



RESETTING THE NATIONAL SAIL:

A CONSIDERATIONS PAPER ON INDIGENOUS GOVERNANCE AND THE CANADA WATER AGENCY

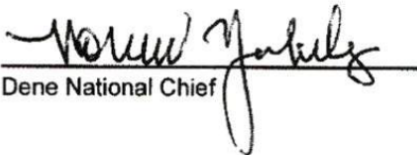
Water is critical to life, yet our water resources are at great risk due to climate change, pollution, overuse and other management challenges. On December 19, 2019, Prime Minister Justin Trudeau mandated ECCC Minister Jonathan Wilkinson to “create a new Canada Water Agency to work together with the provinces, territories, Indigenous communities, local authorities, scientists and others to find the best ways to keep our water safe, clean and well-managed.”

The way to water is through governance. We need a new way of working together on water, one that respects Indigenous rights and responsibilities and the needs of generations to come. Dene Nation is mandated to speak out on national and international issues of concern to the Dene and the Canada Water Agency is one such matter. The Centre for Indigenous Environmental Resources is a national, First Nation environmental charitable organisation that works on environmental capacity building. To discuss the CWA, we requested our advisors to prepare a brief paper on considerations regarding Indigenous governance and the proposed Canada Water Agency.

The attached brief paper has set out many important ideas. Our goal is to create a conversation on this issue, moving beyond mere consultation and engagement, to a consideration of true water governance reform. We need this because of the United Nations Declaration of the Rights of Indigenous Peoples, the Truth and Reconciliation Calls to Action, and the need to move to collaborative and productive conversations about how to sustainably manage waters that we all rely upon.

We are in the time of collaboration and partnership. The last 153 years has shown us that the status is not working and no one government can go it alone, especially with water.

We look forward to the conversation and discussion that will be prompted by this paper.


Dene National Chief


CIER Chair

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Overview

On December 19, 2019, Prime Minister Justin Trudeau mandated Minister Jonathan Wilkinson (Environment and Climate Change Canada), with the support of the Minister Bibeau (Agriculture and Agri-Food Canada), to “create a new Canada Water Agency to work together with the provinces, territories, Indigenous communities, local authorities, scientists and others to find the best ways to keep our water safe, clean and well-managed.” The Canada Water Agency (CWA) has not yet been created (the engagement phase is underway), and other than the above words, the mandate has not been defined.

Key questions are: how will the CWA be created and what will it do?

This paper discusses the CWA development and governance opportunity. It also provides food for thought for Indigenous, federal and other potential jurisdiction-based partners in a CWA about possible pathways towards a positive outcome.

What is that outcome?

That the CWA development and implementation is a vehicle for reconciliation and water governance reform that ensures a meaningful role for Indigenous jurisdictions to exercise their water governance authorities at the CWA table of water decision-making in Canada.

Who is the audience for this paper?

The answers to the two questions posed above matter greatly to Indigenous governments, Nations and citizens that are protecting or implementing Indigenous land, water and governance rights. The creation and implementation of a CWA touches upon matters that are the subject of various provisions of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and so a collaboratively designed CWA can be UNDRIP compliant (or, conversely, it could be another example where Canada fails to meet UNDRIP commitments). Finally, we are all looking for evidence of reconciliation terms of the rightful role of Indigenous peoples in the governance of Canada. Water management, and the CWA, is part of this governance.

How the CWA will be built and what it will do also matters to the five water jurisdictions that exist in Canada (meaning, five distinct governments - Indigenous, federal, provincial, territorial, municipal - with some decision-making power with regard to water in Canada). All have a stake in and can impact the health of waters in Canada.

A Brief Word on “Jurisdictions”

Often Indigenous and municipal governments have been excluded - for very different reasons - from water decision-making. Indigenous governments have been excluded because federal, provincial and territorial governments have denied that they have any inherent, Aboriginal or treaty-based water jurisdiction, and have refused to entertain discussions as a result. Municipal governments are excluded because their authority is delegated from provinces (and can be revoked) and therefore they are sometimes seen as less than a “true” government.

The reality is that all five jurisdictions are unique and have some exclusive, shared and/or overlapping jurisdiction. Indigenous governments are not similar to municipal governments, but then, they are not similar to provincial or federal governments either. They are unique. Collaboration will not (and is not attempting to) change that; collaboration is not concerned with the source of powers, just that they are exercised collaboratively.

Collaboration means that the five jurisdictions agree to work together, bringing whatever jurisdictional tools they have to the CWA table to accomplish common goals.

Do We Need a CWA?

The Prime Minister has mandated the creation of the CWA. Numerous scientific, environmental, and Indigenous organisations have presented extensive evidence backing up their view that we need a CWA:

“Water is our most precious resource – it is a foundation for healthy communities, economies and ecosystems. But, across the country, water problems are on a rapid rise.... Climate change is accentuating existing water quality and quantity management challenges in addition to presenting new and deeply complex water management concerns.... Yet, Canada currently lacks a robust commitment, plan, or legal framework at the federal level to drive effective coordinated action on increasingly common, extreme and costly water problems.”¹

The status quo is not working. **Our current institutions are not equipped to deal with the water challenges that we are facing.** No one government can go it alone but the five water jurisdictions in Canada (Indigenous, federal, provincial, territorial, municipal) do not currently work well enough together to address our challenges. And, costs are increasing every year. By building a CWA, together we can use a process of collaboration and building mutual consent to ensure effective and lasting institutional reform.

Why Support a Collaborative Approach to a CWA?

Water in Canada is managed by a “jurisdictional layer cake” where each layer of the cake represents one of the five water jurisdictions – Indigenous, federal, provincial, territorial, municipal – that have a decision-making role regarding water. Each layer has a different scope of their jurisdiction, but in any given location they all play a role in water management and

¹ Global Water Features, United Nations University, Centre for Indigenous Environmental Resources, Polis Project on Ecological Governance, Forum for Leadership on Water, “*Water Security for Canadians: Solutions for Canada’s Emerging Water Crisis*”, 2019.

decision making. No matter where are you slice the layer cake in Canada, all or most of the jurisdictions will have authorities or decision making regarding water or an activity that could impact waters (the sole exception to this is that municipal jurisdictions do not have authority on first nation reserve land). These decisions can have a positive or negative impact on the health of those waters.

The CWA needs to be a collaborative model that exemplifies and embodies the layer cake model of water jurisdiction. All jurisdictions should be partners in co-development of the CWA and have a choice to be able to play a clear, ongoing role in its implementation.

The Minister's mandate letter indicated that the new CWA must "work together with the provinces, territories, Indigenous communities, local authorities, scientists and others" to accomplish its mandate.

The CWA can be an institution involving jurisdictions that come together and collaborate towards common water goals.

How Can This Meet UNDRIP and Other Key Commitments?

The UNDRIP calls for Indigenous peoples to be involved in the creation of institutions that impact them (Article 19) and provides that they have the right to participate in decision-making in matters which would affect their rights, (Article 18).

The Truth and Reconciliation Calls to Action 45-47 call for a restructuring of legal, governance and institutional structures in Canada:

"We call upon federal, provincial, territorial, and municipal governments to repudiate concepts used to justify European sovereignty over Indigenous peoples and lands, such as the Doctrine of Discovery and terra nullius, and to reform those laws, government policies, and litigation strategies that continue to rely on such concepts."

The way to achieve this is to build new institutions together and the CWA is one such an opportunity. **The CWA needs to be a collaborative effort of the five water jurisdictions who must then participate (or at least have the choice not to participate) in its governance structure and decision-making processes.** Canada can lead the way by creating the CWA structure and funding it, but the CWA itself must be developed and implemented collaboratively.

How could this be structured? An "agency" is a structure that allows governments to do things collaboratively because it allows for flexibility in achieving a mandate. An agency is often a separate corporation (meaning, it is not a government department) charged with pulling together aspects of departmental mandates or other entities in order to achieve a comprehensive mandate. Good examples of this are the Public Health Agency of Canada (PHAC) and the Canadian Food Inspection Agency (CFIA), both of which have numerous departments and other structures that they coordinate and engage with to accomplish their mandate. Both PHAC and CFIA have a responsible Minister, and they are both run by a President that reports to the Minister. A CWA should:

- **Have a multi-leadership governance structure that represents the five water jurisdictions.** It could have co-Presidents that report to a council comprised of federal-provincial-territorial-municipal-Indigenous members. These members would then each

report to their various authorities (i.e. federal representatives report to their minister, as do provincial, territorial, and municipal representatives, and Indigenous members report to their governments or organizations);

- **Have a mandate that includes clear procedural and substantive commitments.** The BC government has created UNDRIP legislation which allows them to enter into co-governance agreements and create collaborative institutions with Indigenous governments. **A similar UNDRIP-based collaborative agreement approach could form the basis of the mandate of the CWA.**

Through the creation of collaborative institutions, laws, and programs consent by all can be built. That's what is meant by "nothing about us without us".

Could a Collaborative CWA Limit Decision-making?

A collaborative CWA involves governments bringing their jurisdictions to a collaborative table and working to make a consensus decision. It does not fetter decision making of any jurisdiction. For example, it is not possible for any government other than the federal government to make a decision on how to spend federal money. In this sense, even in a collaborative institution, no other level of government participating could make a decision that impacts the allocation of federal dollars. This is a decision reserved for the executive branch and Parliament.

Indigenous and other governments in Canada each operate within the scope of their authorities and can and do make decisions within the scope of those authorities. All five water jurisdictions could decide to sit at a common table and reach a consensus to spend money (or anything else within the scope of each of their authorities) in accordance with a decision made at that table. This is the essence of a collaborative process: jurisdictions bring their authorities and make a collaborative decision and then return into their systems to implement the decisions within those systems (subject to whatever processes may exist within those systems).

This is fundamentally different than consultation or engagement-based processes, which only seek information and the views of others but does not seek to collaborate on decisions.

Could a CWA Impact Indigenous Waters and Water Rights?

In 1996, the Royal Commission on Aboriginal Peoples (RCAP) called for four principles as the basis of a renewed relationship between Indigenous and non-Indigenous Canadians: recognition, respect, sharing, and responsibility. Recognition requires "both sides to acknowledge and relate to one another as partners, respecting each other's laws and institutions and co-operating for mutual benefit." RCAP based this on their view that:

"...Aboriginal people must be recognized as partners in the complex arrangements that make up Canada.... Shared sovereignty is an important feature of Canadian federalism. It permitted the early partnership between Aboriginal and non-Aboriginal people, and later it permitted the union of provinces that became Canada."²

² <https://www.rcaanc-cirnac.gc.ca/eng/1100100014597/1572547985018>

Many Indigenous nations are focussing their immediate priorities on implementing their Indigenous water laws to manage waters and drinking water sources within their territories. However, other governments also have authorities regarding those lands. For example, all other governments in Canada have some responsibility in environmental assessment, licensing or permitting developments that might impact drinking or other waters that are located adjacent to or run through Indigenous traditional, treaty, or reserve lands.

A collaborative CWA does not mean that federal jurisdiction overrides or eliminates any other jurisdiction, including Indigenous water rights, laws or jurisdictions. **A collaboratively developed CWA could be an expression of the roles of all five water jurisdictions. Indigenous water rights are supported in an effective CWA because Indigenous partners would bring their water jurisdictions to a collaborative table to work with other jurisdictions to achieve common water outcomes.**

The CWA cannot eliminate Indigenous laws or institutions. This is supported by UNDRIP (Article 18). In fact, **a CWA must increase support for Indigenous laws or institutions in order that Indigenous nations can bring their full authorities and jurisdictions and information to the CWA table.** For example, Indigenous nations in the Atlantic region recently negotiated the creation of a First Nation Water Authority; the CWA could support the creation of such Authorities across Canada if Indigenous nations or government(s) so desired. These water authorities need to work with other authorities to achieve better water management for all; this coordination could be a key function of the CWA.

The CWA doesn't impact existing jurisdictions; it is a place for those jurisdictions to come and collaborate towards common water goals. The main need for the CWA table is to leave behind the debate about who has authority to do something, and focus on how Indigenous, federal, provincial, territorial, and municipal water responsibilities can work together. In the very practical sense this means figuring out, "what do we want to do and who can do what?"

Indigenous nations that are seeking legal recognition for their water rights through land claim negotiations or legal action could continue to pursue that path if they wish and it would not preclude their participation in CWA as a collaborative institution. The courts and current federal government have held that Indigenous rights do not have to be litigated to exist; the issue is about negotiating how rights are implemented in Canada. **The CWA is one (but not the only) opportunity to implement Indigenous authorities in the realm of water by working collaboratively with other governments that might impact shared waters.**

Indigenous governments can ensure that they are a full part of future decisions regarding waters - both within their territories and those that affect them - by being part of the co-design and co-implementation (including ongoing governance, if that is what they wish) of CWA.

The CWA Begins but Does Not End with a Federal Mandate

The CWA is initially mandated by federal government and is the way that Canada can begin a collaborative discussion with other jurisdictions; but that doesn't mean that is the end of the story. An effective **CWA should be mandated by Canada and also mandated by Indigenous (and other) governments.** A collaboratively developed mandate would ensure that the institution meets the needs of and is officially supported by its founders.

Which Governments and Organizations Would Collaborate in a CWA?

When it comes to the participation of Indigenous peoples, UNDRIP provides that Indigenous nations and their governments must have the opportunity to choose to self-organize to participate as collaborators in institutions that impact them (Article 18). This would mean, at minimum, determining their meaningful representation in the development process and in the CWA governing structure.

Innovation and flexibility are needed in terms of final membership or participation in the CWA. Water requires effective governance, which means that it needs to have seats to accommodate the idea of “governance” not just “governments”. Relying only on Indigenous representative organizations is not adequate, but neither is relying solely on Indigenous governments (which is also untenable given the number of Indigenous governments nationwide).

In order for the CWA to operate collaboratively, it will probably need some representation of both Indigenous governments and representative institutions on its governance structure, ensuring that the focus is on those bodies that have a direct link or mandate from Indigenous governments (such as, having a CWA council comprised of some Indigenous government representatives plus representatives of organizations created by or elected by Indigenous government leaders).

The critical thing is this: **it is up to Indigenous governments to decide who will represent them.**

This is the same for the representation of the other four jurisdictions. Choices will have to be made by each jurisdiction because not all possible representatives of all five jurisdictions can participate in the governance of the CWA, it is far too unwieldy.

The mechanism for all voices to be heard either in the governance or implementation of the CWA would be determined in the CWA co-design process.

Can We Collaborate?

There are a number of institutions in Canada’s history that have relied on collaboration. The federal-provincial-territorial tables such as the Canadian Council of Ministers of the Environment (CCME) or the provincial-territorial Council of the Federation are well-known examples. However, these existing entities do not involve Indigenous governments, meet infrequently, tend to operate by policy only, and also exclude municipalities.

As a collaborative institution, the CWA should be based on respect, trust, and the art of diplomacy between governments. **It needs to embrace a creative, open and solution-oriented approach that rejects traditional turf-protection or other-government bashing and focuses on finding common, productive ground.** As well, it must:

- recognize all governments as legitimate authorities
- create decision-making tables, which means that representatives must have the authority to participate fully and make decisions at the table
- insist on a long-haul commitment by jurisdictions to work together
- ensure all government’s interests are dealt with in a satisfactory manner from their own point of view

- generate measurable improvements to environmental, social, and economic realities in Canada's watersheds.³

What Could a CWA do?

As already suggested above, the mandate for the CWA needs to be developed collaboratively. As it is developed, both procedural requirements (how it does what it does, such as its governance structure) and substantive roles and outcomes (what it does, such as its scope of authority and programs) must be set out. There are many possible CWA roles; a few brief examples will be discussed here.

A critical role that is both procedural and substantive relates to coordination of decision making. **The CWA could have a coordination function regarding decisions that have transboundary impact on waters within Canada.** For example, a clear but somewhat controversial example is where a province or territory plans to allocate water (such as for manufacturing which could impact water quality, or irrigation which could impact water quantity) that ultimately flows from provincial land through to First Nation reserve land, settlement lands, or unceded territories (and beyond). This example could apply to either surface water or groundwater.

The CWA role could be to ensure a collaborative decision that involves all relevant jurisdictions (including Indigenous) is made. This would be highly preferable to the (sometimes) insufficient engagement and/or consultation process that can end in litigation. Substantively, **the CWA could also have a role in ensuring that the water decisions are in the public interest in that they are sustainable ecologically and in terms of long-term human needs.**

Another role for the CWA could be to ensure that traditional knowledge of Indigenous peoples has both procedural and substantive impact in water decision making and management. Ensuring traditional knowledge influences decisions is critical to ensuring Indigenous values and needs are part of the fabric of water decision making in Canada. Also, traditional knowledge (as Indigenous science), should be part of evidence-based water decision making, just as western science is a critical information source.

Finally, the **CWA could recognize or enable the authority of existing useful collaborative regional bodies (such as the Mackenzie River Basin Board or Fraser Basin Council)** that have demonstrated support and collaboration with Indigenous partners. Such regional collaborative institutions could support and help discharge a CWA mandate. These institutions would be particularly useful in implementing a CWA mandate to ensure regional or watershed/river basin level planning.

³ This is taken from Phare, M-A., Simms, R., Brandes, O.M., Miltenberger, M. (2017). *Collaborative Consent and Water in British Columbia: Towards Water Co-Governance*, POLIS Project on Ecological Governance and Centre for Indigenous Environmental Resources. Available at: <http://poliswaterproject.org/polis-research-publication/collaborative-consent-british-columbias-water-towards-watershed-co-governance/>

What Next?

Canada has begun the process of creating a CWA, but the full mandate of the CWA should be co-designed with representatives of Indigenous (and other) governments. To do this, and not get bogged down immediately in complex mandate discussions that could threaten whether the CWA gets developed at all in the life of this government, Indigenous nations and governments should:

- Indicate conceptual support for Canada's CWA efforts on the condition that the institution will be co-designed with full Indigenous (and other) governments to ensure a culture of collaboration that respects Indigenous laws, governance and authority and embodies the principles and articles of UNDRIP;
- Indicate the need for Canada to exercise exemplary leadership in building the CWA and fulfilling their role in protecting Canada's waters;
- Indicate that Canada should immediately confirm an interim Agency structure that is aligned with the very general mandate as currently set by the Prime Minister ("keep our water safe, clean and well-managed");
- Suggest that ECCC submit a budget request in the next federal budget that allows for full collaborative development of CWA governance structure, mandate, etc. by the five water jurisdictions;
- Begin to determine, through their representative institutions or otherwise, how Indigenous nations and governments could structure and the costs of their participation in a CWA co-design process.