



Indigenous Peoples and Water Governance in Canada: Regulatory Injustice and Prospects for Reform

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INTRODUCTION

This chapter explores two interrelated examples of injustice in access to water for Indigenous peoples in Canada. Injustice, from our perspective, has two main dimensions: limited access to safe water (water security); and exclusion from water governance and management, even on traditional territories. The roots of this injustice run deep. Indigenous¹ peoples in Canada have historically been excluded from water governance by the colonial settler state. To date, the question of whether water is included within Aboriginal title (legal land rights) has not yet been settled by the Canadian courts (Laidlaw and Passelac-Ross 2010; Phare 2009).² As a result, Indigenous water rights in Canada, with few exceptions, have been treated implicitly within land-focused legal claims. Moreover, historical inequalities have often constrained Indigenous communities' access to water and exercise of Indigenous rights (Phare 2009; Simms 2014; von der Porten 2012; von der Porten and de Loë 2013). High-risk water systems, for example, pose a threat to the health of one-third of First Nations people living on reserves.³ In short, stark injustices exist with respect to water access, quality and governance for Indigenous communities in Canada.

To some degree, this situation is a direct result of Canada's fragmented system of governance: municipal, provincial and federal governments hold responsibility for different aspects of water management. Provincial governments are largely responsible for freshwater (and delegate drinking water to municipalities), whereas federal responsibilities include a range of issues related to water rights for Indigenous communities.⁴ Competing jurisdictional priorities, lack of clarity on roles and

¹ In the Canadian context, 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). Inuit refers to Indigenous peoples primarily residing in Canada's far North. Métis refers to communities of mixed European and Indigenous heritage. The term First Nations has supplanted the previously widely used terms “Indian” and “Native” in policy and public discourse, and is the operational term used to refer to governments of “Indian bands” (the basic unit of governance for reserves under Canada's Indian Act). The term “Aboriginal” is a formal legal term used in the justice system and also by the Canadian government; it is a term critiqued by many Indigenous scholars. Indigenous scholars tend to prefer the term “Indigenous”, as distinct from the formal legal term “Aboriginal” (for example, Indigenous law refers to laws emerging from communities, distinct from Aboriginal law, imposed by the settler colonial state).

² Aboriginal rights to water have never been explicitly established or disproven through a court ruling in Canada. This situation contrasts to the United States, where the Winters doctrine and subsequent Cappaert decision (Winters v. United States, 1908; Cappaert v. United States, 1976) state that surface and ground water rights are implied by the federal establishment of American Indian reservations, and (further) set standards to which the U.S. government must adhere in ensuring sufficient water for reservations, thereby recognizing the centrality of water-land interactions to American Indian communities (Shurts 2000).

³ McLaren, M. (2016) “Water Systems at Risk” *Globe and Mail*. Tuesday, October 30th. Accessed at: <http://www.theglobeandmail.com/news/national/indigenous-water/article31589755/>.

⁴ Canada's Constitution allocates responsibility for issues between the federal government on the one hand, and provincial governments on the other. Provincial governments have responsibility for most aspects of fresh water management (separate arrangements apply to Canada's three northern territories). Provincial legislative powers include, but are not restricted to: water supply, pollution control, hydroelectric development, flow regulation, and authorization of water use. The federal government has jurisdiction over fisheries, navigation, federal lands and Indian reserves (including drinking water supply on reserves), and international relations (largely responsibilities related to management of boundary waters shared with the U.S.). Section 91(24) of Canada's Constitution Act (1867) specifically assigns Indigenous issues to federal (rather than provincial) governments. Canada's *Indian Act* (first passed in 1876 and still in place, with amendments) sets out provisions governing a broad range of issues (including registration for

responsibilities, and a failure to cooperate have resulted in systemic governance gaps leading to increased risk in water supply systems and widespread underfunding, which some scholars have characterized as institutionalized racism (Mascarenhas 2007; Murdocca 2010).

These issues are particularly acute in Canada's western-most province of British Columbia (BC). In the majority of the Province, formal treaties were never signed between the Crown and Indigenous communities. This is a significant issue for many reasons, not least of which is the fact that the potential for legal recognition of water rights creates the possibility for extensive Indigenous control of water governance. This, however, is currently far from the reality in practice.

This chapter documents and analyzes examples of regulatory injustice within British Columbia's water governance framework by exploring two short case studies. The first example (Section 2) is a critical analysis of the FITFIR (First in Time, First in Right) water rights regime; although First Nations are undeniably "First in Time," they are often not the first rights holders in the context of BC water licensing practices (BCAFN 2010; Simms 2014). In section 3, we explore a second example: the approach taken to consultation between First Nations and the provincial government under the recent major overhaul and modernization of the BC *Water Sustainability Act*. In section 4, we reflect on the implications for Indigenous water governance in Canada. In section 5, we conclude the chapter with possible responses, focusing on the potential for water co-governance—concluding with some concrete suggestions for reforms that might further water justice for Indigenous communities.

FIRST IN TIME, BUT NOT FIRST IN RIGHT

"The introduction of the water licensing system by the Province does not change the fact that Aboriginal peoples of BC, and indeed across Canada, were the first users of the water, and continue to use water for the exercise of their constitutionally protected Aboriginal and Treaty rights."⁵

One of the most controversial topics in British Columbia's water governance framework is the system for allocating water rights: First in Time, First in Right (FITFIR). Similar to other Provinces in western Canada and states in the western United States (US), FITFIR was originally implemented with the onset of colonial settlement. In British Columbia (BC), the process of designating Indian reserves and water rights also became closely tied to FITFIR. At the time that reserve lands were delineated, the struggle over reserve water rights and allocation also began. Water allocation systems "provide the rules and procedures for assigning rights and establishing the processes used to decide how water should be shared among various users" (Brandes et al. 2008: 6). As its name suggests, the FITFIR allocation scheme operates on a first-come, first-served logic:

Indian "status," governance, land use, health care, and education) relating to Indian reserves and Indian "bands" (governments and communities). Imposed unilaterally (in contrast to treaties), the Act has been subject to numerous critiques.

⁵ Submission by Union of British Columbia Indian Chiefs to British Columbia Water Sustainability Act consultation process (2011), p.3.

Water rights in BC may be exercised under a system of priorities according to their respective priority dates. During times of scarcity, water licenses with the earlier priority dates are entitled to take their full water allocation over the junior licenses, regardless of the purpose for which the water is used” (MoE 2013: 17).

The irony of the title ‘First in Time, First in Right’ could hardly be more blatant: despite the fact that Indigenous peoples undeniably are the *first* peoples in the land of BC and were clearly first in time for all water in the Province, the water rights defined and assigned to reserve lands were not consistently registered as such—an outstanding issue that to this day Indigenous communities continue to raise as an injustice.⁶

The creation of reserves was, at its core, a strategy to remove Indigenous peoples from the landscape – to “keep them quiet” (Carstens 1991) – in the face of increasing Euro-Canadian settlement pressures in the 1800s. Historian Cole Harris (2004) is explicit on this point: “[Indigenous] people were in the way, their land was coveted, and settlers took it” (167). Although some 140 reserves had been established prior to 1871 when BC joined Canadian Confederation⁷, the majority were mapped throughout the late 1800s and early 1900s (Harris 2001). As a consequence of colonization and the reserve system, Indigenous peoples were denied access to much of their territories and confined to tiny tracts of fragmented land. The ratio of reserve land area to total provincial land area demonstrates the scale of dispossession: there are 1500 small reserves in what is today the province of BC, comprising a mere one third of 1% of the provincial land base (Harris 2004). While it is beyond the scope of this chapter to consider the full breadth of impacts that the reserve system had on physical, socioeconomic and cultural wellness, it is clear that it affected almost every aspect of Indigenous lives and livelihoods (Harris 1997, 2001, 2004; Kelm 1997; Miller 2000; Thom 2009). As Armstrong and Sam (2013) describe: “Forced removal and displacement from land imposed restrictions on water and other resources that disallowed freedom of movement to vital subsistence procurement sites and inhibited the ability of Indigenous peoples to continue ancient customary relationships and responsibilities within their ecosystems” (245).

Mirroring the provincial-federal wrangling over the so-called ‘Indian land question’ and the delineation of reserve boundaries, jurisdictional strife was pronounced in the debate over how to allocate water to the parcels of reserve land (BCAFN 2010; Bartlett 1998; Harris 2004; Matsui 2005, 2009; Richard 1999). BC began to grant water licenses to settlers in 1865. Significantly, these licenses were registered *prior to* the establishment of reserves (BCAFN 2010). In 1871, Indigenous peoples and their lands became a federal responsibility, while jurisdiction over land and water was transferred to the Province (Harris 2001). With this division, a prolonged dispute was initiated between the two governments over whether or not water rights should be assigned to reserve lands and, further, both governments were determined to maintain exclusive authority for defining water rights in the Province (Bartlett 1998). Indigenous peoples were completely barred

⁶ British Columbia is home to the second largest Indigenous population in Canada: approximately 200,000 people (5% of the population of the province at present).

⁷ Canadian Confederation refers to the process by which formerly separate British colonies were federally united—initially into the Dominion of Canada in 1867, which was subsequently enlarged. British Columbia joined the Confederation in 1871.

from applying for water licences in their own name until 1888 (BCAFN 2010). This dispossession in the 1800s did not proceed in the absence of resistance from Indigenous communities: “Indigenous people were not quiescent in the face of deteriorating conditions on their reserves...Repeatedly they [Indigenous leaders] petitioned the government for assistance in getting adequate water” (Kelm 1997: 48). As reserve water rights were designated, however, colonial governments did not consider [these] well-articulated demands and desires. Rather, these communities were barred from applying for water rights; as Matsui (2009: 63) writes,

“Despite their differing opinions on the question of [Indigenous] water rights jurisdiction, both provincial and federal officials shared the belief that whatever rights [Indigenous peoples] had, they were held at the ‘pleasure of the Crown.’ A number of [Indigenous] testimonies and petitions, which asserted inherent Aboriginal rights to water, did not sway either federal or provincial officials”.

In 1876, a joint federal-provincial Reserve Commission was established with the aim of settling reserve land boundary disputes, and by extension, resolving reserve water allocations. Federal commission officials generally recognized that reserve water rights were essential to fulfil the objectives with which the reserve lands were designated (Bartlett 1998). Arguing that water was necessary for irrigated agriculture, which in turn was a critical element in the project of assimilating Indigenous peoples, Federal Reserve commissioners took measures to register water licenses to accompany reserve lands in BC. The federal government held these licenses on behalf of Indigenous communities (Matsui 2005, 2009; Walkem 2004). Provincial government officials, on the other hand, were reluctant to recognize the federal government’s jurisdiction over reserve water allocation, or to recognize Indigenous water rights to the detriment of settlers (Bartlett 1998). Provincial authorities maintained that the reserve water rights granted by federal officials were not legitimate grants but merely unauthorized records (Matsui 2009). In 1920, for example, a provincial Board of Investigation ruled that the reserve water records entered by federal Indian Commissioners were legally invalid (Matsui 2009). This federal-provincial divide over reserve water allocation is evident in the case of the Lower Similkameen Indian Band, for instance, where water rights data indicate that the provincial government still does not formally recognize two reserve water allotments that were granted by federal officials in the 1880s. Overall, as a result of the back-and-forth between federal and provincial officials, there was a great deal of ambiguity and inconsistency in how water allocations were being documented and assigned to reserves.

The ultimate outcome of the provincial-federal clash over reserve water licenses, and of the fact that Indigenous peoples could not apply for their own licenses, was that reserve water rights were often left far down the priority list within the provincial system and were frequently cancelled or overridden by settler water licenses (Bartlett 1998; Richard 1999). Bartlett (1998) notes that the allotments of water made by the Reserve Commissioners were, “invariably made subject to the prior recorded rights of white settlers, though it was noted at the time that in many instances water had been recorded by white settlers which was really necessary for the Indians” (48).

As an illustrative example, Simms (2014) documents the case of the Lower Similkameen Indian Band (LSIB). According to historical records, in 1969, the LSIB applied for the right

to use 2,000 gallons of water a day from Nahumcheen Brook, but the application was refused on the basis that there was insufficient water to grant this allocation. However, seventeen years later, the Province issued a license to a private landowner for 150 acre-feet of water annually (1 acre-foot is approximately 893 gallons per day, or 326,000 gallons per year) in addition to 1,000 gallons a day from Everden Spring and Nahumcheen Brook (Ministry of Environment (1997a, 1997b). Also highlighting the low priority given to a number of First Nations communities, the LSIB has 61st priority out of 105 licenses on the Similkameen River (Simms, 2014, p 49). Sam (2013) has further documented how this inconsistency unfolded in the case of the Penticton Indian Band, where, "...settler water licenses were given priority on all streams that flowed through reserve lands, despite the Commission's recognition of existing water rights" (45).

Indigenous communities in BC have actively resisted the water licensing scheme from the outset and continue to voice opposition to the system today. Our review of the recent BC *Water Act* Modernization process, discussed in the next section, shows that issues of water allocation and licensing continue to be a key concern for many Indigenous communities, as well as for others in the Province (see also Jollymore et al., 2016). FITFIR is likely to be increasingly contentious moving forward, particularly for those Indigenous communities that do not have priority water licenses within the ranking scheme. It is important to recall that under FITFIR, the earliest recorded license has priority access to water *in times of shortage*. Water scarcity is becoming a tangible and pressing reality across the Province: many water bodies are nearing the point of full or over-allocation; 25% of water sources in BC now have restricted licensing (Brandes & Curran 2008). In the presence of water scarcity, the FITFIR system will come into force in a substantial way and those license holders lower down the priority list, including many Indigenous communities, will face a great deal of uncertainty in water access.

CONSTRAINED CONSULTATION: MODERNIZING BC'S WATER ACT

*"The province's approach maintains the fundamental flaw of assuming that the Province has sole jurisdiction over water and thus the authority to delegate water resources where there is a reasonable legal basis for Aboriginal jurisdiction."*⁸

Indigenous peoples in British Columbia have long contested the basic principles of the First in Time, First in Right system. Despite opposition, the doctrine was enshrined within BC's new *Water Sustainability Act* when it passed in 2014 (MOE 2013) and is set to enter into law in 2016. The decision to uphold FITFIR was justified on the basis that this allocation system is easy to understand and administer, and does not require a re-ranking of users which "could change with time and be highly subjective" (MoE 2013: 116). Although the *WSA* does not provide substantive changes to the Provincial water allocation mechanism, the legislation does enable decision-makers to make allowances for essential household use regardless of the priority of other licenses. This is deemed a sufficient amendment to satisfy concerns with the FITFIR system: "These modifications...to allow for essential household use should address many of its perceived shortcomings" (MoE 2013: 116). Further, although the *WSA* includes a provision for decision-makers to

⁸ Submission by BC AFN, December 3, 2013, p.23.

consider environmental flow needs⁹ in new water license applications, the adopted definition of environmental flow needs does not include cultural or spiritual flows and only makes mention that there will be “continued mechanisms to reserve water for First Nations” (MoE 2013: 6). The licensing measures adopted in the *WSA* fall short of responding to the many issues and questions that Indigenous communities and organizations have raised about FITFIR, and do not speak to Aboriginal rights and title to water more generally.

The decision to strategically disregard Indigenous peoples’ input is evidenced by a review of the consultation process for the *Water Sustainability Act* (Joe et al. 2016, see also Jollymore et al., 2016). In soliciting feedback on the proposed changes to the Act, the Province initiated a public engagement process and invited members of the public, interest groups, stakeholders and Indigenous peoples to participate. This process proved to be challenging, as Indigenous peoples are not an ‘interest group’ or even a stakeholder under the law, yet they were treated as such as part of the consultation process. The consultation process did not recognize that Indigenous peoples have constitutionally protected rights that have been “recognized and affirmed” in the Constitution of Canada and thus require an appropriate degree¹⁰ of consultation directly with First Nations governments.¹¹ Aside from a handful of public information and consultation workshops, no additional resources were provided to meaningfully engage Indigenous peoples in the review and discussion of the proposed changes to the legislation.

The result was that Indigenous participation in the consultation process was limited. A total of 34 Indigenous organizations, governments and individuals throughout the province of British Columbia participated in the public engagement (while others actively resisted the process, based on the concerns suggested above, namely treating Indigenous people and communities as ‘stakeholders’). We can take these generally low numbers as indication that the process was not designed and implemented in a way that solicited meaningful Indigenous input to the process (cf. Jollymore et al., 2016).

In their submissions, Indigenous individuals, organizations and governments expressed the view that the public consultation process set out by the Province did not meet their expectations or legal obligations to engage in a meaningful consultation process over changes to the legislative framework governing water use in BC. Many submissions argued that Indigenous peoples must be involved in any and all decisions that impact, or have the potential to impact, their lands and resources, and by extension this includes their full participation in the development of legislation and regulations pertaining to water

⁹ Environmental Flow Needs (EFNs) refers to the quantity and timing of flows in a stream that are required to sustain freshwater ecosystems, including fish and other aquatic life (i.e., maintain stream health).

¹⁰ In 2008 (*Hupacasath*), the Supreme Court distinguished “deep consultation” from lower levels of consultation. The extent of consultation depends on the First Nations’ strength of claim and the extent of the potential infringement on Aboriginal rights.

¹¹ From the *Haida* and *Taku River* decisions in 2004, and the *Mikisew Cree* decision in 2005, the Supreme Court of Canada determined that the Crown has a duty to consult and, where appropriate, accommodate First Nations when the Crown is contemplating an action or activity that might adversely impact potential or established Aboriginal or Treaty rights. The degree of consultation with First Nations depends on the strength of the case supporting the existence of Aboriginal rights and title and seriousness of the adverse effect, or potential effects, on the rights and/or title claimed (*Hupacasath First Nation v. British Columbia (Minister of Forests) et al.*, 2000 BCSC 1712, para. 138).

resources (Joe et al. 2016: 24).

Furthermore, many respondents clearly stated that their submission did not constitute consultation. Many described consultation as a longer period of engagement, compared to the relatively short timeframe allowed for by the Province for the submissions. A meaningful consultation was also understood to require mutual negotiation and agreement by all of the parties prior to engaging in the consultation process – which did not happen – raising concerns about the likelihood that the Province had failed in its legal obligation to uphold the honour of the Crown in respect of its duties to consult with Indigenous peoples.¹²

The Courts have also been clear in their position on what constitutes meaningful consultation. In a decision on *Halfway River* (1999), the BC Supreme Court declared that the process for adequate and meaningful consultation must “ensure that Aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.”¹³

The process undertaken by the Province to solicit feedback from First Nations also created barriers to participation. The majority of submissions by BC First Nations expressed interest in participating in the discussion due to the significance of water and its management on their reserves and in their traditional territories. They indicated, however, that the time period given for review of the discussion papers did not allow for a thorough review or critical analysis of the proposed legislation. As per the fiduciary relationship between the Crown and Aboriginal peoples,¹⁴ many of the respondents requested additional resources be provided by the Province to perform such a review and thus enable greater First Nations participation in the process.

Some respondents also felt that an additional barrier involved the primary use of Internet technologies to communicate information and gather input. First Nations communities in BC can be isolated with limited Internet access. Relying primarily on an online forum could

¹² Ratcliff & Company, LLP, May 4, 2010. Submission on behalf of the Coldwater Indian Band.

¹³ *Halfway River First Nation v. British Columbia (Minister of Forests)* [1999] 4 CNLR, (BCCA 470), para.160.

¹⁴ The fiduciary obligations of the Canadian Crown [state] to Indigenous communities include the duty to consult on resource development on lands subject to Aboriginal rights. The Crown's fiduciary obligations have their origins in negotiations that took place at the time of British colonization of Canada, as enshrined in the *Royal Proclamation of 1763*. The debate over these fiduciary duties is complicated by divergent views over the nature of the relationship between the Indigenous peoples of Canada and the Canadian state. At the risk of over-simplification, Canadian law frames this as a nation-to-nation relationship established between sovereign peoples and the Canadian Crown (Canada is a constitutional monarchy; Her Majesty Queen Elizabeth II is the Queen of Canada and Canada's Head of State). Related but distinct, Section 35 of Canada's *Constitution Act* recognizes and affirms Aboriginal rights. Some aspects of this relationship are structured in agreements (e.g. treaties) between Indigenous peoples and the Crown, which are administered via Canadian Aboriginal law, and overseen by the federal Minister of Indigenous and Northern Affairs. Several Supreme Court of Canada decisions (including *Guerin*, *Sparrow*, *Wewaykum* and *Ermineskin*) have directly addressed the nature and scope of the Crown's fiduciary duties, which include not only Crown management of reserve lands and resources, but also Crown decision-making and legislative authority over resources and lands subject to Aboriginal rights. The extent of the Crown's fiduciary duties is subject to debate; for example, there is ongoing debate over whether and to what extent Crown public interest obligations may counter, alleviate, or eliminate the Crown's fiduciary obligations to Aboriginal communities. Nonetheless, Canadian law clearly affirms the principle of fiduciary obligations as a constitutional duty, the fulfilment of which is consistent with the honour of the Crown (Asch 1984; Borrows 2003; Coulthard, 2014a, 2014b; Daigle 2016; Luk 2013; Macklem and Sanderson 2016; Turpel 1991).

exclude some communities, particularly community members with specialized local knowledge of water resources.¹⁵ Despite clear direction from both First Nations and Canada’s judiciary to engage and consult BC First Nations, the Province did not distinguish First Nations rights and interests from that of other public “stakeholders” as evidenced in their *Report on Engagement* (issued in the first phase of consultation). Moreover, the Province did not follow up on additional feedback received by First Nations during the second and third discussion phases. As a result, there was a distinctive change in the tone of submissions from First Nations as the consultation process unfolded. In the early phases, some of the submissions welcomed the opportunity to work together with the Province to shape the legislation to reflect the interests and values of First Nations as well as the new legal realities surrounding resource management. One organization called it a “precursor”¹⁶ to the consultation process to engaging First Nations while the BC Assembly of First Nations extended a direct offer to help the Province in developing a consultative process to engage meaningfully with First Nations across the Province. However, as the constrained approach to consultation became clear, the tenor became more confrontational: for example, several submissions made in the third phase (the legislative proposal) referred to the legal risk of excluding First Nations from meaningful consultation.

From publicly available documents, it is unclear how the Province chose to consider First Nations submissions into their changing legislative framework—if at all. Indeed, a review of the submissions relative to outcomes confirmed that there were many issues identified where the majority’s view of submissions (including from First Nations and input from other stakeholders) did not influence the outcomes. This was particularly the case for rights and license-related issues for which FITFIR was maintained: the preferences expressed in submissions by industry were heeded (Jollymore et al., 2016).

It is also clear that the legal duty to consult was not perceived by First Nations as merely a matter of legal obligation or procedural requirement owed by the Crown. Rather, First Nations clearly expressed the need for *meaningful* consultation due to the significance of the proposed changes to the outdated *Water Act* and its significant potential to affect Aboriginal rights and title. In the submissions, they reiterated the point that First Nations depend on access to clean safe water for their lives and livelihoods. Poor water quality, degraded aquatic habitat, or even reduced access to water, affects or has the potential to affect the ability of Aboriginal peoples to fish, hunt and harvest traditional foods and medicines. It becomes clear that a change in legislation impacts Aboriginal rights and/or title, which are in fact protected under the *Constitution Act of Canada* (1982). Numerous First Nations articulated in their submissions that, it is of utmost importance to these communities who decides ‘what’ and ‘how much’ water is used in their traditional territories.

Moreover, because of their relationship with their lands and water, First Nations have considerable knowledge about their water systems. As suggested by many of the respondents, traditional knowledge can help to inform the development of appropriate site-specific water objectives including critical thresholds, environmental flow needs, and

¹⁵ Submission by Union of British Columbia Indian Chiefs 2011, p.7

¹⁶ Submission by First Nations Women Advocating Responsible Mining, 2010.

sustainable water allocation plans—all newly enacted provisions in BC’s WSA. As noted in the Simpcw First Nation’s Water Declaration:

Our relationship with our lands, territories and water is the fundamental physical, cultural, and spiritual basis for our existence. This relationship to our Mother Earth requires us to conserve our freshwaters and oceans for the survival of present and future generations. We assert our role as caretakers with rights and responsibilities to defend and ensure the protection, availability and purity of water. We stand united to follow and implement our knowledge and traditional laws and exercise our right of self-determination to preserve water, and to preserve life.¹⁷

As stated by the First Nations Summit in a 2013 submission:

First Nations have a rightful governance role in setting principles that guide decision-making in any water management regime. They have important traditional knowledge that would help to establish relevant and necessary standards and thresholds for effective water management.¹⁸

Increasingly recognized as a valuable source of ecological information,¹⁹ the contribution of traditional knowledge has been credited with playing a central role in the development of co-management systems in northern Canada.²⁰ However, privileging traditional knowledge cannot simply be an exercise in extracting and appropriating Indigenous peoples’ knowledge that can then be inserted into colonial frameworks for water governance. Instrumentalizing indigenous knowledge, in other words, should not be mistaken for meaningful consultation and effective engagement and respect for those knowledges. Rather, Indigenous communities have argued for an acknowledgement of the importance of indigenous knowledge, and the incorporation of this knowledge in a respectful and meaningful manner. Justice as recognition, in other words, is equally important as justice as inclusion (full participation in decision-making processes).

The issue of consultation, and of co-governance, have been the subjects of ongoing debate in Canada. A summary of critical assessments of consultation (including but extending beyond the legal “duty to consult”) is beyond the scope of this paper. As in international debates, Indigenous peoples in Canada have raised the point that while consultation is important and perhaps even essential for achieving procedurally just outcomes, it is potentially rife with contradictions. For example, the Canadian Crown’s approach to consultation does not systematically incorporate the principles of Free, Prior and Informed Consent (FPIC).²¹ The four elements of FPIC (free, prior, informed and

¹⁷ From the Simpcw First Nation (a Shuswap Nation member) Water Declaration (2010) cited in Shuswap Nation Tribal Council WSA submission, 2013, p.1

¹⁸ Submission by First Nations Summit, December, 2013, p.19

¹⁹ For more information on best practices, see research by Berkes 1989; Berkes 1999; Binder & Hanbridge 1993; Moller et al. 2004; Pinkerton 1989; Pinkerton 1998.

²⁰ Binder & Hanbridge 1993

²¹ Although there is no internationally agreed upon definition of free, prior and informed consent (FPIC), the meaning is contained within the four elements that constitute “FPIC”: it is the right of indigenous peoples to make free and informed choices about their lands and resources prior to any sort of development. According to the U.N. Commission on Human Rights (and sub-committee on the Promotion and Protection of Human Rights Working Group on Indigenous Peoples), the basic principles of FPIC are: to ensure that indigenous peoples are not coerced or intimidated; that their

consent) create a framework that *establishes consent as the objective of consultations* in order to empower communities to protect their rights and to address situations of imbalance of power and capacity between communities and organizations. But the potential of government-led consultation processes to serve as a mechanism for conflict mitigation or resolution is rarely matched by the reality of bureaucratic procedures, particularly when the rules and processes for consultation are created by those in power—and notably when these processes do not incorporate recognition and respect for the full scope of Aboriginal rights. Beyond consultation, there are also increasing calls for co-governance. It is not yet clear what precisely this may look like, or what potential the concept holds, but it is an important task to continue to sketch out the potential for such arrangements in the future, for water governance, and beyond (Simms et al., 2016).

REFLECTIONS

Fresh water allocation in British Columbia embodies historical injustices that are strongly contested by Indigenous communities. Lack of water security and exclusion from governance processes are twin mechanisms of injustice. A key element of the solution, we suggest, is that justice as recognition should underpin justice as inclusion (full participation in decision-making processes). Without recognition of Indigenous rights, current injustices in regulatory decision-making and water access are likely to persist.

While there were significant missed opportunities with the recent modernization of the *Water Sustainability Act*, including the maintenance of FITFIR and clear failures with respect to First Nations engagement and consultation, there are clear opportunities that can still be addressed. Among such opportunities, it is worth noting that the FITFIR allocation system does not inherently negate Indigenous water rights per se (excluding the deeper epistemological issue that defining water as an inanimate ‘resource’ that can be granted in licenses stands in contradiction to many of the beliefs that Indigenous peoples hold about water, in addition to the upholding of the Crown as the arbiter of allocation and ‘rights’). These points aside, it is the way in which priority of water access was determined in BC that is particularly controversial, where First Nations were not recognized as the original occupants of the land holding distinct First in Right entitlements to water. We can look to the example of the *Winters Doctrine* in the United States, which recognized that surface and groundwater rights were implied by the establishment of American Indian reservations. In other words, the *Winters* doctrine affirmed that water rights were assigned at the time of reserve creation and that reserved rights were based on historical occupancy, intention, and agreement – not on diversion and use. The doctrine also includes an understanding that reserve water rights were flexible and unquantified, and further, that water rights assigned to reserves were understood to encompass not only existing but also *future* tribal reserve water needs (Shurts 2000). At least in principle, *Winters* more closely adheres to the notion of First in Time, First in Right in its truest sense: the first peoples of the land generally hold the earliest recorded water

consent is sought and freely given prior to the authorisation or start of any activities; that they have full information about the scope and impacts of any proposed developments, and; that ultimately their choices to give or withhold consent are respected.

licenses, which has “real effects on water allocation decisions, including effects at least partially favorable to the long-term interests of western American Indians” (Shurts 2000: 8).

Although FITFIR is now written into the WSA and the future of water allocation in BC, other amendments and interpretations are also possible that could begin to address some of the concerns described in this chapter. We suggest that First Nations’ rights to water – of sufficient quality and quantity for existing and future needs – must be explicitly recognized and protected within the licensing system, whether or not a particular license holder’s ranked priority is currently lower than that of other water users. For instance, the First Nations Summit states in its WSA submission:

*Fundamentally, planning for and responding to times of water scarcity must engage First Nations from the outset, on a government-to-government basis. Some First Nations communities experience drought situations regularly. Others may begin to experience scarcity where their water sources are overburdened by user demands. These plans and response mechanisms need to be jointly identified and developed, and a mutual plan for implementation agreed on...*²²

Overall, it is critical that the water allocation respond to the concerns that First Nations have raised, as such issues will likely only continue to be amplified as water shortages become a tangible reality in many parts of BC. As Brandes & Curran (2008) state: “The vast majority of Aboriginal Rights and Title claims to water in BC have not been finalized and are not factored into the water licensing regime and ecological needs for instream flows. This could have a significant impact on existing allocations in the future” (p. 4).

We also recognize that making progress on meaningful consultation is vital. Meaningful and effective consultation is a resource and time intensive task, and it is also particularly difficult given the histories of inequities, and lack of trust that characterizes the relationship between many First Nations and settler colonial governments. Beginning with this recognition is the only possible way to begin to move forward to build trust, to work on the basis of acknowledging past injustices, and affirming the need for reconciliation and redress. This is a long and difficult road, and often there is no clear ‘solution.’ Nonetheless, recognition in the context of justice involves not only acknowledging communities and their unique rights, claims, or histories, but also recognizing that these are sometimes longer-term issues that do not offer a solution. In this way, recognition in the sense of justice (Schlosberg 2007) is to work from a position of sincerity, respect, and investment—the only place to begin.

Among the many opportunities to move forward with respect to the concerns discussed in this chapter, our final recommendation would be to invigorate and explore options for co-governance of water between First Nations and colonial governments. This would involve agreeing upon processes for sharing authority and decision-making related to water. Doing so should necessarily involve inclusion of Indigenous conceptualizations of governance and include local and traditional knowledge in decision-making. While co-governance has potential as a route forward toward more meaningful and inclusive

²² Submission by First Nations Summit, December, 2013, p.1.

watershed governance, there are a number of preconditions that need to be met in order for it to truly constitute a meaningful shift away from the status-quo approach. We mention several of these conditions here (explored in more detail in Simms et al., 2016). An initial key condition is to consider not only the resources that First Nations require to address existing capacity constraints, but also the capacities that colonial governments and institutions need to build to work respectfully with First Nations in water governance. This could include, for instance, requiring colonial governments to build an understanding of different First Nation's laws and protocols for working together. It is clear that adequate and sustained funding and capacity building will be essential for both First Nations and colonial governments to engage meaningfully in collaborative processes. It is also important to develop ways and protocols for working together in the interim, notwithstanding fundamental disagreements about jurisdiction and authority. The Kunst'aa Guu – Kunst'aayah Haida Reconciliation Protocol establishes a possible model: in the reconciliation protocol, both the Haida Nation and the Province explicitly acknowledge their competing claims to jurisdiction for Haida Gwaii territory. With these competing claims made clear, the Protocol states:

Notwithstanding and without prejudice to the aforesaid divergence of viewpoints, the Parties seek a more productive relationship and hereby choose a more respectful approach to coexistence by way of land and natural resource management on Haida Gwaii through shared decision-making.

Collaborative water governance entails investing time into relationship building to move beyond the “crisis of confidence” (Goetze 2005) and establish trust and capacities for collaboration. This must happen at multiple levels, from the personal to the institutional. Ultimately, reconciliation of the relationship between the colonial governments and Indigenous peoples may not only be a pre-condition, but the *basis* for creating enduring and effective water governance.

CONCLUSION

It is clear the history of water governance in the province of British Columbia is one of exclusion and injustice with respect to Indigenous rights and title. At present, there is a significant legal, ethical and ecological imperative to move in new directions, and to provide more appropriate and meaningful engagement and decision-making authority for Indigenous peoples. Many of the recent policy shifts, including the *Water Sustainability Act* that was adopted into law in 2016, are calling for a fundamental shift towards co-governance. However, the nature of such shifts, and their tenability, remain uncertain.

That said, there are clear pathways to move forward in addressing, and redressing, some of the key justice challenges laid out in this chapter. First, it is worth noting that while progress has been slow, things are changing very quickly; for example, recent Supreme Court of Canada decisions (such as the Tsilhqot'in decision), which may produce fundamental shifts for Indigenous peoples in the Province (and across Canada) (Mandell Pinder 2014).²³ Second, there are examples of collaborative water management that have proven to be effective and meaningful. In the Northwest Territories (NWT), the Canadian

²³ Tsilhqot'in Nation v. British Columbia, 2014 SCC 44

and territorial governments began working directly with First Nations governments to co-develop a water stewardship strategy. Released in 2010, this strategy privileges Indigenous knowledge and explicitly recognizes Aboriginal rights. The NWT approach acknowledges that future uncertainties and challenges related to water would benefit from sincere learning that acknowledges the tremendous wisdom of Indigenous knowledges. An independent evaluation of the NWT water strategy found the new approach has helped to promote greater collaboration between water partners.²⁴ Other jurisdictions in Canada would do well to learn from, and then adapt and adopt elements of this approach.

Third, and finally, however difficult it may be, we have stressed the need for a politics of recognition that begins with a frank acknowledgement of past and ongoing injustices in multiple forms. It is only with such acknowledgement that trust and relationship building can proceed. As such, recognition of injustice, and a shared quest for justice, is as important to our shared water future as any scientific understanding of future water flows or climate change. As this volume stresses, water justice is about understanding and building relations of mutuality, shared norms, and bringing ethics to the fore in our decisions of how to use and manage water. An Indigenous concept of water justice moves beyond technocratic definitions of governance (and, indeed, co-governance) to embody a sense of the sacred trust at the heart of “sustainability.” Water justice from this perspective is at once inclusive, non-anthropocentric, and relational—an embodiment of reciprocal relationships between land, water, and animals—redefining human relationships with water and one another.

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²⁴ Harry Cummings and Associates & Shared Value Solutions 2015, p.ii

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