



**BRITISH COLUMBIA
ASSEMBLY OF FIRST NATIONS**

***Watersheds 2014:
Towards Watershed Governance in British Columbia and Beyond***

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January 23, 2014**

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Gilakas'la. Greetings Elders, Chiefs, delegates.

I would like to acknowledge the territory of the Hulqiminum Peoples' and in particular the Cowichan Tribes and our host, Chief Seymour as well as the Cowichan Watershed Board and the Cowichan Valley Regional District.

Water is the life blood of this planet. Along with the air it is the most important resource we all share. However, from the actions of governments around the world one would be forgiven for thinking otherwise. There may be a UN Environmental Program and UN Resolutions on the human right to water and sanitation – indeed there is a UN water rights special rapporteur – but it remains a global challenge for nation states and their sub-national governments to govern in a manner to ensure sustainable development and the protection of our natural resources – our inheritance.

We can do better. And Canada – with approximately 20 percent of the world' fresh water but where less than half is considered renewable – will have an important role to play in the international discussion around water use, governance and management – a discussion which will only become more intense as global warming continues and as we continue to deplete our existing sources of non-renewable fresh water.

To meaningfully participate in this conversation internationally – with both authority and influence – Canada needs a more vigorous and informed discussion domestically – to develop a national vision and

water strategy and where our respective laws support and reflect that common vision.

In Canada, both the federal and provincial governments have constitutional responsibility for aspects of jurisdiction over water.

Into this governance mix we must now, of course, consider the place of Aboriginal governments.

As Aboriginal peoples we are in an exciting period of rebuilding – taking our rightful place within confederation.

To help understand Aboriginal issues with respect to water, conceptually, I have found it useful to make a distinction between 1) who “owns” the water and has access to it and 2) which laws govern the purveying of water from source to tap – notwithstanding who may legally own it.

Looking at questions of ownership first – under western legal traditions, water is typically viewed as a commodity and can be owned. At common law there are riparian rights. Indeed water rights can be included in and run with grants to land. In BC, this was the case up until 1909 when water rights were, for the most part, removed from title and governed under separate statute. A statute the province still uses today -although woefully out of date – and is only now actively looking to update with the proposed *Water Sustainably Act* expected to be introduced late February.

In BC, there is, of course, still the outstanding "Indian land question" and issues of Aboriginal title – including Aboriginal title or ownership to water. Simply stated, because there were few or no treaties through which our ancestral lands were lawfully acquired by the Crown much of the lands and resources in BC remain subject to Aboriginal title.

While the courts have said, legally, Aboriginal title exists, the question now is "where and to what extent?"

We may have an answer soon. This past November the Supreme Court of Canada heard a case concerning the Tsilhqot'in title – *William*. We are awaiting the decision. For those of us that were in the court room – although often unwise to predict – many believe the court will find that Aboriginal title will not be the "small spots" or "postage stamp" areas that the province or Canada argued it should be – nor will it be the entire extent of the traditional territory that the Tsilhqot'in occupied – rather it will be somewhere in between. But it will be significant and a lot larger area than the small reserves that were unilaterally set aside for us in the absence of treaty.

My true hope is that *William* will create the impetus for true reconciliation that has been so elusive despite the modern treaty making process. *William*, however, is unlikely to answer conclusively the question of Aboriginal title to water. However, it is, I believe, reasonable to assume that Aboriginal title include water. This principle is already well established south of the border where through what is called the Winters' doctrine, the US Tribes own water associated with their reservations. In the true reconciliation discussions that must

inevitably ensue following the first title declaration in Canada, the question of the ownership of water will be an essential subject.

To date, in Canada, there has been no political recognition of Aboriginal title to water. First Nations have often struggled to ensure fair access to water and have influence over its use by others – although there has been some recognition of the need to consult and accommodate First Nations interests when decisions affecting water allocation are made. In the modern treaties that have been negotiated in BC, the issue of First Nations access to water is addressed by the province creating a water reservation for the Nation. Governance of water in these treaties is addressed separately – both in terms of on settlement lands and in terms of involvement in decisions off-settlement lands.

Interestingly, in 1909, when the province amended its land laws to exclude ownership of water, federal Indian Agents sought to acquire water rights for the reserves to be registered within the new provincial system. In this way limited access to water for domestic and agricultural purposes on-reserve were recorded.

Today, and notwithstanding Aboriginal title to water, for the most part, this is still the case and the way water rights for reserves are limited and recorded. However, some of our Nations simply exercise their Aboriginal title to water drawing from sources adjacent to or on their reserves regardless of how other governments have determined how water is owned and controlled.

Before I move away from issues around water ownership, it is important to appreciate that many of our Nations – through our teachings and our cultural beliefs – do not actually see natural resources, such as water, as commodities that can be owned in the western sense. Rather we are caretakers – resources are being borrowed from future generations. In many of our cultures, we believe inanimate objects have their own identity and spirit- including bodies of water - as a human does.

Internationally, such indigenous perspectives on the natural world are now beginning to influence environmental stewardship and even in some cases reflected in legal codes – perhaps best encapsulated in the evolving legal concept of the “Rights of Nature”.

No doubt many of you are familiar with Ecuador’s constitutional amendments in 2008 that provide rights for the natural world. Amendments brought about by their indigenous President Rafael Correa. The indigenous concept of “*Buen Vivir*” or “good living” – which focuses on social, environmental and spiritual wealth as opposed to material wealth – guided the new constitutional provisions where “nature” has fundamental and inalienable rights, reflecting the indigenous beliefs that nature is the mother and must be respected and consequently protected with legal standing.

As Indigenous Nations’ here in Canada rebuild no doubt so too will our Nations develop laws that reflect differing perspectives on ownership, the environment and the management and protection of natural resources. I would submit that these perspectives will help all of us to

find the right balance between the need for exploiting natural resources to support economic growth and development with the need to ensure the preservation of the environment.

Now I want to talk briefly about water governance from the perspective of the purveying of water from source to tap – the municipal side of water management, notwithstanding the question of ownership.

As you are all aware, in BC, the provincial government establishes and regulates what entities can own and operate local water systems and sets the rules for how they are governed. The Province also sets water quality standards.

On reserve, it is not so clear. The designing of governance structures, systems for water management and the purveying of water is one of the many aspects of local government our peoples are grappling with. For bands that are not self-governing, the *Indian Act* still governs most aspects of reserve life. For water, as for most areas that need to be governed appropriately and effectively, the *Indian Act* provides very little guidance. While there are some bylaw-making powers for Chief and Council – which some Nations have relied upon – these powers are limited, and there is nothing describing the governance structure for water. There are no legislated water quality standards.

To fill this gap, Canada recently passed Bill S-8, the *Safe Drinking Water for First Nations Act*. The Act is a not a recognition of self-government – there are no recognized law-making powers. The fundamental problem with this Act, like so many being developed by this

government, is that the bill was for the most part developed unilaterally by federal civil servants with limited consideration of First Nation's perspectives.

The Act contemplates that federal regulations will be developed for each province. There are serious questions about First Nations' capacity, the cost of meeting the new rules and building and maintaining infrastructure.

The impetus for this federal initiative was the continuing embarrassment of unsafe drinking water on so many reserves in Canada and the media attention this garners. There is no question that developing appropriate governance structures and standards for water quality on-reserve is a shared objective, but with any reform comes the need for developing systems jointly and not simply transferring responsibility from one party to another. My hope is that First Nations will be able to address their governance more comprehensively, and become self-governing and that the Act will not operate as a distraction from the larger objective – of Nation rebuilding.

In addition to title to water and local governance, there is, of course, a whole other related conversation about industrial uses of water and water management where water is used in processes such as fracking or where water quality is impacted by other industrial activities. With industrial water use, there are the same questions of ownership and jurisdiction that I have already talked about but with an even greater need to address the environmental impacts and broader watershed management issues. How each of our Nations will be and are involved

in governance on their title lands, including reserves, and within their broader territory, or shared decision-making, with respect to industrial development is a live and on-going issue.

Clearly the movement to managing water based on watersheds as opposed to other geo-political boundaries is the right way to go. It becomes more of a challenge where watersheds cross boundaries – whether international, between provinces or, indeed inter-tribal. It is also complicated where multiple jurisdictions have concurrent authority regardless of boundary.

As all governments, federal, provincial and First Nation, are actively engaged in governance reform and updating their laws with respect to water...it is incumbent on all governments to coordinate and work together. To understand how our various governments with overlapping and concurrent jurisdiction will operate.

As we all look to develop improved systems for watershed governance, and the process of legal and administrative reform occurs, I am sure in no small way many of you will continue to be involved in the discussion – whether it be at the federal, provincial or First Nation level in determining ownership of rights and creating licenses for the use of water, or whether you are coming to the issue from the perspective of a municipality or band or local government regulating or administering the purveying of water from source to tap, or you are coming from the perspective of environmental protection and fish habitat or indeed an industrialist that needs water to extract resources.

Conferences such as this play an important role in exchanging ideas and developing and maintaining networks. I would like to thank the organizers for your insight and recognize the numerous partnerships between First Nations, local government and provincial authorities that are represented here today. Through our offices at the BCAFN, we are committed to sharing best practices and ideas, supporting partnerships and our Nations in their Nation rebuilding efforts. Here in BC, and indeed Canada, through our combined wisdom and efforts, we can set an example for the world when it comes to responsible and sustainable resource management.