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Navigating the tensions in collaborative watershed governance: Water governance and Indigenous communities in British Columbia, Canada

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ABSTRACT

First Nations in British Columbia (BC), Canada, have historically been—and largely continue to be—excluded from colonial governments' decision-making and management frameworks for fresh water. However, in light of recent legal and legislative changes, and also changes in water governance and policy, there is growing emphasis in scholarship and among legal, policy and advocacy communities on shifting water governance away from a centralized single authority towards an approach that is watershed-based, collaborative, and involves First Nations as central to decision-making processes. Drawing on community-based research, interviews with First Nations natural resource staff and community members, and document review, the paper analyzes the tensions in collaborative water governance, by identifying First Nations' concerns within the current water governance system and exploring how a move towards collaborative watershed governance may serve to either address, or further entrench, these concerns. This paper concludes with recommendations for collaborative water governance frameworks which are specifically focused on British Columbia, but which have relevance to broader debates over Indigenous water governance.

1. Introduction

1.1. Overview

Indigenous[1] peoples in Canada have historically been—and largely continue to be—excluded from colonial governments' decision-making and management frameworks for fresh water. The existing colonial water governance system[2] is predicated largely on provincial government control over decisions related to water access and use, and the Canadian government (referred to as the "Crown") asserts exclusive ownership of all ground and surface water.

Today, however, there is growing interest and movement towards a renewed set of principles and relationships for Indigenous water governance in Canada. This parallels international debates over Indigenous water rights, particularly in Latin America and Australia (Bartlett, 1998; Basdeo and Bharadwaj, 2013; BCAFN, 2010; Boelens, 2014; Blackstock, 2001; Budds and Hinojosa, 2012; Getches, 2005; Mascarenhas, 2007; Matsui, 2009; Passelac-Ross and Buss, 2011; Perreault, 2005, 2008; Rizvi et al., 2013; Singh, 2006; Thorson et al., 2006; Toussaint et al., 2005; von der Porten, 2012; von der Porten and de Loë, 2013a, 2013b, 2014; Walkem, 2007; Wilson, 2014). Notable in the Canadian case is the fact that evolving legal frameworks imply new approaches to Indigenous title, rights, and traditional territories and hence expanded (and indeed potentially unprecedented) roles for Indigenous peoples in water governance, paralleling evolving frameworks for Indigenous law more generally (Basdeo and Bharadwaj, 2013; Borrows, 1997; Phare, 2009, 2011; von der Porten and de Loë, 2014; Walkem, 2007). However, although evolving jurisprudence creates expanded water rights and opportunities for Indigenous communities to participate in governance processes, there is significant uncertainty with respect to processes, scope, and uptake. This is a particularly critical issue for Indigenous communities currently grappling with access to safe water, and with associated health

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[1] The term "Indigenous" refers to First Nations, Inuit, Métis peoples, and also serves as an inclusive reference to communities that claim a historical continuity with their original territories (Corntassel, 2003).

[2] The term *colonial water governance* refers to Crown-implemented decision-making frameworks for water in Canada that set out *who* decides and who is accountable; *what* the parameters of the decisions are; and *how* the decisions are made. This includes the colonial legal frameworks for water and the existing division of powers and responsibilities. Although colonial water governance processes pertain to and impact Indigenous peoples, Indigenous input, interests and knowledges are often excluded from colonial governments' political, organizational, and administrative processes for water.

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and livelihood issues in the context of climate change (Basdeo and Bharadwaj, 2013).

These debates are particularly acute in Canada's western-most province of British Columbia, a jurisdiction in which formal treaties were never signed between the Crown and Indigenous communities—which hold full rights to land and water, as recognized by Supreme Court decisions in recent years. Debates over Indigenous rights to water intersect with broader trends in water governance, including growing support for shifting water governance in BC towards an approach that is watershed-based,[3] collaborative, and involves Indigenous peoples more centrally and meaningfully in decision-making[4] (Fraser Basin Council, 2012; Brandes and O'Riordan, 2014).

In light of these issues, this paper explores Indigenous communities' perspectives on reforms to colonial water governance systems. Our rationale stems from Cohen and Davidson's (2011) critique of watershed-based governance, writ large: "Watersheds may *not* be appropriate in cases where re-scaling is being undertaken to address persistent governance challenges, such as lack of monitoring and enforcement, without concomitant attention to the underlying sources of the problem; such cases, we suggest, perpetuate rather than solve governance failures" (9). This paper considers both where collaborative watershed governance[5] has potential to respond to some outstanding issues that First Nations have identified, as well as ongoing issues it will have to contend with, and where it still may fall short of addressing persistent governance challenges.

The paper is organized into 6 sections. Following from this introduction, Section 2 provides detail on the context and drivers of water governance reform in BC. In Section 3, we give a brief overview of the methods used in this research. Section 4 is divided in two parts. The first part presents an overview of persistent governance challenges as described by different First Nations interviewees and identified through document review. The second part of Section 4 discusses how the transition towards collaborative watershed governance in BC may 'articulate with' the governance challenges identified in part one. For Section 5 we offer a discussion of alternative water governance frameworks for consideration, including several that may facilitate meaningful participation of First Nations in BC's ongoing water governance reform. Finally, in Section 6, we summarize our research with concluding remarks.

2. Context: drivers of water governance reform in BC

The primary drivers for current water governance reform in BC generally fall into three key categories. The first category involves the dynamic legal landscape for Indigenous peoples in Canada more broadly, and the recent changes in the legislative framework for water in BC. The second category speaks to the priority that Indigenous communities in BC give to water and water governance. Finally, the third category draws from broader calls for water governance reform, including growing interest from academic and advocacy communities in creating more collaborative and participatory forms of water governance.

2.1. Legal drivers

The legal landscape for First Nations in BC is unique in Canada in that very few historic treaties were signed in the province (with the exception of the Douglas Treaties on Vancouver Island and a section of north-eastern BC which falls under Treaty 8), and few treaties have been finalized through the modern treaty process (Madill, 1981; Kotaska, 2013). Thus, the legal fact stands that the majority of the province is unceded First Nations' territory (FNLC, 2011; UBCIC, 2010, 2011; Walkem, 2004). Through a series of legal decisions,[6] most recently the 2014 *Tsihlqot'in* case, the Supreme Court of Canada has clearly established that Aboriginal rights and title can no longer be legally ignored and that First Nations must be involved at a strategic level in decisions that impact their territories (Kotaska, 2013; Morellato, 2008). As the legal landscape of rights and title continues to evolve, so too do the requirements and impetus for provincial and federal governments to engage meaningfully with First Nations in land and water governance and management. These changing legal requirements constitute a critical "precondition" of collaborative or co-governance-based approaches to water governance, not only in BC, but across the entire country (Plummer and Fitzgibbon, 2004).

Legal changes specific to the realm of fresh water are driving water governance reform in BC. While there are numerous existing watershed stewardship and governance entities, some of which involve First Nations, these existing arrangements have thus far "emerged organically, and are not directed by an overall provincial law or policy" (Nowlan and Bakker, 2007: 14). Now, however, BC's new *Water Sustainability Act (WSA* or Act*)*, which came into force in early 2016, presents the opportunity for formalized governance shifts to augment and substantiate the role of these entities. Although the *WSA* itself does not specify the form of governance that could be developed, the 2013 legislative proposal stipulates a "collaborative public process" (60) and "greater involvement and participation for First Nations in water management and watershed planning processes" (6). Thus, there are broad suggestions that the Province may work towards establishing or supporting collaborative watershed governance entities (e.g. authorities or watershed boards) with First Nations representation.

2.2. Water is a First Nations priority

In addition to the legal drivers mentioned above, First Nations across BC have also clearly identified that water and water governance are priority areas of concern within broader efforts to assert Indigenous rights and governance (UBCIC, 2015). While being mindful of the diversity of First Nations and wary of making essentialist claims, the cultural, spiritual, and socioeconomic values of water to Indigenous peoples are widely depicted—descriptions of water as a powerful medicine and sacred resource, as the lifeblood of the land, and as a relative that must be respected and cared for, are echoed by Indigenous communities and organizations, and scholars throughout the literature (Blackstock, 2001; LaBoucane-

[3] Watersheds are commonly understood to be "areas of land draining into a common body of water, such as a lake, river, or ocean", although they are not scientifically given, and often contested (Cohen, 2012: 2207).

[4] A "Statement of Support for B.C. *Water Sustainability Act* and Regulations" was jointly prepared by advocacy groups and three universities to urge the BC government to ensure First Nations are meaningfully engaged and adequate resourcing will be provided to enforce the new Act. See Statement of Support (2014).

[5] Collaborative watershed governance and co-governance are distinct concepts: we suggest that there are fundamental differences in how these two concepts address power sharing and Indigenous rights and authority: from collaborative processes, in which First Nations play a consultative or advisory role, to co-governance in which First Nations and colonial governments co-create shared forms of jurisdiction, and First Nations have substantial or legally-binding authority (Kotaska, 2013; Goetze, 2005; Tipa and Welch, 2006). The two terms are used accordingly throughout this paper.

[6] From the 1970s through to present there have been a series of pivotal court cases on Aboriginal rights and title. Critical outcomes from these cases include: confirmation that Aboriginal title to land existed at the time of the 1763 Royal Proclamation (*Calder v. British Columbia* [1973]) and continues to exist (*Delgamuuk'w v. British Columbia* [1997]); declaration of Aboriginal title to specific lands (*Tsilhqot'in Nation v. British Columbia* [2014]); establishment of criteria to determine whether an Aboriginal right exists and how a government may be justified to infringe upon it (e.g. *R v. Sparrow* [1990]); and development of requirements for consultation and accommodation (e.g. *Haida Nation v. British Columbia* [2004]). Section 35(1) of the 1982 Canadian Constitution recognizes and affirms existing Aboriginal and treaty rights.