right reserved in treaty. This judgement stands today, reaffirmed by the US Supreme Court. Phare then asserted, the key elements of the Winter doctrine, that the Canadian government could benefit from, were Indigenous water rights were “implied rights” and it entitled the community to the quantity of water needed for their purpose on reserve lands, i.e., irrigation. The water can be from outside the reserve, and the Case law precedent has never been appealed and remains entrenched, despite State angst.

Moving into the Future, Merrell-Ann Phare asked, who will make the hard decisions and how will Indigenous people find a needed balance (socio-culture, political, economic) in dealing with these water rights, especially as there are increasing competition among scarce resources. Fortunately, the Canadian Courts have been critical of the government’s so called plugging-the-system approach with decision making around Indigenous peoples. Phare said, that the Courts are deciding more in-favor judgements for Indigenous groups. Merrell-Ann became personal with the reader at this late stage of the book. She admitted that she was personally frustrated by the federal government disrespect shown to Indigenous peoples, by their not living up to their fiduciary obligations. She then identified a few of the main struggles that Indigenous people have faced in trying to have influence with these rights. These challenges were that rights are determined by agencies who already have rights and are reluctant to share. In addition, if your world view conflicts with the commons, then one is already at a disadvantage. Only humans have rights, which discredit Indigenous laws and sets up a clash of cultures.

The author introduced and expanded on the attributes of the Indigenous laws and promoted these attributes as a possible solution to the water problems. She reminded the reader about aboriginal sacred ethics and value to land and water and that indigenous people learn and think differently from non-indigenous people, using the four the attributes of the body, spirit, heart and mind. Indigenous peoples have an inherent obligation to be stewards of the land and water into the future or for at least 7 generations. Indigenous values come with a strong association with place, interconnections, mutual dependence and a need to share. Indigenous laws include decision-making based on a greater good for all.

Phare used a quote from acclaimed Canadian author, John Raulston Saul, to say there is “little political will”, to really change the status quo in dealing with Indigenous peoples. She used the example of how the government has not lived up the recommendations of the past Royal

Commissions and Expert Panels. “*We all need to stop managing the problem and start solving the problems*”, she said.

The author concluded with the promotion that Indigenous peoples should be managing their own water system and resources, solving their own problems and embracing Indigenous laws. There is the strong need to resolve the long outstanding delay and complete the Canada Water Policy, a need to engage civil society and the public, and promote new water ethic with a shared vision. She hailed a new and more holistic approach is needed to manage water and Indigenous peoples. Within this new change, she said that more attention was needed for source water protection, multi-barrier approaches, watershed management, conservation, reconciliation and promotion for the principles of the Soft Path. She closed the section with the virtues of the Winter doctrine, as the way forward for Indigenous water rights in Canada. Further, a special final mention went to the successful treaty called the Navaajo-Gallup Water Supply Project, of which the Indigenous people have positively benefited this treaty...another example for Canada to look up to.

Critique:

Cons:

To be honest, I could not find much to be critical about, especially when Phare had six extremely reputable Canadian leaders dedicate her book, thus how can one find much criticism? However, a few comments on the con side would be the small size of the book. It begs the question, why was it so small to begin with? She could have continued to describe more relevant facts and information or perhaps made more of an effort to offer other success stories in achieving Indigenous water rights. The context of the book was heavy in legal doctrine and another perspective would have been interesting, such as, what were the perspective from an Indigenous water operator who struggled with the operations and maintenance of his water plant. Or, the perspective of a Band Manager who had struggled to find money to pay for crucial supplies of maintenance, or to find training to meet the needs of the staff. As much as I support the idea that Indigenous peoples should be manage their own water systems and solving their own problems and embracing Indigenous laws, she didn't mention the importance of operational capacities needed to undertake this kind of a paradigm shift. Without such capacity any transfer of responsibilities would eventually fail in short order. It would have been rather interesting to read an updated version of this topic, since the seven years in has been in publication.

Pros:

This book, *Denying the Source*, was an excellent and equally easy read and yet also very relevant. For such a small book, it had a big punch. The book offered further light on the Indigenous water rights issues and its association with the Canadian legal system. The book is yet another call-out to governments and industry to respect these water rights of Indigenous people and to create a new water ethic in Canada. Merrell-Ann wrote that, in order to understand

the tragic Indigenous water problems of today, one needs to understand the past decision-making by the fore fathers of Canada. Phare wanted Indigenous rights to be restored and relationship bridges to be restored. She mentioned of the uncertainty of who's really in control and for equity. Phare was able to explain a lot of information of complex legal ambiguity of Indigenous water rights into an informal and meaningful way to understand her message. She used relevant facts and case law for examples. There was often a sense of urgency and compassion in her writing, while ideas for change were presented. She expands a little on the threat of climate change and its impacts. Phare clearly explained the crucial importance and need for Indigenous peoples' effective participation in the decision-making processes, especially in matters related to the ownership, control and use of water found in their territories. The ongoing denial of Indigenous peoples' inherent water rights since colonization up to the present, is also common experience of most Indigenous peoples in various parts of the world. Phare effectively documented how the water rights of Aboriginal peoples were being violated and she provided helpful examples of past negotiations on water issues between Indigenous peoples, both in Canada and the US governments, which she really hoped others can learn from. In addition, the six dedications inside the book jacket, from leading water experts, were most impressive, and certainly gave significant clout to the credibility of the book and the need to pay attention to the messages within. The paraphrased words of Justice Murray Sinclair were most poignant, namely, that if society ignores this Indigenous water issue and the arguments in Phare's book, then it does so at its own demise.

References:

Phare, Merrell-Ann S. (2009) " Denying the Source - The Crises of First Nations Water Rights" pp. 1 - 99. Rocky Mountain Books: Vancouver BC.

Watersheds 2016, 2013, Speakers Bio.

<https://watersheds2016forum.wordpress.com/speakers/merrell-ann-phare/>