# THE BLUE PAPER: WATER CO-GOVERNANCE IN CANADA

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## EXECUTIVE SUMMARY

Everyone and everything needs water to survive. It is an inescapable truth that connects all life. Because we are all connected, we must work together to ensure that water resources are protected and shared equitably for humanity and the environment for present and future generations. Our water governance systems must respect this basic law of nature or we risk our own health and wellbeing.

Good water governance regimes reflect this reality. Criteria for good water governance include, coordinated leadership, accountability and transparency, fairness and equity, resilient institutions, rational regulation and enforcement, and an integrated approach.

Yet Canada's water governance scheme is fractured, inequitable, unaccountable, and weak. The failure to engage Indigenous peoples in water governance is particularly problematic, because their participation in a nation-to-nation relationship is a precondition to good water governance. By failing to accommodate the basic truth of our collective reliance on water, Canada's water governance system is ultimately ineffective and unsustainable. As a result, Canada's water future is in peril. A new water governance scheme for Canada is essential to our collective health and well-being, and to accomplish that Canada needs a new relationship with Indigenous peoples.

This paper takes a critical look at the state of water governance in Canada with specific attention to the participation of Indigenous peoples. Criteria for good water governance are identified and Canada's performance is judged against them, concluding that recognition of Indigenous rights is a necessary precondition to good water governance. Examples of Canadian and international water regimes that are inclusive of Indigenous peoples are examined in light of these criteria. Drawing from these examples, a series of options for a new regime are presented. The paper concludes with general recommendations for power and resource redistribution between Canada and Indigenous peoples and specific proposals for the creation of new independent watershed councils and national water authority that include Indigenous peoples as equals.

This paper sets a challenge for Indigenous peoples and other Canadians to develop a new water governance regime that fosters good water governance by respecting our common need for water. We need a more coordinated and inclusive national water governance scheme that both meets legal obligations owed to Indigenous peoples and honours our collective need to protect the water for other species and future generations.

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# Introduction

All life needs water to survive. This need for water is a basic law of nature that connects us all. Water governance regimes must respect our interconnected needs or risk threatening us all. As the Honourable Justice O'Connor stated when inquiring into seven deaths from ecoli in the drinking water of Walkerton, Ontario, "water is a mobile resource that does not respect political boundaries. One person's sewage disposal system may affect someone else's water supply. Simple geography argues for the joint management of a commonly shared resource" (O'Connor, 2002). By its nature water demands we work together.

A good water governance scheme takes this fundamental truth into account. Good water governance requires, among other things, fairness and equity (Hipel, Miall & Smith, 2011; Furlong, 2005), coordinated leadership (Furlong, 2008; IUCN, 2009) and an integrated approach (IUCN, 2009; World Water Council, 2012).

Yet Canada's water governance scheme is fractured, exclusionary, inequitable and ultimately ineffective and unsustainable (Hipel, Miall & Smith, 2011; Furlong, 2005; FLOW, undated). In part this is a result of Canada's failure to include Indigenous peoples in water governance. Just as water problems do not begin and end at the reserve boundary, neither do the rights of Indigenous people to participate in making decisions that have the potential to affect their legal rights, health and well-being, and exercise of their traditional cultures. As a precondition of good water governance Canada requires a new relationship with Indigenous peoples, embracing our mutual inter-reliance.

This paper will examine the state of water governance in Canada, particularly in relation to Indigenous peoples, and judge Canada's performance against generally accepted criteria for good water governance. Examples of existing Canadian and international water governance regimes will be examined for their potential adoption nationally. Building on these examples, three national water governance regimes are presented. Finally, recommendations are made for

moving to a more legitimate and effective water governance regime for Canada. This includes general recommendations for a more equitable distribution of power and resources with Indigenous peoples, as well as specific recommendations for the creation of watershed based governing boards and a national water authority.

This paper sets a challenge for all Canadians. It is intended to generate discussion and encourage action to improve water protection and conservation. We need a more coordinated and inclusive national water governance scheme that both meets legal obligations owed to Indigenous peoples and honours our collective need to protect the water for other species and future generations.

## Definitions and limitations

Water governance is the control of human activities as they affect water resources and aquatic ecosystems.

> Governance covers the manner in which *allocative and regulatory* politics are exercised in the management of resources (natural, economic, and social) and broadly embraces the formal and informal institutions by which authority is exercised (Global Water Partnership, 2003:7).
>
> Water governance is defined by the political, social, economic and administrative systems that are in place, and which directly or indirectly affect the use, development and management of water resources, and the delivery of water services, at different levels of society (UNDP Water Governance Facility, 2013a).

Like all issues of governance, water governance is about power and politics and thus reflects the power dynamics in play at the national, provincial, regional, and local levels (Batchelor, undated). Water governance determines "who gets what water, when and how… Water is power, and those who control the flow of water can exercise this power in various ways." (UNDP, Water Governance Facility, 2013b).

Co-governance is when two or more self-governing jurisdictions agree to share authority to make and enforce decisions. Co-governance is very different from co-management, which allows one jurisdiction to hold all decision-making power and merely delegate prescribed administration activities to the others. Decision-making power or authority means the legal capacity to make and impose choices. For example, the Minister of Aboriginal Affairs and Northern Development (AANDC) holds all decision-making authority under the provisions of the *Indian Act* because the Minister may disallow decisions of First Nations' Chiefs and Band Councils and impose his or her own.

Self-government means 'government under the control and direction of the inhabitants of a political unit rather than by an outside authority." (Merriam Webster, 2013). It includes control of territory and people. First Nations were self-governing at contact (Royal Proclamation, 1763; R v. Van der Peet) and have not surrendered or lost their right of self-government through legal means (United Nations Social and Economic Council, 2010). Thus, Canada's relationship with Indigenous peoples is lawfully one of nation to nation. In the context of water governance, self-government for First Nations would include the right to choose their own political representatives and to participate, as equals with the federal government, provinces, and territories in developing, implementing, and enforcing water use, protection, and conservation laws and policies. Co-

governance with First Nations means Canada must fully recognize rights to self-government of First Nations.

The term ‘Indigenous peoples’ refers to the collective of Inuit, Métis and First Nations peoples in Canada. First Nations is also a collective noun referring to the more than 60 nations of ‘Indians’, a misnomer dating from the days of Columbus.

The Canadian government divides First Nation people into ‘status’ and ‘non-status’ Indians. Those with status are subject to the provisions of the *Indian Act*. ‘Non-status’ First Nations people are those whose legal status as Indians has been stripped from them or their ancestors and who, until recently, were presumed to hold no Indigenous rights. A 2013 Federal Court ruling places these people under the purview of section 91(24) of the *Constitution Act, 1867* as “Indians”, but the implications of this ruling are as yet unclear (Harry Daniels, et al *v.* Her Majesty the Queen). There is a third category of First Nations people in Canada; those who are now self-governing and manage their own citizenship laws.

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In light of the complexities of the historic relationships and diverse legal arrangements between Canada and the Inuit, Métis, and status, non-status, and self-governing First Nations people, this paper will focus primarily on status First Nations operating under the *Indian Act*. That said, it is possible to apply some of the principles and recommendations of this paper to the general circumstances of Inuit, Métis, and non-status and self-governing First Nations, but their particular perspectives, values, laws, challenges, and needs will have to be addressed in detail elsewhere. In this paper, the term ‘Indigenous peoples’ will be used when speaking generally and use First Nations when there is a need to be more specific given the unique circumstances of various Indigenous peoples.

Reserve lands, treaty lands, and lands under Aboriginal title are all subject to various Indigenous rights and interests. Reserve lands are small parcels of land set aside for the sole use and benefit for status First Nations (*Indian Act,* section 18). Treaty lands are either those that are the subject of ‘historic’ treaties or of modern agreements. The ‘historic’ treaties, such as the Robinson Treaties in Ontario or the numbered treaties in northern Ontario and the Prairie Provinces, include agreements for land. There is a great deal of disagreement about the terms of these treaties, including a presumption by the Crown that the lands were entirely divested from Indigenous nations and a presumption by the First Nations that they are merely an agreement to share the land. The modern treaties are much more explicit in the legal tenure of the lands under the agreement, but each agreement is different in the amount of land and the status of different categories of land subject to Indigenous interests. Lands under Aboriginal title are those lands for which there is no treaty. This is a unique, or *sui generis*, land tenure interest recognizing the prior occupation of these lands by Indigenous peoples. Most of British Colombia, as well as possibly parts of the Atlantic Provinces, Ontario and Quebec remain subject to claims of Aboriginal title. The diversity of land tenure arrangements between the Crown and Indigenous peoples adds further complication to the governance of water in Canada, complications that will be best addressed by ensuring the full and effective participation of Indigenous peoples in water governance.

The problems with access to clean drinking water and proper sanitation on reserve remain ongoing challenges for First Nations, but these have been well documented elsewhere (Polaris Institute, 2008; Auditor General, 2011; AANDC, 2011). However, little has been written about the off reserve water rights and interests of First Nations and the challenge this creates for water governance in Canada (see however, Phare, 2009). Yet, as will be demonstrated below, the participation of Indigenous peoples is a precondition of good water governance. Therefore, the

primary focus of this paper is on the participation of First Nations in inter-jurisdictional water co-governance to challenge false preconceptions, improve respect for Indigenous peoples and their rights and encourage dialogue about how to do things better.

As a final caveat, this paper is limited to an examination of governance of fresh water. It does not address the marine environment, which likewise requires a co-governance regime.

**PART 1**

## What is good water co-governance?

"Poor governance leads to increased political and social risk, institutional failure and rigidity and a deterioration in the capacity to cope with shared problems" (Global Water Partnership, 2003: 9). The 6th World Water Forum, convened in 2012 at Marseille, France agreed that the worldwide "water crisis" is actually in large part a governance crisis (World Water Council, 2012). It is our collective failure to govern our own activities that has caused this crisis.

So what does good water governance look like? A review of work by Canadian and international experts makes clear it includes at least the following eight interrelated elements:

1. **Accountability**: To be accountable is to be "both responsible for something and liable for the failure to produce agreed upon and expected outcomes."(Furlong, 2005). To be accountable is to be predictable (Global Water Partnership, 2003) and transparent (Institute on Governance, 2003a). This paper will consider the degree to which water governance regimes are accountable to First Nations, either through direct First Nations participation or stemming from governance by the Crown in the interest of First Nations.

2. **Fairness and equity:** These are essential elements of social harmony and peaceful co-existence. Including multiple perspectives in governance regimes implies fairness because it gives voice to a various rights holders and enables policy adjustment to account for their needs (Furlong, 2005). Respect for the rule of law is also an element of fairness and equity (Institute on Governance, 2003a).

3. **Coordinated leadership**; Given the cumulative effects of human activity on water resources and the division of responsibility across multiple levels of government, avenues for effective communication, joint action and decision making across and within governments are critical to good water governance (Furlong, 2005; IUCN, 2009). Given Indigenous rights to self-government, Indigenous nations in Canada must be included to ensure all governments with jurisdiction over water are working together.

4. **Sound capacity** in water management practices and techniques is essential to ensure the safe operation of water supply and disposal systems (O'Connor, 2007). Capacity in this paper refers to not only financial resources but also the development of human capacity through education and training.

5. **Resilient institutions:** Building resiliency into our water governance and management system is prudent to allow the socio-ecological system to adjust smoothly to large disturbances (Homer-Dixon, 2006; Brandes & Maas, 2006). Our formal and informal institutions define our use of the water resources and serve as the connection between our social and ecological systems. (Herrfahrdt-Pahle & Pahl-Wosti, 2012). "Formal institutions are all kinds of legally binding norms, such as constitutions, laws, and policies in the political system (e.g., the governance structure), the economic system (e.g., property rights), and the enforcement system (e.g., the judiciary)… informal institutions include cultural norms, such as customs, traditions, and moral values—the socially shared rules that exist and are enforced outside of the formal governance structures" (Herrfahrdt-Pahle & Pahl-Wosti, 2012). As biological diversity builds natural resiliency, cultural diversity builds institutional resiliency. The inclusion of Indigenous laws, knowledge, culture and perspectives in water governance institutions will enhance our collective

resiliency. The participation of Indigenous Elders and other knowledge holders as experts, in addition and with equivalent status to the participation of 'western' scientists, will be essential to ensure this occurs.

6. **Coherent and effective regulation and enforcement**; Regulation and enforcement are primary tools of formal institutions to govern behaviour and these must be coherent and effective in achieving their anticipated objective (IUCN, 2009). Failure of the state to respect the rule of law generates unpredictability and inequity, which in turn creates political and social risk contrary to the objective of good water governance.

7. **Integrative approach** to water governance is the internationally accepted norm (IUCN, 2009; World Water Council, 2012). Integrated water resources management "is a process which promotes the coordinated development and management of water, land and related resources, in order to maximize the resultant economic and social welfare in an equitable manner without compromising the sustainability of vital ecosystems."(UNEP-DHI Centre for Water and Environment. 2009). Watershed, or sub-basin level management, 'soft path' which balances water needs with water supply (Brandes & Maas, 2006; Brandes & Brooks, 2007), and environmental water flow or 'e-flow', which includes accounting for the water needs of the environment (eFlowNet, 2011) are examples of integrative approaches.

8. **Respect Indigenous rights**; In the Canadian context this is a condition precedent to achieving the other conditions described above. For example, to be fair is to respect the rule of law, which requires respect for Indigenous rights. Or, to be resilient is to be inclusive of Indigenous cultures. The water governance system must serve as a bridge to and respect rights of self-government (Institute on Governance, 2003b) and rights to land.

"Good governance is a means of facilitating improved decision-making; improving the efficiency of management and water use, and improving government responsiveness." (Norman, et al, 2012: 6). Good water governance is a key condition of success to ensure everyone's wellbeing, contribute to economic development and keep the planet blue, but also to foster peace and stability (World Water Forum, 2012). The next section considers how Canada fares against this standard.

# Does Canada practice good water governance?

*Environmental State of the Waters*

One simple way to determine if Canada is practicing good water governance is to examine its success at water protection and conservation. While the perception of Canada is a land of bountiful and boundless water resources (Brandes & Maas, 2006), the reality is quite different (Hipel, Miall & Smith, 2011; Yale Centre for Environmental Law, 2012; Commissioner of the Environment and Sustainable Development (CESD), 2010). In particular, our ecosystem vitality is dangerously low – a harbinger of greater water stress in the near future (Hipel, Miall & Smith, 2011; Yale Centre for Environmental Law, 2012). A weakening fishery, climate change, and air pollution are the three principle encumbrances on our ecosystem health (Yale Centre for Environmental Law, 2012). All three are either signs of or contribute to poor water health.

The CESD stated in his 2010 report that the "quality and quantity of [Canada's] water resources are under pressure from a range of sources, including urban runoff and sewage, agriculture, and industrial activities. Other long-term threats include population growth, economic development, climate change, and scarce fresh water supplies in certain parts of the country." (CESD, 2010).

The current lack of long-term water quality and quantity monitoring at the federal level makes it that more challenging to define our circumstances (CESD, 2010). This situation has only gotten worse. For example in 2012, the federal government weakened the *Canadian Environmental Assessment Act*, removed key habitat protections from the federal *Fisheries Act*, repealed Canada's commitment to the Kyoto Protocol and removed thousands of water bodies from federal protection and oversight under the *Navigable Waters Protection Act*. In March 2013, the federal government announced it was cancelling funding for the experimental lakes research program, threatening the end to decades of ongoing research into the effect of various human activities on water quality and quantity (CBC, 2013a).

The consequences of human development on water quality and quantity are noticeable throughout much of Canada (Hipel, Miall & Smith, 2011). For example, the most recent report on the state of the Great Lakes indicates a new range of chemicals are now of concern, and a rise in surface water temperature and a decline in ice coverage indicates climate change is affecting the lakes (IJC, 2013; see also, Barlow, 2011). Lake Winnipeg continues to suffer from extreme eutrophication arising from human activity resulting in toxic blue green algae blooms (Lake Winnipeg Implementation Committee, 2005) and was named the most threatened in the world in 2013 by the Global Nature Fund (CBC, 2013b). The circumstances of other water bodies are only now coming to light, such as the impact of the oil sands development on Alberta lakes and the Athabasca River (Kelly, et al, 2013). Many northern lakes and rivers have not yet experienced the same development pressures and thus are faring better for the time being, but this may not last in light of climate change and if we fail to heed the lessons from development in the south.

Further evidence of Canada's generally poor environmental management is found in the state of Indigenous cultures in Canada. Partly as a result of colonialist and assimilationist policies (Royal Commission on Aboriginal Peoples (RCAP), 1996) but also partly as a result of the decline in ecosystem health, in particular the decline of biological diversity, Indigenous cultures are in decline (United Nations Environment Program, 1999; Wilson, 2009). Of particular concern is the loss of Indigenous languages (CBC, 2012). These languages contain the unique cultural perspectives of Indigenous peoples and their loss is blow to our collective resiliency and counter to good water governance.

*Legal context*

The legal context for water governance in Canada is complicated by the legal relationship between the Crown and Indigenous peoples. This section will focus on the legal authorities for water governance, the rights of Indigenous peoples, and the legal relationship between the Crown and First Nations with respect to water. As will be seen, a legacy of injustice and failure to respect the rule of law has harmed Canada's capacity to achieve good water governance.

Authority for water governance is a shared head of power between the federal, provincial, territorial, and Indigenous governments in Canada. There is no specific reference to water in the *Constitution Act, 1867*. Instead, the authority to govern water is embedded in various heads of both federal and provincial powers and in section 35 of the *Constitution Act, 1982*.

The federal government is responsible for federal lands and waters, including national parks, land and waters in the territories, boundary waters, inland fisheries, commercial navigation, and protection of river basins. The *Canada Water Act* provides authority to the federal government to govern inter-jurisdictional water bodies and establish necessary mechanisms to achieve this (Hipel, Miall & Smith, 2011; Hill, undated).

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The provinces hold authority over natural resources and jurisdiction for the management of provincial public lands, property and civil rights, and matters of a local or private nature (Hipel, Miall & Smith, 2011; Hill, undated). By the exercise of these powers, the provinces hold the greatest potential to influence water governance. These provisions provide authority over, among other things, water supply, pollution control, and hydroelectric development (Environment Canada, 2011). The territories hold delegated authority from the federal government to manage water resources.

The federal government, provinces, and territories share responsibilities for other issues, such as health and agriculture, which also have a bearing on water resources in Canada. There are various government departments or ministries at the federal, provincial and territorial levels whose mandate may directly or indirectly affect water. For example, at the federal level, at least five different departments are involved in water governance, including Health Canada, Environment Canada, Natural Resources Canada, the Department of Fisheries and Oceans, and AANDC.

The only mechanism available to Canada to coordinate on water governance at the national level is via the Canadian Council of Ministers of the Environment (CCME). Two committees of the CCME and a task group address water – the Water Management Committee, the Municipal Wastewater Effluent Coordinating Committee and the Water Quality Task Group. The purpose of the CCME, like the other Canadian Councils of Ministers, is to address issues of national importance and "to develop national strategies, norms and guidelines"(CCME, 2011). The CCME works on the basis of consensus, but relies on the good will of the governments involved to implement any agreements reached. Indigenous peoples are rarely invited to participate. The CCME developed a Canada-wide Strategic Directions for Water and a three-year Water Action Plan (2011-2014), (CCME, 2010, CCME, undated), but these lack the necessary elements, including financial commitments, to be effective.

The federal government also holds authority for "Indians, and lands reserved for the Indians" under section 91(24) of the *Constitution Act, 1867*. The *Indian Act*, first adopted in 1876, controls virtually every element of governance for status First Nations people. It accords to the

Minister of AANDC all authority to govern First Nations reserves, though the Minister has delegated some management authority to First Nation governments. For example, under the provisions of section 81(1) of the *Indian Act*, Band Councils may pass local resolutions to address, among other things, the construction, maintenance, and regulation of watercourses, ditches, public wells, cisterns, reservoirs and other water supplies, and the preservation, protection and management of fish on reserve. First Nations may also manage drinking water supply and delivery and waste water systems and treatment on reserve. In addition, some First Nations now operate under the provisions of the *First Nations Lands Management Act*, which provides a somewhat wider range of management authorities, including protection of the environment. Nevertheless, no matter the management responsibilities held by First Nations, the Minister retains ultimate governing authority.

The *Indian Act* is at variance with other parts of Canadian law and international law. It is an ongoing source of conflict between status First Nations and the Crown that is harmful to First Nations and Canadians as a whole. First, at international law, the minimum standard for relations with Indigenous peoples are set out in the *United Nations Declaration on the Rights of Indigenous Peoples*. This includes rights of self-government, and requirement for governments to obtain the 'free, prior, and informed consent' of Indigenous peoples prior to adopting legislation or regulation that may affect Indigenous rights and prior to development that will affect Indigenous lands, waters, or environment (UNDRIP, Articles 4, 19 and 32). Contrary to international law, Canada relies on the 'doctrine of discovery' to deny Indigenous rights and to substantiate its claims of sovereignty over Indigenous peoples and their lands and waters (Frichner, 2010; Watson, 2011). Canada has also relied on the doctrines of *terra nullius* and *terra nullus*, both meaning 'devoid of human beings' (Frichner, 2010:14) to deny Indigenous rights. These too have been discredited in international law.

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Canadian law and policy also suffer from internal inconsistency. First, as per the *Royal Proclamation, 1763*, legitimate Canadian control of land and people is predicated on the conclusion of treaties with Indigenous nations on a nation-to-nation basis. As noted earlier, lands under Aboriginal title have not been surrendered to the Crown, contrary to the requirements established by the Proclamation (Calder *et al v.* Attorney General of British Colombia, 1973). Thus, at least on lands subject to Aboriginal title, Indigenous peoples have a continuing legal right to govern their territory until a treaty has been concluded.

The second internal conflict is between section 91(24) and section 35 of the Constitution, although Section 35 of the *Constitution Act, 1982* recognizes the inherent and treaty rights of First Nations including the right to self-government as well as rights to land, to hunting and fishing, and the practice of traditional ways of life (Imai, 2010). However, section 91(24), which predates section 35, has been interpreted as establishing a relationship of fiduciary and ward between Canada and Indigenous peoples (Guerin *v.* R., 1984) – not self-governing equals. Inherent in this fiduciary relationship is a power imbalance "such that one party is at the mercy of the other's discretion" (Guerin *v.* R., 1984). But the fiduciary duty has been defined as "trust-like", and "imposing restraint on the exercise of sovereign power", though sadly too often "honoured in the breach" (R.*v.* Sparrow, 1990).

The actions of the federal government must be tempered by the duty of "utmost loyalty" to Indigenous peoples (Guerin *v.* R., 1984). The federal government's authority to govern is also tempered by section 35 of the *Constitution Act, 1982*, "[F]ederal power must be reconciled with

federal duty" (Sparrow *v.* R., 1990). The Crown is legally bound to ensure the unique class of rights held by Indigenous people is given priority and any infringement of these rights must be justified (Sparrow *v.* R., 1990). One element of justification is whether the First Nation peoples affected have been consulted and accommodation made to minimize any impact (R.*v.* Sparrow, 1990; Haida Nation *v.* British Colombia, 2004). This provision too, is more frequently honoured in the breach. The courts have strived to give both Constitutional provisions affect, as they must in Canadian law, but this has been at the expense of Indigenous rights. See for example the comments of Justice McLaughlin in dissent in R. *v*. Van der Peet, where she concludes the Chief Justice's findings are "more political than legal" in justifying infringement of Indigenous rights (R.v. Van der Peet, 1996: para 302).

The implications of section 35 of the Constitution for water governance are significant, though full of uncertainty at present, as the definition and observation of Indigenous rights is the subject of much litigation. From the Government of Canada's perspective it remains an open and hotly contested question whether First Nations hold inherent, treaty, or other rights directly or indirectly to water or have a role to play in water governance. From the perspective of First Nations, lands and waters under treaty were not ceded or surrendered, but were to be shared, and lands under Aboriginal title remain under First Nations jurisdiction. First Nations seek and have a legal right, at least in international law, to expect a nation-to-nation relationship with Canada. The degree to which other governments in Canada are prepared to acknowledge and respect these rights has been a long-standing point of contention.

The courts have continuously urged reconciliation between Indigenous peoples and other Canadians through dialogue and negotiation as the only peaceful way forward.

In light of this general uncertainty respecting the limits of Canadian sovereignty and First Nations rights, the courts have urged Canada and First Nations to negotiate mutually acceptable agreements setting out their respective rights and responsibilities. Modern comprehensive agreements with the Inuit and some First Nations are examples of this approach. The courts have continuously urged reconciliation between Indigenous peoples and other Canadians through dialogue and negotiation as the only peaceful way forward (Delgamuukw *v.* British Colombia, 1997). This includes the reconciliation of cultures, laws, rights, and responsibilities.

Understanding and finding ways to respect Indigenous laws is essential to the task of reconciliation. It will be a necessary element of any co-governance regime to find common ground between Canadian and First Nations' laws if we are to move forward together with mutual recognition, mutual respect, sharing and mutual responsibility (RCAP, 1996). Some of this work was begun by the Law Commission of Canada, disbanded by the federal government in 2006, and with the efforts of Indigenous legal scholars, such as John Burrows and Sakej Henderson (Law Commission of Canada, 2006; Burrows, 2006; Henderson, et al, 2000). Much more must be done, however, to describe, compare and contrast these laws with Canadian laws and to make joint decisions about the best way forward together.

Legally speaking, Canada is a multi-juridical legal system incorporating the British common law, French civil law, and Indigenous traditional legal systems, though the later have been little acknowledged or respected by Canada. Indigenous traditional laws are the social norms and mores by which Indigenous peoples in Canada historically and, to some degree, continue to govern themselves (Chartrand, 2005). Indigenous laws, like Canadian laws, address a wide variety of issues from criminal matters, to family issues, to the distribution of land and resources (Chartrand, 2005). However, "the proper place of Indigenous peoples is not merely as subjects of either the common law or civil law legal system, with their Indigenous legal traditions treated as insignificant, irrelevant and unenforceable…true justice demands that Canada's juridical state

make room for Indigenous legal traditions and that these traditions be acknowledged along with the common law and civil law systems" (Chartrand, 2005:5).

While there is great diversity amongst Indigenous peoples and their legal traditions, it is possible to discern some elements commonly shared. These include an oral tradition, with legal dictates and consequences found in stories and fables (Borrows, 2004; Henderson, Benson and Findlay, 2000). Elders are repositories for these laws. Offerings and songs are common means to fulfill responsibilities (Anderson, 2010). Obligations to care for the land and water are frequent themes in Indigenous laws as are respect for the spirit of people, land, water, flora and fauna, based on a perspective of interconnectedness between all things. (Assembly of First Nations (AFN), 2012; Anderson, 2010; Wilson, 2009). Taking too much or wasting what was taken is a common approbation across Indigenous cultures (Wilson, 2009). In the context of water governance, women were frequently appointed responsibility in Indigenous cultures to care for the water, with particular duties and authorities to fulfill their function as life givers (Anderson, 2010). Often described as a sacred duty derived from the Creator, First Nations generally see it as their obligation to protect water for present and future generations (AFN, 2012; Chartrand, 2005).

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First Nation Peoples have been forcibly divorced from their traditions for several generations as a consequence of residential schools and other mechanisms of assimilation (RCAP, 1996). As a result, these traditional laws have been undermined and maligned. Many First Nations people are working to reconnect with their traditional laws and to revitalize their place in society.

As part of this effort, the Assembly of First Nations (AFN) has developed a draft *Strategy to Protect and Advance Indigenous Water Rights*, which reinforces the historic and legal rights of First Nations to water. As part of the strategy, First Nations hope to develop a watershed approach to water use, protection and conservation and seek to develop a national water policy (AFN, 2012).

*Political Context*

As is evident from the previous discussion on the legal context, First Nations – Canadian relations is as much a political issue as it is a legal one. It is a rare government in the history of Canada that has demonstrated its willingness to respect the rights of First Nations and work with them as partners. Government policy has historically been racist, colonialist, and assimilationist (RCAP, 1996; Canadian Federal Government, 1998). It remains so today (Human Rights Watch, 2013).

Canada has long pursued a policy to exclude Indigenous peoples from decision making, instead treating Indigenous peoples as wards of the Crown, incapable of managing their own affairs. This again points to the inequitable power dynamic, manifest as a 'tyranny of the majority'. Though "rule by a majority or dominant culture may be democratic, it is not always equitable. If indigenous peoples' interests consistently fall on deaf ears and the views of a differently-opinioned dominant culture consistently prevail, then their rights are "insecure": (Firestone, Lily, & Torres de Noronha, 2005:223). Recall, however, that fairness and equity are fundamental to good water governance.

Water governance is really about power. The Royal Commission on Aboriginal Peoples (RCAP) report in 1996 called for the "rebalancing of political and economic power between Aboriginal nations and other Canadian governments" (RCAP, 1996: Vol. 5). RCAP also called for a fundamental reallocation of lands and resources. The federal government has been slow to act on the recommendations of this report. Most have simply been ignored (AFN, 2006). Canada is prepared to negotiate limited observation of Indigenous inherent rights to self-government (AANDC, 2010), dividing water governance into three separate governance categories. Under the Inherent Rights Policy, natural resources management, fishing, and local land management on First Nations lands are considered, 'internal to the group, integral to its distinct Aboriginal culture, and essential to its operation as a government or institution', environmental protection and assessment and pollution prevention maybe the subject of Indigenous laws, but federal or provincial laws are paramount. The federal government is also open to considering fisheries co-management, but again, federal or provincial laws would prevail if there were a conflict. Other issues, including navigation and shipping, are considered beyond the scope of First Nations governments. Here again there is evidence of Canada's disjointed approach to water governance.

Water governance is really about power.

Further evidence of the current administration's lack of respect for the rights of First Nation Peoples is evident in its position on the *United Nations Declaration on the Rights of Indigenous Peoples*. Canada was one of only four countries in the world to vote against its adoption in 2007, only agreeing to it in November 2010, though not in its entirety (KAIROS Canada, 2010). There is precious little evidence that it has had any impact on federal law or policy to date (Grand Council of the Cree, et.al, 2012)

Ongoing disregard for First Nations rights and interests has resulted in a flurry of litigation and public protests. For example, the federal omnibus legislation that amended the federal *Navigable Waters Act*, removing protection from thousands of water bodies in Canada, was a key motivator for the Idle No More campaign that began in December 2012 (IdleNoMore, 2013). There is an accountability and transparency deficit frustrating good relations between Indigenous peoples and the Crown and undermining efforts of good water governance.

An additional political challenge is the failure to adopt integrative or holistic water governance structures. Water governance remains splintered along jurisdictional lines. Though Canada claims to pursue a policy of integrated watershed management (Environment Canada, 2010), the challenge has been in creating a workable regime (Polis Project, 2005).

*Social, Cultural, and Economic Context*

Generally speaking, the social, cultural and economic interests of non-Indigenous Canadians are given precedence over those of First Nation peoples in Canada. First Nation Peoples in Canada have been subjected to centuries of assimilation (RCAP, 1996). The inequitable power balance expressed through failed colonial policies have resulted in nationally embarrassing statistics regarding lower education attainment (AFN, 2011), higher percentage of child poverty (MacDonald & Wilson, 2013), higher rates of incarceration (AFN, 2011) higher incidence of suicide (AFN, 2011), and poorer health outcomes experienced by First Nation communities (AFN, 2011). Income disparity between Indigenous peoples and other Canadians (Wilson & MacDonald, 2010) and the disparity between funding for other Canadians and funding by the federal government on Indigenous peoples (AFN, 2005) are also the result of the systemic bias against First Nation Peoples that plagues Canadian society.

It is not only First Nations people who experience the consequences of these policies, however. The financial cost of the status quo is undermining the country as a whole. The Auditor General and RCAP have both noted the costly toll on Canadian and Indigenous peoples resulting from a dysfunctional relationship. This includes financial mismanagement and poor administration by successive federal governments, resulting in waste, duplication, and lost opportunity (Interim Auditor General, 2011; RCAP, 1996).

RCAP also documents some of the social costs – the cost of economic disadvantage and the cost of remedial programs to fix the problems. The cost of forgone production arising from the poor education and underemployment of Indigenous peoples was estimated at $5.8 billion in 1996, almost 1% of GDP. The cost of remedial programs was estimated at $1.7 billion for the same year, thus a total loss to the Canadian economy in 1996 of $7.5 billion, or over $10 billion per year by 2013 when adjusted for inflation. RCAP warned that, "unless tangible progress is made soon, there is a serious risk of major conflict, with high human and economic cost, much higher than the cost of the status quo discussed here" (RCAP, 1996). Sadly we have seen this prediction come true time and again with protests and loss of life including at Oka, Ipperwash, and Caledonia. These costs are borne by us all and undermine our collective capacity to build a just and peaceful society, essential for good water governance.

Addressing the economic challenges facing First Nations is not simply a matter of throwing more money at the issue (AFN, 2013). Education, structural fairness, social justice, and an end to systemic racism must be part of the package.

It is possible to conclude that Canada gets a failing grade on the simple and direct measure of whether Canada's water governance regime is effective in achieving water protection and conservation. As a result of the decline in overall water health, ecosystem health generally is likewise in decline. We see a decrease in biological diversity in Canada, including aquatic diversity and this undermines the retention of Indigenous cultures. The loss of Indigenous cultures undermines our formal and informal institutional resiliency. Lack of accountability, lack of fairness and equity, and lack of co-ordination among different levels of government are recurring problems in water governance in Canada (Furlong, 2005). Splintered, weak, unfair, inequitable, ineffective, unaccountable, and lacking in capacity, resiliency, and an integrative approach, Canada's water governance scheme has allowed unfettered development to run roughshod over Indigenous rights and brought our ecosystem health to dangerous new lows.

Defining a new system of water governance requires a stripping away of unilateral decision-making, majority rule in the sole interest of the majority, First Nations as wards of the Crown, and exclusivity instead of sharing. Canada must do better.

# Part 2

# Examples

If Canada's water governance structures needs redress, are there examples of good water governance that also ensure the inclusion of Indigenous peoples? This next section looks at six examples where domestic and international governments have endeavoured to coordinate governance of water use across jurisdictions and evaluates them for potential adoption nationwide in Canada. The water governing bodies considered here will be judged against the criteria for good water governance described earlier. These examples have been chosen because they already include Indigenous peoples to some degree. A brief description of each example will be provided, followed by a chart analyzing their suitability for adoption for national water governance by Canada.

*Fraser Basin Council*

The Fraser Basin Council is a non-profit organization that endeavours to coordinate activities by federal, provincial, municipal, and First Nations governments affecting the health of the watershed. It includes representatives from civil society and the private sector on its 36 member Board of Directors. One individual from each of the eight First Nation language groups that inhabit the area participates on the Board. The Board of Directors oversees implementation of their *Charter for Sustainability*, its foundation document, supported by an Executive Director and staff in five regional offices (Fraser Basin Council, 1997). The Council has no regulatory or enforcement authority itself, but through dialogue and consensus building it hopes to influence decision making by its government members. The *Charter for Sustainability* recognizes Indigenous rights and acknowledges the importance of Indigenous culture to the future of the Fraser River as well as the need to build relationships between Indigenous peoples and other communities for the betterment of all.

*Mackenzie River Basin Board*

The Mackenzie River Basin Board (MRBB) was established in 1997 by agreement between the federal government, Saskatchewan, Alberta, British Columbia, Yukon and North West Territories (Mackenzie River Basin Transboundary Waters Master Agreement). It is not a regulatory or licensing body but it may influence regulatory decisions by providing information, influencing planning, environmental impact assessments, and ministerial reviews, and appearing as a friend of the tribunal in federal, provincial or territorial public hearings. A board of directors manages the Board and includes representatives from each of the participating provinces and territories and one representative from each of Environment Canada, Health Canada and AANDC. Indigenous governments do not participate, though one representative from each province or territory, agreed upon by all Indigenous organizations in that province or territory, may participate on the board at the pleasure of the Minister (Mackenzie River Basin Transboundary Waters Master Agreement, 1997). Among other things, the board, provides a forum for communication among six jurisdictions, makes recommendations, and submits a report on the status of the aquatic ecosystem every five years. Financial support comes from the federal, provincial and territorial governments involved. The MRBB has a mandate to incorporate traditional knowledge and values of Indigenous peoples, but beyond the participation of Indigenous peoples on the board and the provision of culturally appropriate communications there is no explicit mechanism to

support this (MRBB, 2011). The Master Agreement does not explicitly recognize Indigenous rights, but it does include a non-derogation clause.

*International Joint Commission*

Canada and the United States have a long established mechanism for addressing boundary waters. The International Joint Commission (IJC) was established in 1909, pursuant to the *Boundary Waters Treaty*. Six commissioners are appointed, three each from Canada and the United States. The IJC addresses issues regarding water use, water pollution, air pollution that affects water quality, and water levels. The commissioners are responsible for impartial review and decision-making to prevent or resolve disputes. A small secretariat and various boards of experts support their work. Funding is from the federal governments of Canada and the United States. The Commission may take evidence on oath and compel the attendance of witnesses. Decisions of the IJC, based on a simple majority, are binding on Canada and the United States. If the IJC is not able to reach agreement, the matter is referred to the federal governments for diplomatic dialogue or to an umpire whose decision will be final. First Nations do not participate on the IJC, nor are there provisions for the inclusion of Indigenous knowledge, although the IJC does invite input from First Nations from time to time. In 2001, the *International Boundary Waters Act* was amended to include a non-derogation clause so that the Act could not be construed to abrogate or derogate from the protections provided under section 35 of the Canadian Constitution.

*Yukon River Inter-Tribal Watershed Council*

The Yukon River Inter-Tribal Watershed Council is an example of an organization that was developed solely by Indigenous Peoples. It is international in nature, as it deals with the Yukon River watershed that crosses the international boundary between Alaska in the United States and the Yukon Territory in Canada and because it involves the national governments of many different Indigenous peoples. It is a non-profit organization and relies on donations or government-funded proposals. The Board of Directors is selected from members present at their bi-annual summit, for a total of 7 representatives of Alaska Tribes and 7 representatives of Yukon self-governing First Nations. A secretariat is responsible for a range of activities including measuring and monitoring activities, education, stewardship, preservation, restoration, and capacity building and oversees day-to-day work. The Council has no regulatory or enforcement authority. Using a watershed based approach the Council relies on both Indigenous and western science. Indigenous knowledge is a key element of its work and the Council has adopted an Indigenous Research Paradigm. Decision-making is on a consensus-based model.

*Australia National Water Commission and National Water Initiative*

Like Canada, water in Australia is a matter of shared jurisdiction by the states, territories and national government. A National Water Commission was established in 2004 consisting of six independent commissioners selected by the states, territories and federal government. The federal government appoints an additional member of the Commission to serve as Chair. The Commission is a purely advisory body responsible for assessing, auditing and monitoring water reform in Australia. The National Water Initiative, also adopted in 2004, commits the states and territories to among other things, include Indigenous representation in water planning, take account of Indigenous rights to water, incorporate Indigenous social, spiritual and customary objectives and strategies, and take into account water allocated to native title holders for traditional cultural purposes (Government of Australia, 2004; National Water Commission, 2011). A First People's Water Engagement Council was established in 2010 when the biennial

assessment of the National Water Commission found it was rare for Indigenous Peoples' requirements to be included in water plans and most jurisdictions were not adequately engaging Indigenous Peoples in water planning processes (National Water Commission, 2011). The First People's Water Engagement Council provides advice to the National Water Commission on national water issues. Members of the Council are appointed by the Chair of the National Water Commission and most currently are Indigenous people.

*Waikato River Authority, New Zealand*

In 2009 and 2010, the New Zealand Government signed co-management and co-governance agreements with a number of Maori *iwi*, or nations, for the protection of the Waikato River. The agreements were confirmed in the *Ngati Tuwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010*. The agreements acknowledge the traditional relationship between the Maori in the river and the "deeply felt obligation of the [Maori *iwi*] to restore and maintain the waters that flow into and form part of the" river, and that this is a "significant and enduring" relationship (Government of New Zealand, 2010). The Deeds contain a lengthy description in Maori of the significance of the river to them. The purpose of the agreements is to restore and maintain the quality and integrity of the Waikato River for present and future generations and the care and protection of the *mana tuku iho o Waiwaia* or the "ancestral authority and prestige handed down from generation to generation in respect of *Waiwaia*…and *Waiwaia* refers to the essence and wellbeing of the Waipa River; to [the] Maniapoto *Waiwaia* is the personification of the waters of the Waipa River, its ancient and enduring spiritual guardians" (Government of New Zealand, 2010). The Waikato River Authority was established under these agreements and legislation to co-manage and co-govern to achieve restoration and protection of the river, promote an integrated, holistic and coordinated strategy, and fund rehabilitation projects.

Funding comes from the New Zealand Government and includes a NZ$20 million endowment to a college trust, NZ$50 million for initiatives to restore and protect the river, NZ$1 million per year for 30 years to support Maori participation in the co-governance arrangement, and NZ$7 million for 30 years to a clean-up fund for the river. The Authority is trustee for the clean-up fund.

Ten members, five appointed by the Crown and one appointed by each of the five *Iwi* signatories of the agreements compose the Authority. Two co-chairs, one a Crown appointee and one an *Iwi* appointee, manage the Authority, but the Authority is independent from either the Crown or *Iwi*. Decisions are to be reached using the "highest level of good faith engagement" and consensus decision-making. If the members of the Authority are unable to reach a decision the matter is referred to the Minister of the Environment and a person nominated by the *Iwi* who make a recommendation back to the Authority. If the Authority cannot resolve the matter within 20 days of receiving the recommendation the recommendation becomes binding on the Authority. Any agreements of the Authority are binding on both the Crown and the *Iwi* and the parties agree to not undermine the decisions. The New Zealand government undertakes to provide assistance to, and to work with, [the Maori Iwi] to assist the restoration of their mana whakahaere [autonomy and self-determination]" (New Zealand, 2010).

## TABLE 1: Comparison of Water Co-Governance Regimes

| Criteria of good water governance | Fraser Basin Council | Mackenzie River Basin Board | International Joint Commission | Yukon River Inter-Tribal Watershed Council | Australia National Water Commission | Waikato River Authority |
|---|---|---|---|---|---|---|
| **Accountability** | No - unaccountable to First Nations – accountable to its board of directors. | No - unaccountable to First Nations – accountable to federal, provincial and territorial governments. | No – unaccountable to First Nations. | Yes – answers to citizens of the First Nation members via a board of directors | No - accountable only to federal and state governments. | Yes – via Indigenous government participation Nation to nation relationship |
| **Fairness and Equity** | No – dominated by non-Indigenous governments and civil society participants | No – dominated by federal, provincial, territorial governments. | No – no official role for Indigenous people. | Partially - Solely operated by Indigenous peoples but does not include non-Aboriginal governments. | No – dominated by officials appointed by state, territorial and federal governments. | Yes – equal participation of New Zealand Government and Maori *Iwi* |
| **Coordinated Leadership** | Partially – provides a forum for discussion across governments, but no decision making authority | Partially – coordinates non-Indigenous governments but does not coordinate with First Nation governments outside of those operating under self-government agreements. | Partially – coordinates Canada and US actions but does not coordinate with First Nation governments. | Partially – coordinates Indigenous leadership but not coordinated at the governance level with non-Indigenous governments. | Partially – coordinates non-Indigenous governments but does not coordinate with Indigenous governments | Yes – coordinates New Zealand government and Maori *Iwi* |
| **Sound Capacity** | Yes – through sharing information, research, etc. | No – has no mandate for capacity building for First Nations. | No – no specific mandate for capacity building for First Nations. | Yes – building capacity in the First Nations communities is a key focus | Yes – supports some capacity building for Indigenous peoples. | Yes. Includes a college trust fund for Maori and guarantees support for Maori capacity for 30 years. |
| **Coherent regulation and enforcement** | No regulatory or enforcement authority | No regulatory or enforcement authority. | Yes - Independent decision-making body. | No regulatory or enforcement authority | No regulatory or enforcement authority. | Yes – Independent decision-making body. |

| Criteria of good water governance | Fraser Basin Council | Mackenzie River Basin Board | International Joint Commission | Yukon River Inter-Tribal Watershed Council | Australia National Water Commission | Waikato River Authority |
|---|---|---|---|---|---|---|
| **Resilient Institutions** | Yes - *Charter for Sustain-ability* acknowledges Indigenous cultures and the need to build awareness and profile of Indigenous cultures in the Basin. | Yes - Board shall consider the incorporation of traditional knowledge and values | No – Does not acknowledge Indigenous cultures, knowledge or law. | Yes - Use of 'best technology' guided by long term observations from Indigenous knowledge and western science | Yes - National Water Initiative include Indigenous representation in water planning; incorporate Indigenous social, spiritual and customary objectives and strategies, Commission may take the advice of the First People's Water Engagement Committee | Yes - Intrinsic to the agreements and legislation which establish the Authority |
| **Integrated approach** | Yes, watershed based | Yes, watershed based | Some programs at the watershed level | Yes, watershed based | Some programs at the watershed level | Yes, watershed based, eflow |
| **Recognition of Indigenous Rights to self-government** | Partially - Recognizes Indigenous rights in the *Charter for Sustainability* but no authority to ensure rights are respected. | Partially - Contains a non-derogation clause, but does not actually give effect to rights of self-government. | Partially - 2001 inclusion of a non-derogation clause in the *International Boundary Waters Treaty Act* but does not actually give effect to rights of self-government. | Yes - As an organization developed by Indigenous Peoples it is an expression of self-government | Partially - National Water Initiative commits to take account of the possible existence of native title rights to water, but there has been a general failure to consider Indigenous rights. | Yes - The legislation and Deeds both formally acknowledge Maori rights and give effect to the right of self-government. |

While all of the examples display many elements of good water governance, based on this analysis, only the Waikato River Authority meets them all. Of particular note is the respect for Indigenous laws, values, and rights demonstrated in this regime. It is not much different from the IJC of which Canada has been a long time member, save for the inclusion of Indigenous peoples as full partners in water governance. The four other examples are more inclusive of Indigenous peoples than the IJC, but lack binding decision making authority, thereby limiting their effectiveness.

Bearing in mind these strengths and weaknesses, the next section draws from these examples and explores a variety of possible co-governance schemes for improving water governance in Canada.

## PART 3

## A NATIONAL CO-GOVERNANCE REGIME

Thus far we have defined good water governance, established Canada's failure to meet this standard, and considered some alternative examples of water co-governance schemes. This next section presents options for a new approach to water governance in Canada that is inclusive of First Nations as self-governing entities. It begins with a brief overview of the recommendations of the Expert Panel on Safe Drinking Water for First Nations (Expert Panel) for three new institutions to address on-reserve water governance that could have a role in a national water co-governance regime. The section closes with three options for water co-governance off reserve, ranging in degree of decision-making authority.

*On-reserve Water Governance*

As noted earlier, Canada has a water co-management relationship with First Nations under the provisions of the *Indian Act* and the *First Nations Land Management Act*. This relationship is highly dysfunctional, resulting in, amongst other things, chronic water problems on reserves (Expert Panel, 2006). Volume II of the Report of the Expert Panel recommended three new institutions for First Nations on-reserve water governance.

The first new institution proposed is a First Nations Water Commission. It would be responsible for "licensing, construction and operation of water and wastewater facilities, inspection, enforcement, and administrative penalties" (Expert Panel, 2006:6). The Commission would be arms length from the Minister of AANDC and First Nation communities, composed of representatives of the federal government and First Nations. It would provide policy advice to the Minister, lead consultations with First Nations on policy and legislation respecting water on reserve, and provide information on First Nations' traditional water laws and knowledge.

Expert Panel recommends First Nations Water Commission, First Nations Water Tribunal, and First Nations Water Trust.

Also proposed is a First Nations Water Tribunal. Both the federal government and First Nations would make appointments to the Tribunal, but it would operate independently from either. The Tribunal's responsibility would be hearing appeals of approvals or orders related to drinking water and wastewater facilities on reserve and to receive and investigate complaints about enforcement from First Nations. The tribunal would have authority to issue orders for the resolution of conflicts and resolve disputes.

Finally, a First Nations Water Trust should be established to hold monies on behalf of First Nations to construct, manage, decommission, or renovate drinking water and wastewater systems on reserve. The creation of a Trust, administered by an arms length commission of appointees, would resolve the current conflict of interest that exists for the federal government as fiduciary for First Nations.

These three independent but interconnected bodies could work cooperatively with the federal government and First Nations to ensure drinking water and wastewater on reserve meets similar standards to those enjoyed by other Canadians. While they would be created through federal legislation in consultation with First Nations, these bodies would serve the interests of First Nations. They would be a resource for First Nations, supplementing the decision-making

authority of First Nation Chiefs and Councils with respect to water issues. Collectively they would provide a more predictable and transparent mechanism for water governance, funding, and enforcement.

Instead of moving forward on these recommendations, the federal government adopted the *Safe Drinking Water For First Nations Act* in June 2013, granting the federal Minister of AANDC further unilateral authority to impose regulations on First Nations respecting the provision of drinking water and the disposal of waste water on reserve. This is not moving towards co-governance, nor is it respectful of legal rights to self-government or the duty to consult. It has been rejected by First Nations (AFN, 2013).

*Options for Inter-jurisdictional water co-governance*

If Canada is going to act on its legal duty to recognize and accommodate First Nations rights to self-government it is going to have to adopt a new scheme for water governance beyond reserve boundaries.

Outlined below are three different approaches and structures for water governance ranging from a simple platform for dialogue to a "system of systems" (Hipel, Miall & Smith, 2011:56) consisting of watershed based boards and a fully independent national water authority. A brief overview of each scenario will be presented, followed by a short analysis of their advantages and disadvantages. A chart summarizing their salient elements in a good water governance scheme concludes this section.

*Expert Panel*

One option is to create an Expert Panel similar to the National Water Commission established in Australia. It would have the authority to commission studies, conduct investigations, prepare audits, and deliver programs. A negotiated national water strategy that has the support of Canadian and First Nations governments would serve as a coalescing mechanism thus facilitating respect for the advice of the Expert Panel and providing focus for its work. The Panel would be responsible for overseeing implementation of such a strategy, monitoring and reporting on developments, and making recommendations for improvements.

An Expert Panel could be created by federal legislation, developed in consultation with the provinces, territories, and Indigenous peoples. The *Australia National Water Commission Act 2004* is a possible model for this approach. Among other things, this legislation would establish the Expert Panel and outline its functions, membership, remuneration, conduct of meetings, funding, and the establishment of the secretariat and appointment of a chief executive officer. The legislation would make it clear that its provisions are binding on the Crown.

Membership in the Expert Panel would be by appointment by Canadian governments – the federal, provincial and territorial governments – and an equal number of First Nation appointees. These individuals would be selected on the basis of their background and experience in Canadian or First Nations' water law, policy and science. All members of the Expert Panel would be independent and serve for a predetermined period of time. If a First Nations Water Commission is established, the same individuals could serve on both the Expert Panel and the First Nations Water Commission, although it maybe necessary to appoint two different groups of people because of the burden of work demanded. In that case, the Expert Panel would draw on the expertise of the First Nations Water Commission as necessary.

One key objective of the Expert Panel would be the reconciliation of First Nation and Canadian laws and perspectives to promote respect for the rights and interests of all parties and to support good water governance in Canada. The participation of First Nations knowledge holders would be essential to this work.

Working with other partners would be an important element of the work of the Expert Panel. Industry would be important stakeholder that the Expert Panel would want to draw advice from and provide support to in implementing strategies. This might include utility companies, dam operators, mining and forestry companies and associations, and the agricultural and food sectors. The Panel could also work with conservation authorities, municipalities, existing river, lake or watershed organizations, and environmental non-government organizations. These partnerships could help leverage the work of the Expert Panel to support implementation of its mandate and help build resilient institutions.

The primary advantage of this approach is also its biggest disadvantage. It may be politically easier to establish an Expert Panel, because no government is required to give up decision-making authority. Each constituent government would remain free to take the advice of the Expert Panel or not, with no diminishment in their authority, autonomy or responsibility making this option politically palatable. This underscores its greatest weakness, however. The only mechanism available to the Expert Panel to encourage compliance with their recommendations would be via its investigative authority and its reports to Parliament, publicly shaming governments that fail to take action for the greater good. Without a mechanism to bind governments to action, an Expert Panel may be ineffectual and governments would remain free to pursue their own, possibly selfish, objectives. The current power imbalance between Canadian and Indigenous governments would remain unaddressed, and ultimately, Canada would be little further ahead in developing a good water governance regime.

Without a mechanism to bind governments to action, an Expert Panel may be ineffectual and governments would remain free to pursue their own, possibly selfish, objectives.

*Canadian Council of Ministers for Water*

Another alternative is to establish a new Canadian Council of Ministers that focuses on water. This Council would serve as a mechanism for research, analysis, dialogue and consensus based decision-making.

The proposal here has two distinct elements. The first is to establish a stand alone Canadian Council of Ministers for Water (CCM Water), upgrading water to a separate Council of Ministers. The purpose of a CCM Water would be to raise the issue of water to a subject of specific attention, further develop the existing CCME national water strategy, reach agreement on its implementation, and develop tools such as guidelines, standards, targets, and classification systems.

The second element of this proposal is to invite First Nation governments to participate as equals at the table. The CCM "is not another level of government regulator, but a council of government ministers holding similar responsibilities" (Government of Canada, 2011).

> Ministers lose neither autonomy, authority, nor responsibility by agreeing to work collaboratively with their colleagues through this Council. Each minister is accountable to his or her government, according to the laws and statutes governing their

> jurisdiction. And as a member of an elected government, each minister is directly accountable to the public whom they serve (Government of Canada, 2011).

The difficulty facing First Nations is how to replicate this principle of direct accountability to the public in the First Nation context. Canada divided the roughly 60 First Nations that existed at contact into approximately 630 First Nation Bands under the *Indian Act.* Adding an additional 630 members to the CCM Water would guarantee failure from sheer numbers. There are few First Nation political structures that represent larger collectives of peoples while also maintaining the principle of direct accountability. Only self-governing First Nations and Band Councils are accountable directly to their electorate. Larger organizations, including tribal councils, provincial organizations, or the Assembly of First Nations at the national level, do not necessarily hold a direct mandate to make binding decisions on behalf of the First Nation population. One possible solution to this challenge depends on the establishment of the First Nations Water Commission and /or First Nations Water Tribunal described above. The members of that Commission or Tribunal could serve as the First Nation representatives on the CCM Water, but their mandates would have to be adjusted to fulfill this role. Theoretically this is not an insurmountable issue, but it will be for First Nation peoples to decide for themselves how they wish to be represented and develop the necessary processes to achieve this if the CCM Water process is determined to be the most desirable of the three options presented here.

The CCM Water would operate on the basis of consensus. It would have no internal enforcement mechanism or authority to impose its decisions on the participant governments. Instead it relies on the honour of the members to keep their commitments. This is both an advantage and a disadvantage. Consensus based decision-making models are common amongst First Nation Peoples making this option possibly more appealing from that perspective. However, it may do little to change the status quo of resource and power distribution in Canada, thus giving the impression of greater equity without actually changing current realities. Furthermore, consensus based decision-making can result in the adoption of the lowest common denominator and be used to stymie affirmative action.

The one real advantage of this option is that a model already exists. The federal, provincial and territorial governments are already accustomed to how the CCM operate and are comfortable with the process. It is also a truly co-governing process, unlike that of the Expert Panel proposal. As creatures of the federal government, a new CCM would also be relatively easy to establish, requiring little more than a federal policy decision and funding to support its work, in consultation with the provinces, territories and Indigenous peoples, of course. There are considerable challenges to be addressed if this process was to move forward, including defining membership for First Nations, the limitations of consensus-based decision-making, and the potential for individual governments to fail to act.

*National Water Authority and Watershed Boards*

A third possible option has two parts; the creation of a national water authority and a series of watershed, or sub-watershed boards. Canada has some experience with this kind of mechanism in the International Joint Commission described earlier. The Waikato River Authority in New Zealand is an even better example, because of its dedication to the inclusion of Indigenous people with full respect as equals for their laws, values, and perspectives.

The watershed or sub-watershed boards would be responsible for water governance at the local level to facilitate local participation in decision-making thus enhancing accountability.

Composed of appointees by, but operating independent of provincial, municipal, regional, and Indigenous governments, these boards would be responsible for, among other things:

- Construction of dams, remediation of dams, or their decommissioning, and conditions for their operation;
- Establishing water quotas for various jurisdictions or order of precedence for water use;
- Ensuring protection of the rights of First Nation;
- Implementing drinking water, waste water, and water pollution standards;
- Dispute resolution between individuals, businesses, and/or jurisdictions;
- Licensing water use;
- Undertake research and implement programs;
- Provide input and recommendations to the national water authority; and
- Implementing national strategies to address, for example, climate change, acid rain, groundwater and aquifer protection, or aquatic habitat protection.

Some existing watershed boards could be used, such as the Mackenzie River Basin Board, Prairie Provinces Water Board (Prairie Provinces Water Board, undated), or the Ontario based Source Protection Committees (Government of Ontario, 2011), with necessary modifications to meet the eight criteria of good water governance, in particular the inclusion of Indigenous governments.

While many water issues can be addressed at the local or watershed level, some national oversight is useful to address issues that are national or international in scope, such as climate change or bulk transfers of water. The national water authority would be a mechanism to facilitate cross-watershed dialogue and strategic action. It would also conduct research and investigations and provide practical support, advice and funding for water related projects. In addition, watershed boards could appeal to the national water authority to resolve disagreements within or between watershed boards that have proved intractable.

The national water authority would be a mechanism to facilitate cross-watershed dialogue and strategic action.

The First Nations Water Commission, Tribunal and Trust would coordinate their work with the national water authority and watershed based boards, just like any other federal, provincial or territorial department responsible for water governance and management. The national water authority could also provide direct assistance such as funding and capacity building to supplement the work of the First Nations agencies.

A national water authority such as this would have to be established through a negotiated agreement between Indigenous peoples, the provinces, territories, and the federal government. These negotiations would take place on a nation-to-nation basis thus recognizing Indigenous rights to self-government.

Once established, each jurisdiction would have to pass legislation or other similarly binding decisions to implement the agreement. Canada, for example, issued the *International Boundary Waters Treaty Act* to implement the *Boundary Waters Treaty.* New Zealand negotiated Deeds with the various Maori *Iwi* whose traditional homelands included the Waikato River and its tributaries and then enacted the *Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010* and the *Ngati Tuwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010* to give effect to the Deeds. The legislation would be binding on the federal and provincial Crowns and Indigenous governments.

Like the other two approaches, the national water authority and watershed boards would ensure the inclusion of Indigenous laws, knowledge, and cultures through the participation of Indigenous

members as well as through hiring Indigenous staff and contractors. Again, reconciliation of the diverse cultures of Canada would be a fundamental principle of the work of both the national water authority and the watershed boards and would be made explicit in the negotiated agreements and terms of reference.

The advantages of this approach include the independence and binding authority of the national water authority and watershed boards. As independent bodies they would be free from the political horse trading of a CCM Water type process and contrary to the Expert Panel option, they would have the authority to impose binding decisions on various jurisdictions. Further, composed of an equal number of Canadian and Indigenous representatives they would be free to reconcile Canadian and Indigenous rights, take affirmative action to protect the environment, and coordinate leadership on water. An additional benefit is that First Nations have already endorsed the creation of watershed boards and have developed a draft national water strategy (AFN, 2012).

The primary disadvantage lies in negotiating the underlying agreements. The federal, provincial, territorial, and Indigenous governments would have to agree to recognize their mutual interdependence on water, and assign authority to an independent body to govern water. The diverse parties must find common ground, which may take a long time, thus making this particular process the most challenging of the three to actually bring to fruition. Its strengths may outweigh this disadvantage over the long term, however.

**TABLE 2: Comparison of three water governance options**

| Elements of Good Water Governance | Expert Panel | CCM Water | National Water Authority/Watershed boards |
|---|---|---|---|
| **Accountability** | No | Yes, but challenges for First Nations in selecting representation. | Yes |
| **Fairness and Equity** | Not necessarily | Not necessarily | Yes |
| **Coordinated Leadership** | No. | Yes, but dependent on good will of governments to meet their commitments. | Yes |
| **Sound Capacity** | Yes, helps to build collective capacity | Not necessarily. | Yes, helps to build collective capacity |
| **Resilient Institutions** | Not necessarily | Not a guaranteed outcome | Yes. |
| **Coherent Regulation and Enforcement** | No, advisory only. | Yes, but potential for lowest common denominator approach. | Yes. |
| **Integrative Approach** | Not necessarily. | Not necessarily. | Yes, as a condition of its mandate. |
| **Rights to self-government** | Not necessarily. | Yes. | Yes, based on nation-to-nation negotiations |
| **Advantages** | • No party is required to give up decision-making authority<br>• Relatively quick and easy to establish<br>• Perhaps a viable short term solution to developing more respectful relations | • No government is required to give up its autonomy or authority;<br>• a model already exists<br>• it is a true co-governing process | • A true co-governance process;<br>• As independent bodies the watershed boards and national water authority would have the jurisdiction to impose decisions for the greater good<br>• Has support of First Nations |
| **Disadvantages** | • Not a co-governance system;<br>• No authority to enforce its decisions leaving governments to pursue their own, possibly selfish, interests;<br>• No guarantee it will actually result in greater respect for First Nation rights | • Limitations of consensus-based decision-making; governments may fail to act, potential to adopt lowest common denominator;<br>• May rely too heavily on trust where there is little trust between First Nation and Canadian governments | • Requires First Nations and Canadian governments to give up authority and autonomy;<br>• May take a long time to negotiate the underlying agreement |

# Recommendations

Having examined the conditions for good water governance and various options available to improve the current state of water governance in Canada, it is possible to make several recommendations.

First, it is clear Canada needs to amend its relationship with Indigenous peoples. It needs to move away from colonial and assimilationist policies and give greater respect to the legal rights of First Nations. In particular the right to self-government of Indigenous peoples must be acknowledged and accommodated.

Second, there must be a redistribution of wealth and resources in Canada. Through a predictable, adequate, fair, objective and efficient fiscal transfer mechanism and own source revenue generating capacity, Indigenous peoples could have the wherewithal to support their governments and provide the necessary services to their citizens (RCAP, 1996: Independent Blue Ribbon Panel on Grants and Contribution Programs, 2006; AFN, 2011). While fundamental changes to the way Indigenous peoples are funded must be an essential part of any co-governance regime, capacity is more than simply money. The mere allocation of funding is inadequate without also addressing systemic inefficiencies, lack of respect for rights of self-government, or racist assumptions of Indigenous peoples governance capacity. Canada also needs to support efforts by Indigenous peoples to revitalize their cultures, particularly language retention, and promote education models that foster greater success for Indigenous peoples.

Third, the political will, or leadership required to foster the development of a co-governance approach to water use is critical to any movement on this issue. Political will obviously requires leadership of elected officials to create change. This must include both Indigenous and Canadian politicians. Politicians are sensitive to public opinion and thus it is incumbent on the Canadian public to raise this issue. Finally, corporations, donors, non-government organizations, universities and colleges, and think tanks can all help to foster a more tolerant and respectful relationship.

With these preconditions, it is possible to make recommendations for the development of a good water governance regime for Canada.

The best option of the three considered is a system consisting of a national water authority and a series of watershed boards. Developing such a system will require discussions and consultation that engages Indigenous peoples at the national level in dialogue as equals to establish the mandate and terms of reference for a national water authority and to draft national strategic water policy. Simultaneous to this, watershed boards would have to be established at the local or regional level, which will also require consultation with Indigenous peoples. As noted earlier, some watershed boards already exist in Canada, but they would have to be modified to accommodate Indigenous peoples as self-governing entities and to make them decision-making, as opposed to advisory bodies.

## Conclusion

Water co-governance is about respecting our collective rights and responsibilities for water and cooperating for the good of all people and the environment.

This paper has defined good water governance outlining eight interconnected criteria. Fulfilling the criteria for good water governance is dependent upon a new relationship with Indigenous peoples as self-governing entities. Supporting the participation of Indigenous peoples in water governance enhances coordination and facilitates the sharing of Indigenous law and knowledge to increase our collective resiliency. Building a governance structure inclusive of Indigenous peoples encourages respect for Indigenous rights, generates fairness and equity, and fosters accountability. Meeting the minimum international standards for the rights of Indigenous peoples outlined in the United Nations Declaration on the Rights of Indigenous Peoples and fulfilling the requirements of Canada's Constitution will enhance respect for the rule of law and encourage coherent and effective regulation and enforcement.

Canada has some experience with water co-governance regimes and can build on this and the experience of other regimes to adopt a new approach that embraces the criteria for good water governance. It is recommended here that Canada adopt a two-part structure that consists of watershed boards, similar to the Waikato River Authority, and a national water authority similar to the IJC.

As noted by the World Water Forum, the 'water crisis' is in reality a crisis of governance. Canada's water governance regime does not meet the standards of good water governance, in part because of its failure to respect Indigenous rights. Reforming Canada's water governance regime is not the panacea to all the challenges facing Indigenous peoples and their relationship with Canada, but it can be a step in the right direction. What is required is a sea change in the attitudes of the Canadian public and governments about Indigenous peoples and their role in the federation. By recognizing our collective reliance on water we recognize our common humanity and on this recognition can build a more respectful and inclusive Canada that reflects our interconnected needs.

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