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Collaborative Consent AND Water in British Columbia

TOWARDS WATERSHED CO-GOVERNANCE

updated
JANUARY 2018

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A JOINT PUBLICATION OF:

CIER
CENTRE FOR INDIGENOUS ENVIRONMENTAL RESOURCES

POLIS Project on Ecological Governance
UNIVERSITY OF VICTORIA

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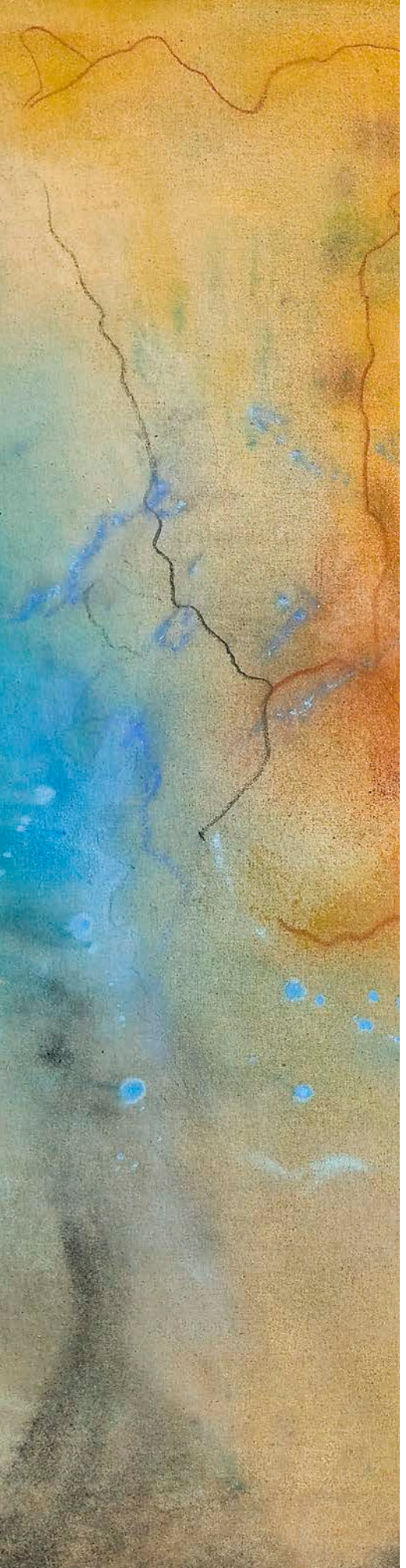
Suggested citation: Phare, M-A., Simms, R., Brandes, O.M., Miltenberger, M. (2017). *Collaborative Consent and Water in British Columbia: Towards Watershed Co-Governance*. POLIS Project on Ecological Governance and Centre for Indigenous Environmental Resources. Available at: www.poliswaterproject.org/polis-research-publication/collaborative-consent-water-british-columbia-towards-watershed-co-governance/

PLEASE NOTE: In January 2018, we updated the title of this paper from "Collaborative Consent and British Columbia's Water…" to "Collaborative Consent and Water in British Columbia…" We are cognizant that the original title was problematic as it could be interpreted as implying that the Province of B.C. has exclusive ownership over fresh water. Our intention is rather to refer to the geographic area of B.C. We recognize the ongoing tensions around jurisdiction and lack of acknowledgement of Indigenous water rights and authority in the province.



CONTENTS

Acknowledgements ii

Executive Summary 1

1 Introduction: Concept and Discussion Paper Overview 5
Paper purpose and outline 6

2 A More Detailed Look at Collaborative Consent 8
The Long-Term Project of Collaborative Consent in Canada 8
Foundations of Collaborative Consent 8
Hallmarks of Collaborative Consent 10
Precedent for Collaborative Consent: Case Study from the Northwest Territories 12

3 Collaborative Consent in Context 15
Interplay Between Co-Governance, Co-Management, and Collaborative Consent 15
Collaborative Consent versus Section 35 Consultation and Accommodation 15
Collaborative Consent versus Shared Decision-Making Agreements 16

4 Collaborative Consent: Applications for Freshwater Governance in B.C. 18
Collaborative Consent and B.C.'s *Water Sustainability Act* 18
Collaborative Consent and *WSA* Implementation Opportunities 20
Local Applications: Local Government and Watershed Governance 23

5 Conclusions and Actions Needed 24

6 Appendix: Examples of Collaborative Initiatives and How They Map Against Collaborative Consent Hallmarks 26
High-Level Policy Development and Shared Decision-Making 26
Project-Level Processes 29
Collaborative Structures 30

Endnotes 31

ACKNOWLEDGEMENTS

This document integrates feedback from peer and practitioner reviewers. We thank everyone who contributed to this work with their thoughtful comments and insights. Further, we acknowledge that their review does not necessarily represent full endorsement of the contents or conclusions of this work. We specifically thank the following individuals for their input:

Kelly Bannister Co-Director, POLIS Project on Ecological Governance, University of Victoria

John Borrows Professor, Faculty of Law, University of Victoria; Canada Research Chair in Indigenous Law; Nexen Chair in Indigenous Leadership

Deborah Curran Assistant Professor, Faculty of Law and School of Environmental Studies, University of Victoria; Acting Executive Director, Environmental Law Centre, University of Victoria

Rod Dobell Emeritus Professor of Public Policy, Centre for Global Studies, University of Victoria

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Susi Porter-Bopp Project Manager, Water for Fish, First Nations Fisheries Council

Jon O'Riordan Former Deputy Minister of the British Columbia Ministry of Sustainable Resource Management; Strategic Water Policy Advisor, POLIS Water Sustainability Project, University of Victoria

In addition, the authors wish to thank **Dana Holtby** for research support; **Arifin Graham** (Alaris Design) for his expertise in report design and layout; and **Laura Brandes** and **Roleen Sevillena** for copy editing.

The POLIS project would also like to thank its core supporters: **The University of Victoria's Centre for Global Studies**, **Eco Research Chair in Environmental Law and Policy**, **The Gordon and Betty Moore Foundation**, the **Sitka Foundation**, and the **Real Estate Foundation of British Columbia**.

Photos: Bryant DeRoy 3, 4, 7, 13, 17, inside back cover; Robert N. Clinton 9; Jennifer Swift 10; NASA 14; KirinX 22(l); hradcanska 22(r); Sam Beebe 25; David Will/Island Conservation 26; Province of British Columbia 27; Tim Proffitt-White 28; Gerry Thomasen 30

On the cover and throughout the report

*Artwork © **Claire Kujundzic**, "Cariboo trails" (detail); mixed media on canvas, 2009. A "contemporary Cariboo cave painting" from a series the artist created in response to the Mountain Pine Beetle epidemic and climate change. We thank the artist for generously allowing us to use this piece in the report.*

EXECUTIVE SUMMARY

OVERVIEW

One hundred and fifty years into Confederation, Canada's relationships with Indigenous peoples—and the institutions, laws, and policies governing these relationships—remain fraught with challenges, racism, and inequality. These tensions are evident in freshwater governance in British Columbia, where Indigenous nations are excluded from the dominant decision-making regime, and water-related decision-making has significant impacts on Indigenous rights and important cultural, spiritual, and economic water uses.

In recent years, governments at all levels in Canada have stated their commitments to developing improved relationships and new pathways forward based on nation-to-nation approaches and reconciliation. In particular, both the federal and B.C. provincial governments have committed to implementing the United Nations Declaration on the Rights of Indigenous Peoples. Courts are affirming that decision-making without the consent of Indigenous nations comes at a high cost and bears significant risk.

Critical changes to governance and how decisions are made are a necessary part of the path forward. This paper provides one response: expanding on the concept of collaborative consent and examining how it can be applied in the specific context of freshwater governance in British Columbia.

COLLABORATIVE CONSENT: CONCEPT AND HALLMARKS

Collaborative consent describes an ongoing process of committed engagement between Indigenous and non-Indigenous governments—acting as equal partners, each with their asserted authority—to secure mutual consent on proposed paths forward related to matters of common concern and all aspects of governance. Collaborative consent is about changing how decisions at all levels are made: from individual projects up to law and policy. These are long-term processes requiring both Indigenous and non-Indigenous governments to build their own structures to engage and ultimately to build new institutions and shared processes for decision-making.

The concept and approach of collaborative consent emerged from the Northwest Territories context to describe the decision-making and co-drafting processes used by territorial and Indigenous governments in developing the *Mackenzie River Basin Bilateral Water Management Agreements* and other recent legislation and plans in the territory. This approach in fact is also a normal part of "cooperative federalism," where federal, provincial, and territorial governments work together institutionally at consensus-based tables on matters of shared importance and concern. However, despite the significance of Indigenous governmental relations in Canada at all levels, Indigenous governments have not yet been included at these tables of Confederation, with the exception of some processes in North.

Elements of collaborative consent are also present in a variety of collaborative efforts between Indigenous and state governments across Canada and internationally. From these examples, several hallmarks of collaborative consent emerge. These hallmarks are not prescriptive or exhaustive but are conditions that facilitate meaningful mutual consent-based decision-making:

1. **Collaborative consent is fundamentally based on respect, trust, and the art of diplomacy between governments.** The process is premised on governments treating each other honourably: they come with mutual respect as partners with an ability to exert jurisdiction in their own sphere. For collaborative consent processes to succeed, governments must commit to achieving mutually-acceptable outcomes.

Collaborative consent is about a different way of being, together, and building a future for Canada in which Indigenous nations assume a more prominent governance place as founding nations in this country.

2 **All governments recognize each other as legitimate authorities.** In a collaborative consent process, each government recognizes that the others hold relevant jurisdiction, but do not necessarily need to agree about the scope or basis for that authority, simply that each exerts authority legitimately in participating at the decision-making table.

3 **Collaborative consent tables are decision-making tables, which means that representatives must have the authority to participate fully and make decisions at the table.** Those sitting at collaborative consent tables must be imbued with the authority to be equals at the table because decisions are the goal. They must have the authority to make decisions about the matter at hand and implement what is agreed upon. Indigenous nations must go through their internal processes to determine who should sit at and make decisions at the table.

4 **The scope of issues considered through the process can be extensive and ultimately must be satisfactory to all parties.** Collaborative consent can be applied in any decision-making process at any scale: from the local project level up to policy and law development. The critical point is that the scope of issues must be satisfactory to *all* parties involved, not constrained by a framework defined by one party alone.

5 **Collaborative consent starts at the front-end and all governments commit to remaining at the table for the 'long haul'.** Collaborative consent is a long-term, iterative, and ongoing process of engagement that (re)builds trust and relationships and that requires all governments involved to commit to remaining at the table.

6 **Each government's interests must be dealt with in a satisfactory manner from their own point of view.** All interests must be considered valid and welcomed at the table. Each government must be satisfied that their own interests are adequately accounted for from their own standpoint.

7 **The process generates real outcomes.** Collaborative consent is not an end in and of itself; rather, it is a *process* that reaches *outcomes* on the ground (and in the water). The process must be aimed at creating measurable improvements to environmental, social, and economic realities in the watersheds involved.

Collaborative consent is about a different way of being, together, and building a future for Canada in which Indigenous nations assume a more prominent governance place as founding nations in this country.

COLLABORATIVE CONSENT AND B.C.'S FRESH WATER

While the opportunities to apply collaborative consent are wide ranging—from pipelines, to park creation, wildlife management, and beyond—governments in B.C. have an imminent opportunity to adopt collaborative consent specifically in freshwater management and governance. In particular, implementation of the *Water Sustainability Act* (2016) is one key realm in which British Columbia can build collaborative consent processes and make good on its commitments to forge improved relationships with Indigenous nations.

The *Water Sustainability Act* offers a number of critical decision-making points to which collaborative consent approaches can be applied, including development and implementation of water sustainability plans and environmental flows. It also offers potential governance avenues through which collaborative consent can be realized, such as delegated governance and advisory boards. Critical starting points include:

- **Water sustainability plans**: the Province must explicitly share authority and create a co-chaired model from outset (from plan initiation to plan approval and implementation)
- **Environmental flows**: the Province must work with Indigenous nations through collaborative consent tables to develop the framework and scope of a provincial environmental flows regulation, while localized co-governed decision-making tables and/or advisory boards determine thresholds and critical flows for ecological health and protection of core related rights, such as fishing, hunting and ceremonial water uses.
- **Licensing decisions**: the Province must work with Indigenous nations to strike a Standing

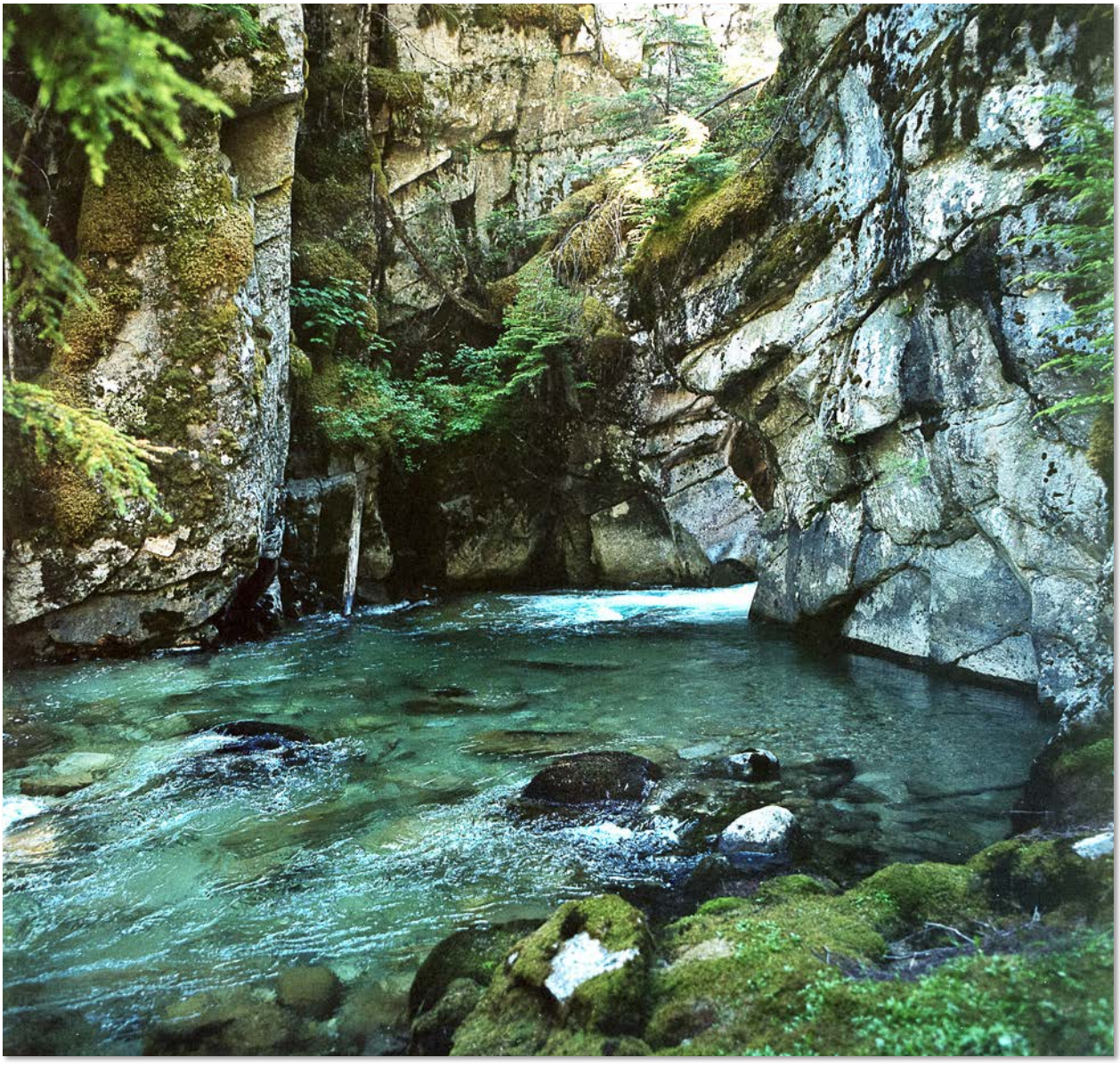
Advisory Board(s) or other body that provides decision-makers with policy/guidance on key considerations and criteria to ensure sustainable water licencing.

The range and potential of such an approach in the context of the diverse watersheds in B.C. is significant—many decisions impact the health and function of watersheds. For example, local governments can also adopt collaborative consent approaches as they use the various tools within their jurisdiction to manage and steward fresh water. Through creating new ways of being and making decisions together, collaborative consent offers a path to deepen the potential of watershed governance and create a rich fabric of localized decisions that prioritize watershed health and function.

ADVANCING COLLABORATIVE CONSENT: WHAT IS NEEDED

Collaborative consent processes are long-term, high-cost commitments. However, precedents exist showing this approach is possible, saves costs in the long term, builds meaningful partnerships, and achieves better, lasting outcomes. For these processes to move forward, several key actions are required, including:

- **Explicit transition spaces are required for all governments engaged**. Collaborative consent requires transformations of existing governance systems, and with this shift, new and vastly different competencies and approaches are needed. Indigenous nations require space, capacity-building, and support to build extended governance from within their nations and self-organize to build and/or come to decision-making tables. Crown governments must recognize that they share authority with Indigenous governments; increase or build competencies to engage in collaborative consent approaches; and shift away from a risk-averse attitude to one that is more proactive, focused on longer-term outcomes and joint solutions, and grounded in nation-to-nation partnerships.
- **Indigenous water rights must be acknowledged to provide the missing foundation for the water law regime in B.C.** Government must develop a more comprehensive way of ensuring Indigenous water rights and eventual title are accounted for in the provincial water management regime.
- **Collaborative consent must be adopted in the priority areas of WSA implementation**, including water sustainability plans, environmental flows, and licensing decisions.



Fresh water—a vital shared resource holding significant cultural, spiritual, and economic values for Indigenous peoples—is an opportune place to build new relationships and innovative forms of collaborative consent-based decision-making.

1

INTRODUCTION: CONCEPT AND DISCUSSION PAPER OVERVIEW

Collaborative consent is a way of doing business and working together. For the purpose of this paper, it concerns how Indigenous and non-Indigenous governments can work together and advance nation-to-nation relationships for the betterment of communities, the environment, and the economy. Collaborative consent specifically describes an ongoing process of committed engagement between Indigenous and non-Indigenous governments—acting as equal partners, each with their asserted authority—to secure mutual consent on proposed paths forward related to matters of common concern and all aspects of governance. It is an outlook, a process, and an outcome. Collaborative consent approaches can be applied to a range of issues and are tailored to the matters at hand—from legal and policy development, through to projects that affect land and water.

Collaborative consent describes an ongoing process of committed engagement between Indigenous and non-Indigenous governments to secure mutual consent.

As a concept, "collaborative consent" emerged from the Northwest Territories to describe the particular decision-making process used in developing the *Mackenzie River Basin Bilateral Water Management Agreements* and other recent legislation and plans in the territory.[1] It is not limited to application by governments: this is an approach that any two nations—or neighbours, or any group working for the benefit of all, together as equals—might undertake because they want to seek meaningful and lasting outcomes. In this discussion paper, however, we focus on Indigenous and Crown nations and governments, given the vital importance of strong nation-to-nation relationships to moving further down the path of reconciliation. This type of approach is exactly what is envisioned and recommended by the Truth and Reconciliation Commission (and accepted by the government of Canada) to ensure that Aboriginal peoples are full partners in the ongoing project of Confederation.[2] The fundamental point is that collaborative consent is about a different way of being, together, and building a future for Canada in which Indigenous nations assume a more prominent governance place as founding nations in this country.

More than 300 years have passed since the first treaties were signed between the Crown and Indigenous peoples in what is now Canada, and 150 years have passed since Confederation. Yet, Canada's present-day relationship with Indigenous peoples remains fraught with

Defining Key Terms

Nationhood: This paper does not provide a singular definition of nationhood, recognizing that Indigenous peoples must define this on their own terms. This is under active debate in many circles.[5] A key question regarding nationhood in terms of collaborative consent is: What is the scope or scale of the nation that participates in consent-based dialogues? Is it a community, or Chief and Council or President, a land claim, settlement or treaty entity, or some other larger regional or national entity? Or, is it all of these?

Indigenous: In this paper, the term "Indigenous" refers to First Nations, Inuit, and Métis peoples within Canada. It is generally used to refer to these groups collectively. The individual terms "First Nations", "Inuit", or "Métis" are used when referring to the specific rights or matters related to those specific nations or peoples.

Ultimately, achieving more just relationships with Indigenous peoples and better outcomes for the ecosystems that sustain us all requires critical changes to governance and how decisions are made.

challenges. This manifests in many forms: from the hundreds of legal challenges that Indigenous peoples have launched contesting government actions in their territories and communities; to the racism embedded within Canadian institutions that continues to disproportionately affect Indigenous lives and livelihoods, leaving, for instance, over 130 First Nation communities without reliable access to safe drinking water;[3] to concerns that the role of Indigenous peoples in resource development decisions that affect their territories, water ways, and rights is inadequate and unjust. The widespread Indigenous resistance to Canada 150 celebrations is symptomatic of this persistent tension.[4]

Collaborative consent offers a path to break this cycle of failure and to build equitable and trust-based relationships.

Several key drivers exist for Crown governments in Canada to seek mutually acceptable paths forward with Indigenous nations. In May 2016, Canada announced its commitment to adopt and implement the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), which marks a potentially pivotal step towards evolving Canada's legal frameworks and institutions to better reflect Indigenous rights and priorities. Federal, provincial, and territorial governments have made numerous other promises to pursue respectful government-to-government relationships with Indigenous peoples; these include the B.C. provincial government's 2017 commitment to fully adopt and implement UNDRIP;[6] the B.C. provincial government's 2005 *Transformative Change Accord*[7] and 2016 *Métis Nation Relationship Accord II*[8]; and the 2015 federal government statement that "*it is time for Canada to have a renewed, nation-to-nation relationship with Indigenous Peoples, based on recognition, rights, respect, co-operation, and partnership.*"[9] Courts are affirming that decision-making without the consent of Indigenous nations comes at a high cost and bears significant risk (see box "The Legal Imperative for Consent," p. 7).

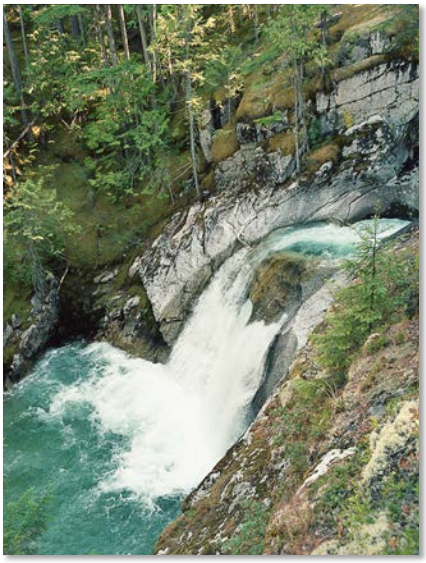
Ultimately, achieving more just relationships with Indigenous peoples and better outcomes for the ecosystems that sustain us all will take more than just articulating commitments on paper. It requires new practices on the ground (and in the water) and critical changes to governance and how decisions are made. This is where collaborative consent enters, and challenges, the status quo.

Collaborative consent is an approach to governance that is applicable across a broad suite of issues: from pipeline and hydroelectric dam development, to park creation, wildlife management, forestry, and community economic development. In this paper, however, we specifically turn our attention to freshwater governance in British Columbia as an especially rich space to build a new relationship and create innovative forms of shared governance. Several reasons exist that make fresh water compelling grounds for collaborative consent in B.C.: the escalating water issues and obvious insufficiency of existing governance and management approaches; the lack of jurisdictional clarity for fresh water and overlapping responsibilities between all levels of government, including Indigenous governments; growing momentum towards co-governance and watershed governance approaches; and the specific window of opportunity to advance the implementation of the new provincial water law regime for the benefit of all British Columbians.

PAPER PURPOSE AND OUTLINE

This discussion paper expands on and refines the concept of collaborative consent, and examines how it can be applied in the specific context of freshwater governance in British Columbia. The ideas have been developed through the authors' long-standing involvement and "lived experience" of collaborative negotiations and governance processes in B.C., the Northwest Territories, and indeed across Canada.[10] The ideas and concepts explored in this paper are neither prescriptive nor the final word on the topic. Rather, they are intended to generate further discussion about building respectful shared decision-making processes between Indigenous and non-Indigenous governments, and a stable and sustainable co-governance regime for fresh water. This work has relevance for provincial, federal, local, First Nations, and Métis governments in British Columbia and elsewhere, as well as water leaders, practitioners, and others.

Indigenous leaders and community members, academics, practitioners from many diverse disciplines, and others have long called for the full engagement and partnership of Indigenous people in governance. This



paper provides one response to this call and details a viable path forward for water co-governance—a path along which territories, provinces, and Indigenous governments can move, as some already are, to address complex governance challenges.

This paper is organized as follows:

- A detailed look at collaborative consent: the longer-term project for Canada and hallmarks of this approach;
- Collaborative consent as put into practice in negotiating the Alberta-Northwest Territories *Mackenzie River Basin Bilateral Water Management Agreement*;
- Review of collaborative consent in context: how it relates to other collaborative and partnership processes
- Opportunities for British Columbia to apply collaborative consent to freshwater governance, specifically in *Water Sustainability Act* implementation and watershed governance;
- Next steps and actions needed to implement collaborative consent and advance this approach for better water management and governance in British Columbia; and
- Appendix of case studies from British Columbia, across Canada, and beyond, showing how the hallmarks of collaborative consent exist in an array of existing initiatives.

The Legal Imperative for Consent[11]

UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLE (UNDRIP)

Twenty-five years after the first drafting efforts began, the General Assembly adopted the *United Nations Declaration on the Rights of Indigenous Peoples* in September 2007 by a majority of 144 states in favour, with four states against (including Canada).[12] Since then, the four countries voting against have reversed their position. In May 2016, Canada announced its full support for UNDRIP. It also accepted all of the **Truth and Reconciliation Commission's Calls to Action**, including the call for all levels of government to adopt and fully implement UNDRIP as the framework for reconciliation. UNDRIP establishes "a universal framework of minimum standards for the survival, dignity, well-being and rights of the Indigenous peoples."[13]

UNDRIP's provisions are wide ranging, addressing both individual and collective rights; cultural rights and identity; and rights to education, health, employment, language, and more. A key tenet of UNDRIP is the requirement for the "free, prior, informed consent" of Indigenous peoples in numerous situations, including regarding resource development. Article 32(2) provides that "*states shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.*"

UNDRIP applies to the Crown and all Indigenous nations in Canada, which includes the First Nations, Métis, and Inuit. Canada has accepted UNDRIP but has stated that it will not implement it directly into our federal legal regime through legislation. Instead, as Justice Minister Jody Wilson-Raybould described in a 2016 address to the Assembly of First Nations, "...the way the UNDRIP will get implemented in Canada will be through a mixture of legislation, policy and action initiated and taken by Indigenous Nations themselves."[14]

SECTION 35

Section 35(1) of the *Constitution Act*, 1982, recognizes and affirms the existing Aboriginal and treaty rights of Aboriginal peoples of Canada. Through case law (see Tsihlqot'in Decision below), the Courts have held that s. 35 is grounded in the Honour of the Crown[15] and creates the duty of the Crown to consult and accommodate potential or established Aboriginal or treaty rights where a proposed activity could adversely impact those rights.

TSIHLQOT'IN DECISION

The 2014 Tsilhqot'in decision of the Supreme Court of Canada provides that "*governments and others seeking to use the land must obtain the consent of the Aboriginal title holders. If the Aboriginal group does not consent to the use, the government's only recourse is to establish that the proposed incursion on the land is justified under s. 35 of the Constitution Act, 1982.*" This justification test is multifaceted and includes engaging in "consultation and accommodation" with Aboriginal rights-holders.

Other pivotal Aboriginal law decisions related to the duty to consult and consent include (but are not limited to):

- **Sparrow** [1990]: The constitutional rights recognized under s. 35 (particularly the infringement of rights) lay the foundations for the duty to consult. The first time the Supreme Court of Canada expressly refers to the Crown's obligation to consult in the context of s. 35 rights.
- **Van der Peet** [1996]: The duty to consult exists even in the context of unproven Aboriginal or treaty rights.
- **Delgamuukw** [1997]: Expanded the requirements for consultation; "the nature and scope of the duty of consultation will vary with the circumstances...consultation must be in good faith, and with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue."
- **Haida** [2004]: Government has a duty to consult prior to proof of Aboriginal rights or title; government cannot delegate the substantive elements of the duty to consult to third parties (e.g. industry).

2

A MORE DETAILED LOOK AT COLLABORATIVE CONSENT

THE LONG-TERM PROJECT OF COLLABORATIVE CONSENT IN CANADA

Collaborative consent is not a new phenomenon (either in concept or practice). Rather, it is a fresh framing of what working together through sharing jurisdiction and institutions can begin to look like in a concrete and implementable form.

In fact, collaborative consent is a key element of "cooperative federalism." Cooperative federalism is how federal, provincial, and territorial governments work together institutionally at consensus-based tables on matters of shared importance and concern.[16] These interactions are ongoing, often challenging, and complex because there are rarely clean divisions of power between governments. Under cooperative federalism, partners in a federation work together for their joint interests, and the common good (see box "Cooperative Federalism in Canada," p. 9). However, despite the significance of Indigenous governmental relations in Canada at all levels, Indigenous governments have not yet been included as collaborative partners at these tables of Confederation, with the exception of some processes in North.[17] The challenge—and opportunity—is to develop these processes with Indigenous governments and the other forms of laws, ways of knowing, and approaches to decision-making that this will involve.

Collaborative consent in its fullest form is a nation (re)building process that fundamentally reforms governance and extends cooperative federalism to include Indigenous governments at all levels of decision-making and in setting the laws and broad policy direction for country.

Many entry points exist to work towards and within the overarching vision of reforming governance so that Indigenous nations assume roles and responsibilities as full partners in Canada's Confederation. A key goal of this paper is to highlight the nature of work that is already underway in Canada between Indigenous and Crown governments in existing territorial, provincial, and region-specific processes (including the Mackenzie case study discussed in detail on pages 12–16 and the examples listed in the Appendix on page 26).

FOUNDATIONS OF COLLABORATIVE CONSENT

In addition to the hallmarks below, collaborative consent is founded on three primary pillars.

First, reflecting the principles of the Two-Row Wampum belt—the symbol of the earliest treaties in North America—collaborative consent (and co-governance) does not mean that all parties are involved in all decisions at all times, but that each nation will not interfere with the internal affairs of the others.[24] In practice this means that jurisdictional exclusivity remains the guiding principle; operationally, however, parties still choose to collaborate, even when certain decisions fall squarely within one government's jurisdiction. Why would they do this? Because agreements with broad support tend to be better and longer lasting and because partners are often needed to implement decisions (because many matters are of joint concern and involve jurisdictional overlap or uncertainty). In collaborative consent, governments agree (consent) on how they are going to work together, including which decisions are made unilaterally, which decisions are shared, and how decisions are made.

Second, collaborative consent places an onus on both Indigenous and Crown governments to adapt their institutions, their governance regimes, and potentially their decision-making timelines. Time is needed for all parties to change as the partnership evolves. Indigenous nations require capacity building, time, and resources to build extended governance from within their nations and to self-organize to build and/or come to decision-making tables. Crown governments must recognize that they share authority with Indigenous governments and that it is necessary to increase or build competencies to engage in

Collaborative consent reflects the principles of of the Two Row Wampum treaty, represented by the Wampum belt: "[Our treaties] symbolize two paths or two vessels, travelling down the same river together. One, a birchbark canoe, will be for the Indian People, their laws, their customs, and their ways. The other, a ship, will be for the white people and their laws, their customs, and their ways. We shall each travel the river together, side by side, but in our own boat. Neither of us will make compulsory laws nor interfere in the internal affairs of the other. Neither of us will try to steer the other's vessel." KANIEN'KEHÁ:KA HISTORIAN RAY FADDEN

collaborative decision-making based on those authorities. All governments must be willing to co-create new institutions and tables because reconciliation is ultimately about building new "shared spaces" beyond existing forums and institutions.[25]

Third, one of the most challenging but critical aspects of collaborative consent is to break from the reflexive position that all decisions are bound to specific process requirements and timelines. This is particularly true of current, established processes involving Crown governments. At the core of collaborative consent is the equality and trust of the partners: like any effort to work together neither has a "veto," but both must engage with flexibility to proceed at the pace that the decision requires, that all the parties are comfortable with, and that maintains the broader goal of reconciliation. This could mean creating new expedited approaches or choosing to "pause" on making a decision until a time when a more respectful and favourable outcome is more likely.

As such, a specific decision becomes less about the decision happening in a defined, rigid timeframe and more about the decision happening at the *right* time with processes structured accordingly. These processes can include explicit commitment to alternative dispute resolution in the event of intractable disagreement, or agreement that decisions of a certain nature will be paused and revisited along agreed timelines, or even that certain decisions will proceed over disagreement in specific, limited circumstances only. This extreme deference to the need for governments to find mutually acceptable solutions is the essence of intergovernmental diplomacy and reconciliation.

Cooperative Federalism in Canada

Cooperative federalism describes the process whereby provincial, territorial, and federal governments in Canada work together to resolve complex governance challenges by seeking "cooperative solutions that meet the needs of the country as a whole as well as its constituent parts."[18] Even since the earliest days of Confederation, each had concerns about Canadian federalism, but recognized that forming a federation would create stability and opportunity. At the same time, Indigenous nations were engaged as self-governing nations in treaty-making with the Queen.[19] This also created stability, and was a solution to complex governance and land challenges related to settlement at that time.

In those early days, the vision of federalism was quite different from that of today: a legitimate and important role existed for provincial interests, but they were generally seen as less important than the national goals of the federal government. This early version of intergovernmental relations was built around the concept of "watertight compartments" between the various constitutionally defined jurisdictions. However, such concepts change over time. More recently (in the post-Depression era and after the Second World War), cooperation has emerged as a driving force in Canadian federalism. Constitutional law expert Peter W. Hogg explains, "The related demands of interdependence of governmental policies, equalization of regional disparities, and constitutional adaptation have combined to produce what is generally described as "cooperative federalism."[20] Further, the Constitution was not entirely clear or exhaustive in delineating responsibilities of the levels of governments. Cooperation has become absolutely necessary to "fill in the gaps."

Under cooperative federalism, the orders of government work together as independent equals at consensus-based tables, each possessing their (not always absolutely clear) spheres of power. Together, they co-determine broad national policies and harmonize approaches to regionally significant issues.[21] The various agreements and understandings take many forms and are based on a governmental system that is ongoing, evolving, and occurs regularly.

This wide-ranging cooperative activity is seen as a sign of health and vitality within the Canadian federal system, providing the necessary efficiency and flexibility to address the emerging needs of Canadian society in a modern context with far greater effectiveness than appealing to the courts or constitutional amendments.[22]

Cooperative approaches like federal-provincial-territorial meetings are not an exception but the main mechanism of cooperative federalism. In addition to well-known examples of cooperative federalism—like the First Ministers Meetings and the Canadian Council of Ministers of the Environment, for example—115 senior-level intergovernmental conferences took place in 2015 and 2016, demonstrating the importance and extent of cooperation within the Canadian system.

As legal scholar Mark Walters suggests, "Canada's constitutional system has already been acknowledged by the courts to be a complex, dynamic, and yes, uncertain, network...The explicit acknowledgment that Aboriginal jurisdictions are as integrated within that system as federal and provincial governments is, we may say, simply a matter of right."[23]

Elder Florence James addresses participants at the Watersheds 2016 *forum, where collaborative consent and building capacity for collaborative watershed governance were key themes explored.*

HALLMARKS OF COLLABORATIVE CONSENT

The following seven hallmarks of collaborative consent have been drawn from examples of existing innovative collaborative initiatives in British Columbia, across Canada, and globally (see Appendix). These hallmarks are not exhaustive or prescriptive, but represent building blocks of meaningful, mutual consent-based decision-making. Each is illustrated by a real-world example, demonstrating that aspects of collaborative consent are already in play. Thus, while the individual hallmarks alone are not unique to collaborative consent, taken together they amount to a fundamentally different approach from our status quo. And this new approach can yield resilient and lasting solutions.

1 Collaborative consent is based on respect, trust, and the art of diplomacy between governments.

The process is premised on governments treating each other honourably: they come with mutual respect as partners with an ability to exert jurisdiction in their own sphere. For collaborative consent processes to succeed, governments must commit to achieving mutually acceptable outcomes (which leads to hallmark 5 below). These are long-term processes that can mean delaying or avoiding contentious decisions. Nobody has veto in the process, which means that if despite long, deep, honest and open discussion and compromise, governments a) do not reach agreement; b) are of the view that they have the unilateral power to act; and c) are required by the circumstances to take action despite their partner's disagreement, they are of course free to attempt to proceed along this path. Collaborative consent does not rewrite the Constitution of Canada, but it does place a great burden on governments to extend the concept of decision-making to *joint* decision-making and to embrace the deep commitment to not proceed over the disagreement of their partner(s). If a government seeks to proceed against the wishes of another, they do so at great risk—politically and to the success of the project—and must weigh the cost of lost or damaged relationships against the short-term benefits gained by proceeding unilaterally.

Example: *Indigenous and Crown governments were partners from the beginning of the three-year negotiation process for the Alberta-Northwest Territories Mackenzie River Basin Bilateral Water Management Agreement. All parties were involved in the scoping of interests, options, and development of all elements of the final agreements.*

2 All governments recognize each other as legitimate authorities.

Any given natural resource in Canada is subject to multiple and overlapping jurisdictions within the constitutional framework, which includes Indigenous governance. In a collaborative consent process, each government recognizes that the others hold relevant jurisdiction, but do not necessarily need to agree about the scope or basis for that authority, simply that each exerts authority legitimately in participating at the decision-making table. Indigenous nations will participate in collaborative consent processes based on their own view of their authority, with many nations of the view that these authorities are not created by the *Constitution Act 1982* or Canadian courts, but rather are *inherent* flowing from their long occupation of their lands and waters.[26]

Collaborative consent does not require surrendering jurisdiction or authority but instead offers a way to craft robust solutions that work for all parties. This process can proceed even with the existence of fundamental underlying uncertainties (e.g. about Indigenous title, rights, land, or water ownership). Complete jurisdictional clarity does not exist between the authorities of any level of government in Canada; it is a continual process of agreeing to work together to "get things done." Occasionally, governments litigate to resolve jurisdictional uncertainty, but this is actually quite rare in Canada.[27]

Importantly, this does not lock the negotiated arrangement in indefinitely: if legal regimes change in the future (e.g. further clarity by the courts on rights and title, or new developments such as treaties or agreements), if new authorities come into effect, or if new authorities are needed (e.g. collaboratively managing climate change is a newer area not contemplated under the original constitutional division of powers), these changes can adjust whatever is arranged at the collaborative consent table.[28]

Example: *In the Kunst'aa Guu–Kunst'aayah Haida Reconciliation Protocol, both the Haida Nation and the Province of B.C. explicitly acknowledge their conflicting views with regard to sovereignty, title, ownership, and jurisdiction for Haida Gwaii territory. With these competing claims made clear, and despite them, the Protocol commits both parties to working together.*[29]

In a collaborative consent process, each government recognizes that the others hold relevant jurisdiction, but do not necessarily need to agree about the scope or basis for that authority, simply that each exerts authority legitimately in participating at the decision-making table.

3 Collaborative consent tables are decision-making tables, which means that representatives must have the authority to participate fully and make decisions at the table.

Those sitting at collaborative consent tables must be imbued with the authority to be equals at the table because decisions are the goal. They must have the authority to make decisions about the matter at hand and implement what is agreed upon.[30] Indigenous nations must go through their internal processes to determine who should sit at the table, negotiate, and provide consent on their community's or nation's behalf.[31]

The legacy of the imposed *Indian Act* (e.g. band council system) has fundamentally disrupted many First Nation governance systems and created tensions around leadership and authority.[32] Time and resourcing will be needed to support First Nations' self-organization and institution building; the fragmentation created by the imposed band council system must not be used against Indigenous nations, nor must Crown governments choose to negotiate with the entity or individual deemed most convenient from their own standpoint. This must be defined by the Indigenous community (or communities) involved; however, there is a need for First Nation and Métis governments to self-organize to ensure decision-making tables are not unnecessarily unwieldy in size, scope, or process design.

In such a transformative model it is natural to expect changes and evolution of all institutions and decision-making bodies over time. Governance is never static—it is always evolving.

***Example:** The Haida Gwaii Management Council makes strategic resource management decisions, including for land use, forestry, and conservation. Importantly, it has delegated Indigenous and Crown authority to make joint decisions.*

4 The scope of issues considered through the process can be extensive and ultimately must be satisfactory to all parties.

Collaborative consent can happen at multiple tables at multiple levels and has the potential for broad applicability in any decision-making process at any scale—from the local project level up to high-level policy and law development. The process will look very different depending on the place, issue, and scale (e.g. which decision-makers must be involved, timelines, nature of the trade-offs involved). The critical point is that the scope of issues must be satisfactory to *all* parties involved, not constrained from the outset by a framework defined by the priorities of one party alone.

***Example:** Territorial and Indigenous governments in the Northwest Territories have co-drafted legislation, policies, and plans in full partnership, including the* Species at Risk Act. *For this specific* Act, *a working group comprised of high-ranking officials from the Government of Northwest Territories and all Indigenous governments, and all parties' legal counsels, was tasked with co-drafting the legislation, which was a three-year process. The final draft legislation was still subject to the regular committee and public review process; however, very few changes were made since all matters of major concern had been addressed in the co-drafting process. The Government of Northwest Territories intends to co-draft and develop several more laws with Indigenous governments.*[33]

5 Collaborative consent starts at the front-end and all governments commit to remaining at the table for the "long haul."

Collaborative consent is a long-term, iterative, and ongoing process of engagement that (re)builds trust and relationships and that requires all governments involved to commit to remaining at the table. It involves creating permanent discussion and agreement-making tables (e.g. working groups, forums, councils) to discuss, work through, and decide on items of ongoing mutual concern. Remaining at the table is a core part of the responsibility of governance. Collaborative consent applies to both the negotiation or development phase and the implementation phase, when each government takes whatever is agreed upon and implements it within the bounds of their own jurisdiction (see box "Phases of Collaborative Consent," p. 14).

***Example:** The Great Bear Rainforest negotiations spanned over 15 years, and the Agreements and Order commit the parties to an ongoing governance relationship for between five and 250 years.*

6 Each government's interests must be dealt with in a satisfactory manner from their own point of view.

Decisions taken or issues negotiated through a collaborative consent process must ultimately work for all the governments involved. To achieve this, all interests must be considered valid and welcomed at the table. Each

government must be satisfied that their own interests are adequately accounted for *from their own standpoint*; this "self-evaluation" element of addressing interests is core to how the process can build trust and relationships.

Example: *The Northwest Territories water stewardship strategy,* Northern Voices, Northern Waters*, was developed with and had sign-off from all Indigenous governments across the NWT, and an Aboriginal Steering Committee (ASC) helped direct and guide the process. The strategy formed the basis for the NWT's transboundary water agreement negotiations with Alberta and B.C., with the ASC continuing to help direct and guide the negotiations. A key issue in the negotiations was the interest that the NWT had in protecting traditional uses of the waters, which was a result of Indigenous government partnership. Some parties did not see this interest as being as important as upstream economic development. However, the focus in the negotiations on each government meeting its interests to its satisfaction meant that the transboundary water agreements had to protect traditional uses as well as economic interests (rather than one to the exclusion of the other).*

7 The process generates real outcomes.

Collaborative consent (and governance writ-large) is not an end in and of itself. Rather, it is a *process* that reaches *outcomes* on the ground (and in the water). The process must be aimed at creating measurable improvements to environmental, social, and economic realities in the watersheds involved (e.g. protecting water for important ecological, social, cultural, and spiritual uses; reducing conflict in legal challenges; increasing social and ecological resilience to a changing climate; striking a better balance between competing water uses and water for ecosystem health and function; reinforcing a foundation for a sustainable local economy). Evaluation mechanisms must be built in to determine if outcomes are being achieved, and to identify adaptations that may be needed to advance progress.

Example: *The Great Bear Rainforest Agreements and associated Coast Opportunities Fund generated actual outcomes on the landscape and for communities, including designation of conservation areas and investment in a Coastal Guardian Watchmen program.*

PRECEDENT FOR COLLABORATIVE CONSENT: CASE STUDY FROM THE NORTHWEST TERRITORIES

Territorial and Indigenous governments in the Northwest Territories have been leaders in adopting a collaborative consent approach. Together, these governments have successfully co-drafted legislation, policies, and plans, and undertaken major collaborative negotiations for lands and waters, including the *Mackenzie River Basin Bilateral Water Management Agreements* with Alberta and British Columbia, completed in March and October 2015, respectively.

This section specifically focuses on collaborative consent in the negotiation of the Alberta-NWT *Mackenzie River Basin Bilateral Water Management Agreement*.[34] This detailed case study not only illustrates many of the aspects and hallmarks outlined above, but also demonstrates proof of possibility. If such a complicated matter in such a nested, overlapping, and complex jurisdictional context can achieve collaborative consent, the possibilities for this approach move from concept to reality in many other situations. This example is highly relevant to

TIMELINE: NORTHWEST TERRITORIES CASE STUDY

Development and negotiation phase

July 1997
Mackenzie River Basin Transboundary Waters Master Agreement comes into effect

January 2009
Aboriginal Steering Committee formed

May 2010
Northern Voices Northern Waters: NWT Water Stewardship Strategy released

August 2012
Formal negotiations begin between NWT and Indigenous governments to develop position on NWT-AB transboundary agreement

1997 | 2009 | 2010 | 2012

governments across Canada, and indeed globally, as a model of how to "do things differently."

BACKGROUND

The Mackenzie River Basin is a globally significant ecosystem encompassing nearly one-fifth of Canada's landmass. In 1997, the governments of the Northwest Territories, Yukon, British Columbia, Alberta, Saskatchewan, and Canada signed the *Mackenzie River Basin Master Agreement* (the "Master Agreement"), a unique, cooperative, intergovernmental framework agreement to manage the Mackenzie River Basin. Indigenous representatives from each of the five provinces and territories sit on the management structure created under the Master Agreement, the Mackenzie River Basin Board.

Given the complexities of water management in the basin, the Master Agreement commits neighbouring jurisdictions to enter into bilateral (transboundary) water agreements. These bilateral agreements provide specific binding commitments for implementation of the Master Agreement to ensure a coordinated approach to sustainable watershed management in the Mackenzie River Basin.

An important NWT policy that formed the basis for the negotiation of the bilateral agreements is the territorial water strategy, *Northern Voices, Northern Waters: NWT Water Stewardship Strategy*. An Aboriginal Steering Committee, representing most of the NWT's Indigenous governments and other Indigenous government representatives,[35] was formed to co-develop and implement the *Northern Voices Northern Water Strategy* and continues to advise the Government of Northwest Territories on water and other environmental issues. This policy was developed in advance of the negotiations, and provided the NWT negotiation team with the territory-wide consensus vision for water protection and use.

COLLABORATIVE CONSENT PROCESS TO ARRIVE AT FINAL AGREEMENT

Negotiation of the Alberta-NWT *Mackenzie River Basin Bilateral Water Management Agreement* relied on the previously developed Aboriginal Steering Committee for scoping of interests, options, and development of all elements of the final agreements. Formal discussions with Indigenous governments on the development of negotiation positions for the Alberta-NWT transboundary water agreement began in August 2012[36] and Indigenous governments were partners from the beginning of the three-year negotiation process. The NWT negotiation team also had numerous community-based meetings as negotiations proceeded to continue to get direct input from Indigenous community members.

This ongoing, multi-faceted collaboration with Indigenous governments and citizens was instrumental to the success of the negotiations, and maintaining this involvement will be critical for its successful implementation. As part of the process, the Government of Northwest Territories and Indigenous governments also signed a *Memorandum of Understanding on Bilateral Water Agreement Implementation* that sets out their respective roles in implementation.

IMPLEMENTING THE ALBERTA-NWT AGREEMENT

The Agreement commits Government of Alberta and the Government of Northwest Territories to cooperative, integrated watershed management in Mackenzie River Basin. It is administered by a cooperative, consensus-based Bilateral Management Committee (BMC). Currently, the BMC has representatives from the

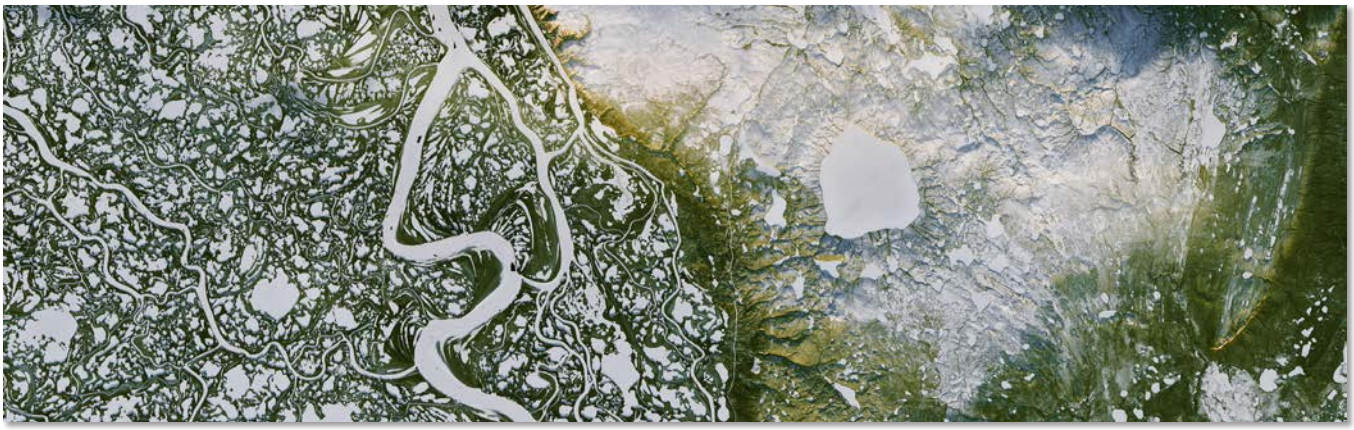
Implementation phase

March 2015
Alberta-NWT Mackenzie River Basin Bilateral Water Management Agreement signed

March 2015–May 2016
Intergovernmental Agreements on Bilateral Water Agreement Implementation signed between Government of NWT and six Indigenous governments

2015–ongoing
Meetings of Bilateral Water Management Committee (at least one each year)

2015 >>



The Mackenzie River Basin as seen from space.

governments of Alberta and the Northwest Territories, and Indigenous representation from the NWT; however, the Agreement provides for each signatory to be able to appoint Indigenous representation on the Committee.

Each party will implement the Agreement within their own jurisdictions. NWT and Alberta agree that they will manage waters within their boundaries according to their own internal laws, regulations, etc., but in a manner that is aligned with the purpose and principles of the Bilateral and Master Agreements. The Bilateral Agreement requires the parties to work closely with Indigenous peoples and governments by, for example, consulting with Indigenous organizations in advance of BMC meetings, or inviting additional Indigenous participants to BMC meetings.

Phases of Collaborative Consent

The Mackenzie example reveals three distinct phases that should guide any collaborative consent process going forward:

PHASE 1: DEVELOPMENT AND NEGOTIATION

This involves the process through which Indigenous and non-Indigenous governments work together to reach a mutually acceptable agreement on a given matter; this could be a piece of legislation, a regulation, an agreement, a watershed plan, or a specific decision point such as issuing a water permit or licence. This is done through agreed-upon decision-making forums or tables (e.g. steering committees, negotiation tables, advisory boards) and processes. Part of this process is reaching consent about how the governments will continue to make decisions in the implementation phase once an agreement is reached, including which types of decisions must be shared and which will remain separate.

PHASE 2: IMPLEMENTATION

Once an agreed-upon outcome is reached or ratified, each government in the collaborative consent process then implements it within their own legal and political system. In this way, the high-level agreement filters down into each government's own jurisdiction—laws, practices, and decision-making structures—to achieve the desired outcomes. Sometimes additional agreements are required, such as the *Memorandum of Understanding on Bilateral Water Agreement Implementation*. The governments continue to collaborate and share decision-making as required in the agreement.

PHASE 3: FEEDBACK AND ITERATIVE REVIEW

Collaborative consent is never "finished." It involves ongoing governance relationships and interactions, evaluation of progress, and course-corrections and renewal. This requires ongoing transparency, relationships, communication, and trust-building.

3 COLLABORATIVE CONSENT IN CONTEXT

This section draws distinctions between collaborative consent and some other key approaches to collaboration and decision-making with Indigenous nations: co-governance and co-management; section 35 consultation and accommodation; and shared decision-making agreements.

INTERPLAY BETWEEN CO-GOVERNANCE, CO-MANAGEMENT, AND COLLABORATIVE CONSENT

In the freshwater context, co-governance[37] with Indigenous nations is an identified essential "winning condition" for watershed governance in B.C.[38] However, several outstanding questions remain about how to realize this approach:

- How is co-governance operationalized? How can governments meaningfully share authority and work together in practice?
- How do various levels of government co-govern when there are overlapping responsibilities, contested control, sometimes conflicting values, and differing legal systems and sources of authority?
- At what scale(s) should co-governance proceed and for what kinds of issues? Who must be involved, and when?

Collaborative consent provides a powerful pathway to tackle these types of difficult questions and to build co-governance with Indigenous governments in British Columbia. Collaborative consent is a main "ingredient" for co-governance and provides the decision-making process through which co-governance can ultimately be realized: two parties are not truly co-governing unless they are achieving each other's consent on important decisions in an ongoing way (e.g. broad vision statements, plans, laws, policies). Co-governance is the cumulative result of ongoing, multiple collaborative consent processes. Co-governance happens when collaborative consent processes are:

- ongoing and happening at multiple levels and scales;
- formalized (e.g. through memorandums of understanding that outline the relationship, agreements on how the parties will work on issues together, protocols for decision-making); and
- cumulative and dealing with matters of increasing complexity, relevance, and importance.

It is important to note that collaborative consent is fundamentally different from co-management, in which one jurisdiction holds all decision-making power and delegates prescribed administration activities to the others. Collaborative consent gets at *actual* decision-making on a wide scope of complex issues and initiatives including law and policy development—going well beyond sharing responsibilities at the technical and operational level.

Ongoing achievement of consent is also a direct *outcome* of co-governance, when the parties involved are effectively making decisions together and coming to agreement. In this way both concepts reinforce each other, building upon and creating new pathways. The bottom line is that co-governance is not possible without collaborative consent.

COLLABORATIVE CONSENT VERSUS SECTION 35 CONSULTATION AND ACCOMMODATION

"The fact that there have been over a hundred legal cases about the duty to consult and accommodate since 2004 illustrates the reality that on the ground consultation and accommodation is not occurring in a manner that is advancing reconciliation and building patterns of trust, respect, and understanding."

—FIRST NATIONS LEADERSHIP COUNCIL 2013[39]

Collaborative consent differs fundamentally from the approach to consultation and accommodation that occurs under section 35 of the Constitution. Collaborative consent is

the process where governments reach agreement on matters of governance; consultation and accommodation is where specific potential rights impacts are minimized where possible.

Consultation and accommodation tends to deal with project-based decisions and is an "end of pipe" process, meaning that Indigenous nations are *responding* to proposed projects rather than shaping the broad policy and legal foundations of the decision from the beginning. The current consultation and accommodation approach embodies the notion of a fixed hierarchy of authorities where the Crown decides who, how, and when to talk to Indigenous rights-holders (rather than governments). It also determines when the discussion is sufficient and therefore over. Further, this approach is not nation-to-nation.[40] It provides a process to potentially check government authority and power and (at worst) a means for Crown governments to justify infringing on Aboriginal rights and title. As hallmark 4 states (see p. 11), the scope of issues considered through the collaborative process can be expansive: this approach can apply to all decisions at all scales (from individual projects to policy and law).

Through adopting the collaborative consent approach, s. 35 obligations to consult and accommodate do not cease to exist, rather they tend to be supplanted by earlier conversations that have addressed the underlying concerns, needs, or goals.[41] Crown consultation and accommodation processes become more clearly a safety net or last-resort measure to ensure some basic safeguards are maintained, usually project-specific in nature.

The bottom line is that co-governance is not possible without collaborative consent.

Again, collaborative consent does not mean that all parties are involved in all decisions at all times, but that they together decide which decisions are shared, which remain separate, and how decisions will be made. This is an issue of tiering: for instance, a high-level decision arrived at through an expansive collaborative consent process might create new decision-making structures (e.g. board or panels) that deal with certain levels of time-sensitive operational decisions (e.g. water licensing).

Should a collaborative consent process fail, the duty to consult and accommodate always exists. Indigenous governments are always guaranteed the extent of rights protections afforded by s. 35. Adopting a collaborative consent approach does not preclude legal recourse by either government should the process fail; all governments still have their jurisdictions intact. However, if collaborative consent is happening at all levels, including at high-level vision and policy direction-setting tables, Crown decisions that might impact rights and that therefore invoke s 35 consultation and accommodation duties are much narrower. Prior policy consideration would have been discussed and consensus reached. Since project-based decisions would be "surrounded" by an environment of good collaborative consent processes, this would reduce the chances that a project that would unacceptably impact rights would even have been proposed in the first place.

COLLABORATIVE CONSENT VERSUS SHARED DECISION-MAKING AGREEMENTS

Across B.C., a spectrum of relationships exist between Indigenous nations and the provincial government. Progress towards improved government-to-government engagement has been made through several shared decision-making (SDM) agreements negotiated since 2009 between various First Nations and the Province of B.C. While it is beyond the scope of this paper to go into depth on SDM agreements, detailed work has been done on this topic through Simon Fraser University's *Shared Decision-Making in B.C. Project*.[42]

SDM agreements are varied, but in general do two things: 1) set out government-to-government engagement processes for the consideration of resource development applications; and 2) establish senior government-to-government forums that provide for strategic engagement. This section focuses on the former aspect, while acknowledging that the senior government-to-government forums established through SDM agreements are potential institutions to support collaborative consent approaches in freshwater decision-making (see box "Potential Institutional Designs to Support Collaborative Consent & WSA Implementation," p. 22).

Although SDM agreements represent progress and share some

features with collaborative consent, they do deviate from (or fail to embody) several core aspects of collaborative consent. For example:

- **With SDM agreements, the scope of issues under consideration is limited by one of the parties.** SDM engagement processes generally concern fairly narrow development applications, not the broader framework (e.g. legislation or policy) for land and resource management and governance. The scope and nature of the decisions at hand have already been prescribed by a management regime defined by the provincial government.[43]
- **SDM agreements do not generally provide for truly shared decisions.**[44] They assume that the product of government-to-government engagement processes is a *recommendation* supported by the First Nations. This recommendation is then submitted to the relevant statutory decision-maker to issue a statutory authorization, or it is submitted to affected First Nations and provincial statutory decision-makers. However, there is no guarantee that the final statutory decision will be consistent with the recommendation.[45] It is also unclear what happens if the separate decisions made by the Crown and the affected First Nations do not align.
- **SDM agreements do not set out a consent-based engagement process.** Statutory decision-makers make the final decision that could contravene the affected First Nation's decision or consensus recommendation. First Nations can influence the consensus-seeking process but there is no *requirement* for mutual consent.
- **SDM institutions do not have decision-making authority** due to concerns around fettering (The Haida example is one notable exception; see details in Appendix p. 26). It is the provincial view that institutions for SDM cannot be delegated authority and can only generate recommendations for two separate decisions—one by B.C. and another by the First Nation.[46] The distinction between recommendations and requirements becomes significant as the "rubber" of good intentions hits the legally enforceable "road."

Through adopting the collaborative consent approach, s. 35 obligations to consult and accommodate do not cease to exist, rather they tend to be supplanted by earlier conversations that have addressed the underlying concerns, needs, or goals.

4

COLLABORATIVE CONSENT: APPLICATIONS FOR FRESHWATER GOVERNANCE IN B.C.

Beyond the broad case for collaborative consent as an overarching approach, governments in B.C. have an imminent opportunity to adopt a collaborative consent approach specifically for freshwater management and governance.

Water is complex, treasured, and life giving. It is a vital shared resource that holds significant cultural, spiritual, and economic values for Indigenous peoples. Widespread recognition exists that British Columbia's current systems of freshwater governance and management are not working: Indigenous nations are excluded from the dominant decision-making regime; water-related decision-making has significant negative impacts on Indigenous rights; communities are reacting rather than proactively planning to respond to the serious threats to their local watersheds; and water- and land-use decisions are often made at the expense of ecosystem health.[47] Rethinking decision-making arrangements is urgent given the obvious insufficiency of current approaches.

Within the Canadian legal system, water is a jurisdictionally fragmented and challenging resource, with gaps in the constitutional division of powers regarding this shared resource. All levels of government, including Indigenous governments, have a role in how water is managed and governed.[48] Further, Indigenous laws for fresh water exist in parallel with Canadian law, and how these two legal orders interact and inform one another remains an outstanding question. Modern water governance requires a more collaborative approach to watershed governance, which involves better aligning water decision-making with ecological boundaries for whole-of-watershed management, and clear emphasis on partnerships and sharing authority where there is overlapping jurisdiction.

The following discussion builds explicitly on the opportunity offered by provincial efforts to implement B.C.'s new *Water Sustainability Act (WSA)* and the complementing commitments to adopt a more partnership-oriented approach (further reinforced in the provincial water strategy *Living Water Smart*).[49] This is only one of a myriad of ways that the concept of collaborative consent can be applied. This section will also explore how this type of decision-making process could be put into practice by local governments, particularly in the context of watershed entities.

COLLABORATIVE CONSENT AND B.C.'S *WATER SUSTAINABILITY ACT*

After a lengthy modernization process, B.C.'s *Water Sustainability Act* came into force in February 2016. This new law has many promising features that can better protect fresh water in the province:

- Groundwater is regulated for the first time;
- Enhanced legal protections now exist to sustain water for ecosystems;
- Incentives are provided for better understanding our water resources through monitoring and reporting;
- New opportunities are available to deal with water quality and land-water interfaces; and,
- Novel legal pathways exist for improved watershed planning and shared decision-making.

However, critical details of the legislation, especially related to the sustainability aspects, have yet to be developed. Drafting and implementing the necessary supporting regulations will be an ongoing process over the next several years. And, despite the *WSA*'s potential, shortcomings also persist. In particular, First Nations have clearly articulated that the consultation undertaken for *WSA* development was inadequate and that a more meaningful approach is needed in the regulation development and implementation phase.[50] Changing course and bringing collaborative consent to life in the context of the *Water Sustainability Act* is a meaningful path forward to begin redressing

Who Will Be Involved in Collaborative Consent Tables in B.C. and Their Context for Participation

As described in the hallmarks section of this discussion paper (pp. 10–12), collaborative consent requires legitimate decision-makers at the appropriate level and recognition of their authority among all present governments. Below are some key groups that might be considered in determining who is present at collaborative consent tables in B.C. This should not be taken as a prescriptive determination for all collaborative consent-based negotiations. Different decisions may require different types and levels of decision-makers than are included here.

203 FIRST NATIONS AND MULTIPLE NATION ALLIANCES

- With the exception of Treaty 8, the Douglas treaties on Vancouver Island, and a handful of modern treaties finalized through the B.C. Treaty Process, B.C. is unceded traditional territory.
- Indigenous laws, title, and rights are being asserted in powerful new ways. In May 2016, hereditary leaders of the Nadleh Whut'en and Stellat'en First Nations proclaimed Indigenous water laws, which are intended to protect water and guide development in their traditional territories.[52] Numerous other First Nations are similarly developing laws, watershed plans, strategies, and declarations, and exploring how to engage with other governments and organizations to advance freshwater protection.
- ***Key Questions for Consideration:*** *Whose traditional territory is affected in the decision being made? Is there more than one nation or representative body implicated? How, if at all, is decision-making shared between different nations?*

MÉTIS

- There are more than 14,000 provincially registered Métis and roughly 56,000 self-identified Métis people in B.C. Although the Métis have no current land claims in B.C., their population has historic ties to three communities: Fort St. James, Kelly Lake, and Fort Langley.
- The 2016 Supreme Court of Canada decision in *Daniels v. Canada* (the Daniels decision) declared that Métis and non-status Indians were intended to be included in the term "Indians" as used in s. 91(24) of the *Constitution Act, 1867*. Therefore, they are under the jurisdiction of the federal government and may be entitled to federal programs offered to "Indians." The Métis have always been within the definition of "Aboriginal peoples" and therefore have Aboriginal rights and protections under s. 35 of the *Constitution Act, 1982* (including the requirement for appropriate consultation and accommodation).
- ***Key Questions for Consideration:*** *How does the Daniels decision impact Métis people? Who comprises appropriate Métis representation in decision-making?*

THE CROWN (AS REPRESENTED BY THE FEDERAL OR PROVINCIAL GOVERNMENT)

- Crown negotiations with Indigenous governments are bound by the rights outlined in s. 35 of the Constitution of Canada, and further delineated through a number of important court cases (e.g. R. v. Sparrow; R. v. Van der Peet; R. v. Delgamuukw; Haida Nation v. B.C.)
- ***Key Questions for Consideration:*** Which levels of Crown representation are responsible for the decision at hand (i.e. federal and/or provincial)?

MUNICIPALITIES

- Although no legal precedent exists indicating that municipalities have a duty to consult, municipalities are increasingly committing to building meaningful decision-making relationships with Indigenous governments,[53] and could participate in collaborative consent processes if the matter at hand falls within the bounds of delegated municipal jurisdiction (e.g. zoning, riparian area management, protecting groundwater recharge areas, source protection, drinking water, wastewater)
- ***Key Questions for Consideration:*** *How is the municipality implicated in the decision? Who has the authority to make decisions on the current issue? Are municipalities allowed representation for decisions over which they do not hold decision-making power, but for which they will be implicated in implementation?*

these historical shortcomings.

An urgent priority is for the Province of British Columbia to explicitly recognize Indigenous water rights in the *WSA*'s new regime and in water licensing commitments. To date, the failure to define and recognize Indigenous water rights is a major issue with the *WSA* that is likely to violate rights and title claims. It also directly undermines the security and certainty of rights held by other water users. Simply put, this "exclusion solution" will no longer be viable in the future as the law around Aboriginal rights and title continues to evolve, and as collaborative consent becomes mainstream practice.

The development of the *WSA* was a missed opportunity for the Province to work in partnership with Indigenous nations; as has been done in the Northwest Territories, B.C. could have worked with Indigenous nations to develop mutually acceptable provincial legislation. As such, the implementation of the *WSA* provides a critical opportunity for the Province to adopt an improved process and make good on its commitments to build new government-to-government relationships with Indigenous nations.[51] Collaborative consent can provide the pathway forward for preserving First Nations' social and cultural practices related to water and meaningful shared decision-making in *WSA* implementation, as outlined in the table on pages 20–21.

COLLABORATIVE CONSENT AND *WSA* IMPLEMENTATION OPPORTUNITIES

The following table outlines some of the substantive water planning or decision-making points available in the *WSA*. They offer genuine opportunities to protect, steward, and manage fresh water in B.C. These types of decisions are ripe for collaborative consent approaches to help build lasting solutions for fresh water and for communities. This table is not an exhaustive list of decisions under the *WSA*, but rather includes some key areas of decision-making and therefore opportunities for collaborative consent within the Act.

***WSA* ELEMENT**	**CONTEXT**[54]	**COLLABORATIVE CONSENT OPPORTUNITIES**	**IMMEDIATE ACTION(S)**
Water sustainability plans (s. 64-85)	• Enforceable region- (watershed-) specific plans to prevent or address conflicts between water users or between water users and environmental flow needs; or to address risks to water quality or aquatic ecosystem health. • Minister designates plan but third party can request • Plan development may be designated to other entity/ person	• Likely the most immediate application of collaborative consent in *WSA* implementation • Plan process remains under development, but could involve a central nation-to-nation table/forum that includes all Indigenous nations in a given watershed or in the designated plan area (or nations could collectively/ separately agree who they send to represent their interests at the table), with additional stakeholder, advisory, or multi-party tables. • This decision-making table would oversee plan development and implementation processes.	• Province must explicitly share authority and create a co-chaired model from outset (from plan initiation all the way through Cabinet approval and implementation) • Resources for participation, plan development (including robust science and information), and monitoring and enforcement will be required • Province must explicitly recognize local and traditional knowledge as part of evidence-based decision making • Province must recognize Indigenous governments' participation, bringing Indigenous water laws and authority to the table
Area-based regulations (s. 124)	• Area-based regulations allow for the designation of specific areas and creation of thresholds and requirements related to those places.	• Regional decision-making table or advisory board to develop area-based regulations • Could be similar to water sustainability plan process (e.g. a nation-to-nation decision-making table with advisory/multi-party stakeholder tables providing advice).	• Pilot area-based regulations as a tool to address specific regional issues (e.g. domestic groundwater licensing, source protection water management zones)
Environmental flows (multiple sections in WSA)	• Statutory decision-makers must consider environmental flows when issuing new licences (non-domestic uses) (s. 15) • Temporary protection orders (s. 86-88) • Ecological water reserves: prohibit further diversions (s. 39) • Sensitive stream designation (s. 128)	• Co-governed regional (watershed-based) decision-making tables and/or advisory boards to propose appropriate regional and site-specific environmental flow standards/thresholds (as part of the water sustainability plan process or done separately), water reserves, and/or sensitive stream designations and requirements • Collaborative consent tables between the Province and First Nations to achieve mutual agreement on framework and scope of a provincewide environmental flows regulation.	• A provincewide Precautionary Presumptive Standard should be in place while localized decision-making tables and/ or advisory boards determine thresholds and critical flows for ecological health and protection of core related rights, such as fishing, hunting, and ceremonial water uses. This should start in priority regions, including the Nicola, Cowichan, Okanagan, Northeast B.C. and the Skeena. • Local tables/committees should be supported by a co-governed Science Secretariat that will support and inform evidence-based decision-making and blend ecological and hydrological "western" science with traditional knowledge systems and laws.

WSA ELEMENT	CONTEXT[54]	COLLABORATIVE CONSENT OPPORTUNITIES	IMMEDIATE ACTION(S)
Water use and licensing decisions (multiple sections in the WSA and water sustainability regulation)	• Decisions are made by statutory decision-makers in the Ministry of Forests, Lands, Natural Resource Operations and Rural Development. • First Nations are currently consulted on individual water licences through consultation/ accommodation processes (referrals system).	• Standing Advisory Board(s) (s. 115) or other body provides decision-maker with consented-to policy/guidance on key considerations and local criteria to ensure sustainable water licensing.	• As existing groundwater users are brought into the system, Province must engage local First Nations as the batch of all groundwater uses are brought forward to assess the linkage to surface water, protect necessary flows, and ensure traditional uses and rights are protected.
Water objectives (s. 43)	• Water objectives can be set in regulation to sustain water quantity, quality, and aquatic ecosystems. Objectives are set for specific watersheds, streams, or other specified areas or features. • Land- and resource-use decision-makers can be required to consider water objectives if they are making a decision that relates to the watershed, stream, or aquifer to which the objective is attached	• Regional decision-making tables and/or advisory boards to propose objectives and thresholds for a given watershed (as part of the water sustainability planning process or done separately)	• Pilot water objectives in areas where water quality or other concerns such as temperature or water availability are inhibiting ecological health. • Local tables/committees should be supported by a co-governed Science Secretariat that will support and inform evidence-based decision-making and blend ecological and hydrological "western" science with Indigenous knowledge systems.
Measuring and reporting (multiple sections in WSA)	• Various sections in the WSA pertain to measuring and reporting, e.g.: • Licence applicants may be required to undertake studies and provide data to decision-makers to assess the impacts of the proposed licence on environmental flow needs (s. 15) • A wide variety of regulations related to measuring, testing, and reporting water use can be enacted (s. 131)	• Collaborative consent tables between the Province and First Nations to achieve mutual agreement on provincewide measuring and reporting regulation (e.g. which users must measure/ report water use, how the data is stored and reviewed, role of community based monitoring).	• Establish a publicly accessible water-use database and state-of-water reports, including regional high-priority assessments.

Under the *WSA*, various provincial legal mechanisms exist for creating roundtables, forums, or advisory bodies. Depending on how they are structured, and how their decisions (or recommendations) are implemented and by whom, these spaces provide useful opportunities where collaborative consent processes can be undertaken, and potentially aligned with other exertions of authority such as Indigenous laws and rights and title. Key innovative governance opportunities in the *WSA* are:

- **Delegated governance** (s.126). This provision allows for certain decisions under the Act to be made by entities other than statutory government decision-makers
- **Advisory Boards** (s. 115). Advisory boards are designated by the Minister to provide advice on different aspects of the *WSA*, for example, establishing water objectives, methods for determining environmental flow needs, and standards and best practices for diversion and water use.

Delegated governance and advisory boards are two opportunities in the *WSA* to develop governance *structures* along a spectrum of power and influence—from providing advice to actual decision-making. The box "Potential Institutional Designs to Support Collaborative Consent & *WSA* Implementation" (this page) describes some potential institutional designs to support collaborative consent and WSA implementation.

Potential Institutional Designs to Support Collaborative Consent & *WSA* Implementation

It is beyond the scope of this paper to explore in depth the various types of institutions that can support collaborative consent approaches.[55] The examples listed below are complex, but are included here as a starting point:

- **Government-to-government forums.** A common element of shared decision-making agreements is senior government-to-government forums for ongoing discussion between the First Nation(s) and the Province on matters related to lands and resources and other topics.[56] For example, the *Carrier Sekani Tribal Council Collaboration Agreement* establishes a *Leadership Table* comprised of Chiefs and relevant Ministers that oversees implementation of the Agreement. *Collaboration Working Groups* comprised of senior officials from key ministries and First Nations implement the government-to-government agreements.[57]
- **Regional caucuses and tables.** This is the current model of the B.C. First Nations Health Authority. Five regional caucuses, whose representatives (both political and staff) are appointed by the First Nations in each region, provide direction and advocacy to the provincial Health Council, approve regional-specific documents, and create processes that work for the region. Each regional caucus also choose three representatives from the region to sit at the overarching provincial First Nations Health Council, which reports to and engages with First Nations leaders on activities and key decisions.[58]
- **Tier 1 First Nations Council.** For example, the Fraser Salmon Management Council (FSMC) is a governance body currently in negotiations with the federal Department of Fisheries and Oceans. To date, 69 First Nations have appointed delegates to the FSMC. The governance framework is set by the council's constitution and by-laws.[59]
- **Council supported by working groups.** For example, the Arctic Council includes nine nation states and six organizations representing Arctic Indigenous peoples, supported by a series of working groups and others with observer status.[60] It is the leading intergovernmental forum promoting cooperation, coordination, and interaction on common Arctic issues.

LOCAL APPLICATIONS: LOCAL GOVERNMENT AND WATERSHED GOVERNANCE

Historically, limited formal governance relationships have existed between First Nations and local governments in British Columbia beyond service provision agreements, such as water provision. Local governments are a creature of the Province, with no direct legal duty to consult.[61] Thus, this is not a level of authority with which Indigenous nations must (or have historically) engaged. However, many interactions, both positive and negative, can happen at the local level. First Nations are critical parts of local communities and urban centres through, for example, cultural activities and significant contributions to local economy and regional development. Conflicts can occur as well, as local government decisions can have major impacts on traditional territories and practices, and local governments can be ignorant of First Nations' priorities and rights and title claims. The recent Supreme Court of Canada Halalt case is a water-related example showing this kind of local tension and conflict.[62]

Relationships between local governments and First Nations are changing significantly in some regions of B.C. In the Cowichan River watershed, for instance, Cowichan Tribes and the Cowichan Valley Regional District act as co-chairs on the Cowichan Watershed Board (see Appendix), while in the West Kootenays, the Ktunaxa Nation and local and provincial governments work together in a government-to-government relationship as part of the Kootenay Lake Partnership.[63]

Local governments (like any government) could engage in collaborative consent processes with Indigenous governments as they develop and implement the various tools within their powers for water and watershed management. Examples of areas with clear local government "jurisdiction"[64] that could have significant implications for First Nations and their traditional territories include land use or zoning decisions, infrastructure development, designation of water service areas, or bylaws that promote integrated approaches to rainwater or protect local riparian areas. Any of these would be prime candidates to engage with Indigenous governments in collaborative consent processes.

Watershed entities, such as watershed boards, authorities, or trusts are another place where collaborative consent can be applied in local contexts. It is at these kinds of local entities where real movement towards trust, relationship building, and, eventually, co-governance becomes possible. Watershed entities represent opportunities for local institutions to grow, adapt and develop into forums for decision-making about water. Their creation is part of the social and institutional community architecture necessary for thriving local ecosystems and economies.[65]

For local watershed entities to adopt collaborative consent in a meaningful way, each of the hallmarks outlined in section 2 of this paper need to be present. This includes having decision-makers at decision-making tables, and having Indigenous and non-Indigenous participation in other types of forums and advisory roles. This is a multi-table system: a government-to-government table between Indigenous governments and the Crown government(s) that makes the ultimate decisions, as well as separate technical, stakeholder, or multi-party tables that provide input and direction to decision-makers.

The range and potential of such an approach in the context of the diverse watersheds in B.C. is significant. Many decisions impact the health and function of watersheds. Through creating new ways of being and making decisions together, collaborative consent offers a path to deepen the potential of watershed governance and create a rich fabric of localized decisions that prioritize watershed health and function. The Cowichan Watershed Board is an intriguing case study of this kind of approach, with significant untapped potential to substantially change water management and governance for improved ecological outcomes across the province (see Appendix).

Collaborative consent offers a path to deepen the potential of watershed governance and create a rich fabric of localized decisions that prioritize watershed health and function.

5 CONCLUSIONS AND ACTIONS NEEDED

Adopting collaborative consent in land and water decision-making will have lasting benefits for B.C. and Canada. For Crown governments, it offers a path to meet UNDRIP and nation-to-nation commitments, and a means to move away from adversarial decision-making with Indigenous nations and protracted legal battles. For Indigenous nations, this approach provides meaningful decision-making processes that gets out of the piecemeal, project-by-project consultation and accommodation frame and extends the scope of strategic engagement currently offered under shared decision-making agreements. It gives space for Indigenous nations to negotiate as governments and avoid costly legal battles, and provides a chair at the table of Confederation to shape a viable and integrated future. And for all communities, this approach will result in improved decisions for lands and waters, meaningful and trust-based relationships, and avoided conflict.

The journey forward involves more than the governance, legal, or institution decision-making realms: from Indigenous resurgence and nationhood building, to all Canadians responding to the Truth and Reconciliation Commission's Calls to Action, to dealing with longstanding bias, racism, and ignorance. However, collaborative consent is a necessary part of the path forward, requiring both Indigenous and non-Indigenous governments to strengthen their own structures to engage and, ultimately, to build new institutions and shared processes for decision-making. This is not nation building as an abstract aspirational goal, but concrete nation rebuilding, both for Crown and Indigenous governments.

Collaborative consent processes are long-term, high-cost commitments. However, precedents exist showing this approach is possible, saves costs in the long term, builds meaningful partnerships, and achieves better, lasting outcomes. **For these processes to move forward, several key actions are required, including:**

The Crown must fulfill its obligation to UNDRIP and nation-to-nation approaches.

Two things need to happen if the Crown is serious about realizing its commitments. The first is real institutional and legal change. And this must be combined with adopting collaborative consent as a pathway out of entrenched and costly legal battles and social conflict. Past injustices must be addressed, and moving forward with a new approach is just as important. Actions, and not more words, are needed.

Explicit transition spaces are required for all governments engaged.

New and vastly different attitudes, skills, and competencies are needed within non-Indigenous governments to move towards and execute collaborative consent processes. A shift in attitude on the part of Crown governments is also key: away from the status quo, risk adverse approach of limited engagement, to one that is more proactive, focused on longer-term outcomes and joint solutions, and grounded in nation-to-nation partnerships and reconciliation.

Building capacity amongst statutory decision-makers and government staff to engage in and support collaborative consent processes is necessary. One place to begin is to respond to the Truth and Reconciliation Commission's call to action: *"We call upon federal, provincial, territorial, and municipal governments to provide education to public servants on the history of Aboriginal peoples, including the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism."*[66]

Significant time, capacity building, and resourcing is also critical to support Indigenous Nations' institution building and internal governance processes to determine how to organize and engage in collaborative consent processes.

Indigenous water rights must be acknowledged to provide the missing foundation for the water law regime in B.C.

Government must develop a more comprehensive way of ensuring Indigenous water rights and eventual title are accounted for in the provincial water management regime.

Collaborative consent offers a guide on how to implement the *Water Sustainability Act*.

Critical starting points include:

- **Water sustainability plans**. The Province must explicitly share authority and create a co-chaired model from the outset (from plan initiation all the way through Cabinet approval and implementation)
- **Environmental flows**. The Province must work with Indigenous nations through collaborative consent tables to develop a provincial environmental flows regulation and regional decision-making tables and/or advisory boards that determine local thresholds and critical flows, starting in priority regions, including the Nicola, Cowichan, Okanagan, Northeast B.C. and the Skeena.
- **Licensing decisions**. The Province must work with Indigenous nations to strike a Standing Advisory Board(s) or other body that provides decision-makers with consented-to policy/guidance on key considerations and local criteria to ensure sustainable water licensing.

6

APPENDIX

EXAMPLES OF COLLABORATIVE INITIATIVES AND HOW THEY MAP AGAINST COLLABORATIVE CONSENT HALLMARKS

The following examples document how collaborative consent manifests in three types of collaborative initiatives:

1. High-level policy development and shared decision-making;
2. Project-level processes; and
3. Collaborative structures.[67]

Gwaii Hanaas National Park Reserve.

1 HIGH-LEVEL POLICY DEVELOPMENT AND SHARED DECISION-MAKING

Kunst'aa Guu – Kunst'aayah Haida Reconciliation Protocol

In 2009, the Council of the Haida Nation and the Province of British Columbia signed the *Kunst'aa Guu – Kunst'aayah Haida Reconciliation Protocol*. In the protocol, both the Haida Nation and the Province explicitly acknowledge their conflicting views with regard to sovereignty, title, ownership, and jurisdiction for Haida Gwaii territory. With these competing claims made clear, and despite them, the Protocol commits both parties to working together: *"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."*[68]

This reconciliation protocol created a unique shared decision-making framework in which both the provincial government and the Haida Nation passed their own laws to delegate Crown and Indigenous authority to a joint management body, the Haida Gwaii Management Council. The Council is a permanent table that makes joint, consensus decisions on strategic land and resource management issues.[69] This is the only government-to-government agreement that we are aware of in British Columbia that gets to actual shared decision-making.

COLLABORATIVE CONSENT HALLMARKS REPRESENTED

- ✔ **All governments recognize each other as legitimate authorities.** Disagreement over *scope* of authority is made explicit, but both parties recognize the other has legitimate jurisdiction and power.
- ✔ **Collaborative consent tables are decision-making tables.** The Haida Gwaii Management Council makes strategic decisions about resource management, including land use, forestry, and conservation.[70] Importantly, it has delegated Indigenous *and* Crown authority to make joint decisions. As set out in the reconciliation protocol: "The Parties will ensure that their respective representatives in the decision-making processes will have the necessary authority to carry out their responsibilities."
- ✔ **All governments commit for the long-term.** The Management Council is a permanent decision-making table.

Great Bear Rainforest Agreements

The lengthy process that resulted in the final 2016 *Great Bear Rainforest Order* traces back to the 1980s and 1990s, when several factors coalesced to drive collaboration and land use planning in the region.[71] In particular, escalating conflict over logging in B.C.'s coastal forests, and a high-profile international environmental market campaign, brought forest companies, the B.C. Government, and First Nations together into a series of negotiations around land use planning, resource management approaches, benefit sharing, and decision-making.

In 2000, forest companies and environmental groups formed a coalition known as the Joint Solutions Project, which acted as a structure for communications and negotiations, information sharing, and sorting through conflict and differences.[72] That same year, recognizing the need for a coordinated, unified alliance, nine First Nations from the Central and North Coast and Haida Gwaii formed a coast-wide alliance (Coastal First Nations). Collectively, Coastal First Nations agreed that they needed to both protect the region's ecological values and enhance economic development opportunities.[73] In the southern region of the Central coast, seven First Nations formed the Nanwakolas Council in 2007.

In 2001, the Joint Solutions Project, Coastal First Nations, other First Nations and stakeholders, and provincial government land-use planning tables agreed to a framework for resolving the conflicts that included a commitment to ecosystem-based management principles and goals. As part of these agreements, a government-to-government protocol was also signed between the Province and the eight Coastal First Nations. Five years of planning and negotiations then followed—in which both First Nations and the Province developed their own land use planning processes in parallel. Government-to-government negotiations began in 2004 to reconcile the B.C. Government's land use plans with those of the individual First Nations.[74] The first round of Great Bear Rainforest Agreements were announced in 2006, with several core elements:

- Implementation of government-to-government decision-making between First Nations and the Province.
- A new network of protected areas encompassing one-third of the total area, including a new Conservancy designation (management plans for each protected area are to be co-developed by the First Nations in whose territory the protected area lies).
- A commitment to Ecosystem-Based Management.
- Creation of the $120 million Coast Opportunities Fund, $60 million of which was allocated for stimulating sustainable business and economic development in the region. The remaining $60 million went into a conservation endowment fund.

Although the 2006 agreements marked a major landmark, further negotiations were required around implementation. Ten years later, these resulted in the 2016 *Great Bear Rainforest Land Use Order*, which sets aside 85 per cent of the forest in the region for protection.

COLLABORATIVE CONSENT HALLMARKS REPRESENTED

✔ **All governments commit for the long term.** This was a 15-year process to secure agreements and it committed the parties to an ongoing governance relationship.

✔ **All governments recognize each other as legitimate authorities.** First Nations participated as governments in the negotiation process. This was the first government-to-government land use negotiation of its kind in B.C. This ideological and power shift was core to the success of the agreement.[75]

✔ **The process generates real outcomes.** The agreements generated actual outcomes on the landscape and for communities (e.g. designation of conservation areas, investment in guardian watchmen program).

First Nations at the celebration of the final 2016 Great Bear Rainforest Land Use Order.

New Zealand Whanganui River Settlement Agreement

In 2014, after extensive negotiations, the New Zealand Crown government and Māori Whanganui Iwi reached the final Whanganui River Deed of Settlement. This settlement extends legal personhood rights and standing to the Whanganui River as an integrated, living whole that is not "owned."

Given fundamental differences between the Crown and Māori over the importance and nature of the river, a third party river guardian entity (Te Pou Tupua) was created, with one representative from each of the Crown and the Whanganui Iwi tribe governments. This independent guardian entity is to "be the human face of the river," act on its behalf, and protect its status, health, and well-being.[76] It is supported by an advisory committee which includes representatives of Whanganui Iwi, other tribes with interests in the river, and local authorities.[77] Under the settlement, a set of intrinsic values for the river will be established and recognised; decision-makers under the primary legislation affecting the Whanganui River must recognise and provide for both the legal status of the river and these values.

While the fundamental elements of Settlement were negotiated between the Māori and Crown agencies, there was also extensive engagement between the Whanaganui Iwi and other groups. In particular, significant engagement occurred with local governments during negotiations.

> *"Whanganui Iwi did not want a situation in which relevant local authorities were put in a position of reacting at the end of the process to new arrangements for the Whanganui Iwi that have been substantially agreed with the Crown. Instead, Whanganui Iwi knew that the support of local government would be an importance aspect of the future implementation and success of the settlement arrangements and it wished the relationship with relevant local authorities to be in place from the outset ... Through this engagement with local government, the relevant local authorities have not only been well informed on relevant aspects of the settlement framework as it developed, they were also provided with an opportunity to have input at a technical level into the development and refinement of those elements of the framework of particular relevance to local government. This approach made it significantly easier for the local authorities involved to maintain and express their support for the Settlement and now the Bill ... "*[78]

A governance entity was created through the Settlement Agreement with representatives of Iwi; central and local government; and other groups with interests in the River, including recreational users and environmental groups. The entity's functions include developing and monitoring implementation of a strategy for the future environmental, social, cultural, and economic heath and well-being of the river. This entity may also receive delegated functions from local authorities.

COLLABORATIVE CONSENT HALLMARKS REPRESENTED

- ✔ **Collaborative consent tables are decision-making tables—representatives must have the authority to participate fully and make decisions at the table.** The Whanganui River Māori Trust Board, which is empowered by statute to negotiate the settlement of the claims of Whanganui Iwi relating to the Whanganui River, represented the Whanganui Iwi in negotiations. The Ministry of Treaty Settlements, with the support of the Ministry for the Environment, Department of Conservation, and other government agencies, represented the Crown in day-to-day negotiations. The Minister for Treaty of Waitangi Negotiations represented the Crown in high-level negotiations.
- ✔ **All governments recognize each other as legitimate authorities.** The settlement was negotiated by the Crown and Māori governments, however, there was recognition that local governments were also key players and needed to be involved and aware of process from the outset to ensure buy-in.
- ✔ **The scope of issues considered through the process can be extensive.** The settlement shifted the fundamental nature of resource management by acknowledging the River as an indivisible and living whole.

Pimachiowin Aki Protected Area

Pimachiowin Aki, meaning "the Land that Gives Life" in Ojibwe, is a proposed UNESCO World Heritage site covering a vast swath of Boreal Forest. The region stretches across the Manitoba and Ontario border and the traditional Anishnaabeg lands of the Bloodvein River First Nation, Little Grand Rapids First Nation, Pauingassi First Nation, Pikangikum First Nation, and Poplar River First Nation. It includes a network of provincial parks, conservation reserves, and protected areas established on First Nations' lands.[79] It has also involved a unique collaboration between four different First Nations, two provincial governments, and the federal government.

As a first step towards designating their traditional lands as part of a World Heritage Site, in 2002, the Poplar River First Nation, Pauingassi First Nation, Little Grand Rapids First Nation, and Pikangikum First Nation signed the *Protected Areas and First Nation Resource Stewardship: A Cooperative Relationship Accord*.[80] This Accord set out the nations' shared vision for protected areas in their respective territories. Later in 2002, the four Accord First Nations and the two provinces submitted a joint proposal to Parks Canada for inclusion of this site on Canada's list to put forward to UNESCO for World Heritage Site designation.[81]

The Accord and partnership also laid the groundwork for the formation of the Pimachiowin Aki Corporation in 2006, a cooperative governance structure to guide and oversee the initiative.

The Pimachiowin Aki Corporation Board of Directors works on a consensus basis with representatives from four First Nations and two provincial governments acting as equal partners. The board works to ensure environmental sustainability through First Nations-led land stewardship. Decisions are made within the board in a non-hierarchical fashion with input from advisory forums made up of elders, youth, and women.[82] Annual meetings are also held to inform board decisions and are open to all First Nations community members.

COLLABORATIVE CONSENT HALLMARKS REPRESENTED

- ✔ **Collaborative consent is fundamentally based on respect, trust, and the art of diplomacy.** First Nations have played the leading role in defining the approach to protection and management of Pimachiowin Aki. Protection and management of Pimachiowin Aki is achieved through Anishinaabe customary governance, contemporary provincial government law and policy, and cooperation among the four First Nation and provincial government partners.
- ✔ **All governments recognize the others as legitimate authorities.** The Pimachowin Aki Board of Directors works on a nation-to-nation basis with representation from four First Nations and the provincial government.
- ✔ **Representatives have authority to make decisions at the table.** The park is managed by four First Nations (Bloodvein River First Nation, Little Grand Rapids First Nation, Pauingassi First Nation, and Poplar River First Nation) and two provincial governments (Manitoba and Ontario) whose territories include the proposed World Heritage Site's land.

2 PROJECT-LEVEL PROCESSES

Environmental Assessment for Voisey's Bay Mine in Nunatsiavut

In 1993, nickel was discovered within the unresolved and overlapping traditional territories of the Inuit and Innu of Labrador. The mining company Inco Limited sought to develop the deposit, and in late 1995 began negotiating an Impact Benefit Agreement (IBA) with the Innu of Labrador and the Nunatsiavut Government (who represent the Labrador Inuit Association). Negotiations did not go well, and the proposed IBA was rejected by the Nunatsiavut Government. Inco Limited, however, pushed forward with mine construction despite their lack of an IBA and without having completed the environmental assessment (EA) process. This was met by protest and roadblocks from Innu and Inuit community members, and a court-injunction that successfully halted construction.[83]

Working to resolve conflict, in 1997 the governments of Canada, Newfoundland and Labrador, and the presidents of the Labrador Inuit Association and the Innu Nation signed a memorandum of understanding that established a single, harmonized EA process.[84] An independent panel was appointed to establish guidelines for the EA and to conduct the community hearing process. Panel members were selected by consensus of the five parties. The memorandum of understanding required the panel to give full consideration of oral and written traditional ecological knowledge. The panel was also required to report to all four of the Indigenous and provincial governments involved, who in turn consulted each other on the panel's recommendations before announcing their respective decisions. For the first time in Canada,

the panel established "contribution to sustainability" as a key evaluative guideline—setting a considerably higher test than normal in environmental assessments—and expanded the notion of "environmental effects" to take into account the cultural and spiritual importance of the environment for the Indigenous peoples involved.

In 2002, the federal government, Newfoundland and Labrador, the Innu Nation, the Labrador Inuit Association, and the mining company Inco Limited, signed an IBA that set in place a co-management agreement for the mine's development. The environmental co-management agreement establishes a joint body (with two representatives from each of the four governance parties) to monitor project effects, review project-related actions, and recommend necessary adjustments.

COLLABORATIVE CONSENT HALLMARKS REPRESENTED

- ✔ **All parties recognize the others as legitimate authorities**, The panel was required to report EA developments to all the participating parties, not just the Ministry of the Environment. Furthermore, the parties consulted with one another on the panel's recommendations before announcing their respective decisions.
- ✔ **Representatives have authority to make decisions at the table.** Both the Innu of Labrador and the Inuit Association of Labrador were involved in the EA of activities within their traditional territories, as were the Government of Newfoundland and Labrador and the federal Ministry of Environment, in accordance with provincial and federal legislation.
- ✔ **Real outcomes are generated.** The approval of the Voisey's Bay environmental assessment depended on the recognition of traditional ecological knowledge and the consent of the Innu and Inuit of Labrador.

3 COLLABORATIVE STRUCTURES

Cowichan Watershed Board

The Cowichan Watershed Board (CWB) was formed in 2010 as a recommendation of the Cowichan Basin Water Management Plan. The CWB's mandate is to provide leadership for sustainable water management to protect and enhance environmental quality and the quality of life in the Cowichan watershed and adjoining areas. The board is co-chaired by the Chief of Cowichan Tribes and the Cowichan Valley Regional District Chair. The Regional District and Cowichan Tribes each appoint two other board members, so there is equal representation on the board. The CWB uses consensus-based decision-making. Although it currently performs an advisory function and does not have specific decision-making authority, it does lead a number of local education programs and convenes numerous stewardship initiatives. It is also moving towards more formal authority, potentially under the new provincial *Water Sustainability Act*.[85] For the board to represent the full suite of collaborative consent hallmarks, it would either have to be vested with decision-making, or advise a collaborative consent decision-making structure. Currently, however, this is a leading provincial example of one possible path to watershed governance. It is also an important example of how local governments can work effectively with First Nations and begin to (re)build relationships and find projects to collaborate on.

COLLABORATIVE CONSENT HALLMARKS REPRESENTED

- ✔ **Representatives must have the authority to participate fully and make decisions at the table.** The board is co-chaired by the Chief of Cowichan Tribes and the Regional District Chair, with equal representation for other appointed Indigenous and non-Indigenous board members.
- ✔ **All parties commit for the long-term.** The Cowichan Watershed Board has existed since 2010 and is ongoing.
- ✔ **The process generates real outcomes.** The Cowichan Watershed Board plays an important role in building watershed knowledge and outreach; convening stewardship groups; and advancing implementation of the Cowichan Watershed Plan.

ENDNOTES

1 For earlier articulations of collaborative consent, see: Phare Law Corporation & North Raven. (2016). *Collaborative consent: A nation-to-nation path to partnership with Indigenous governments*. Retrieved from https://mullfret.files.wordpress.com/2016/10/collaborative-consent_final-october-11-2016.pdf; Phare, M.A. & Miltenberger, M. (2017). *Report to the National Energy Board modernization panel*. Retrieved from the Centre for Indigenous Environmental Resources website: http://www.yourcier.org/report-to-the-national-energy-board-modernization-panel-2017.html

2 See, for example, the Truth and Reconciliation Commission's call to action #45: *We call upon the Government of Canada, on behalf of all Canadians, to jointly develop with Aboriginal peoples a Royal Proclamation of Reconciliation to be issued by the Crown. The proclamation would build on the Royal Proclamation of 1763 and the Treaty of Niagara of 1764, and reaffirm the nation-to-nation relationship between Aboriginal peoples and the Crown … [and include a commitment to] reconcile Aboriginal and Crown constitutional and legal orders to ensure that Aboriginal peoples are full partners in Confederation*. Retrieved from http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf

3 As of June 30, 2017 there were 99 long-term advisories and 33 short-term advisories in 87 First Nations communities. See: Health Canada. (2017). Questions and answers: Drinking water and wastewater in First Nations communities south of 60°. Retrieved from https://www.canada.ca/en/health-canada/topics/health-environment/water-quality-health/drinking-water/advisories-first-nations-south-60.html; First Nations Health Authority. (2017). Drinking Water Advisories. Retrieved from http://www.fnha.ca/what-we-do/environmental-health/drinking-water-advisories

4 See, for example: Helmer, A. (2017, July 1). A call for 'liberation of indigenous nations' amid the Canada 150 bash. *Ottawa Citizen*. Retrieved from http://ottawacitizen.com/news/local-news/a-call-for-liberation-of-indigenous-nations-amid-the-canada-150-bash; Kabatay, J. (2017, June 29). #Resistance 150. *Vice News Canada*. Retrieved from https://news.vice.com/story/resistance150-canada-day-isnt-a-celebration-for-indigenous-people

5 The Royal Commission on Aboriginal Peoples, for instance, suggested there were 60 to 80 Indigenous nations at the time of Canadian Confederation. See: Institute on Governance. (1997). *Summary of the final report of the royal commission on Aboriginal peoples*. (pp. 10). Retrieved from the Institute of Governance website: https://iog.ca/docs/1997_April_rcapsum.pdf

6 See 2017 B.C. government mandate letters; e.g. Minister of Indigenous Relations and Reconciliation Mandate Letter, Retrieved from the B.C. Government website: http://www2.gov.bc.ca/assets/gov/government/ministries-organizations/premier-cabinet-mlas/minister-letter/fraser-mandate.pdf

7 Province of British Columbia, Government of Canada, and First Nations Leadership Council. (2005). Transformative Change Accord. Retrieved from http://www2.gov.bc.ca/gov/content/governments/aboriginal-people/new-relationship/transformative-change-accord

8 Province of British Columbia and Métis Nation of British Columbia. (2016). Métis Nation Relationship Accord II. Retrieved from http://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/aboriginal-people/aboriginal-peoples-documents/metis_nation_reconciliation_accord_ii_-_nov_16_2016.pdf

9 Liberal Party of Canada. [n.d.] A new nation-to-nation process. Retrieved from https://www.liberal.ca/realchange/a-new-nation-to-nation-process/

10 The Honourable Michael Miltenberger was the former Minister of the Environmental and Natural Resources for the Government of Northwest Territories; Merrell-Ann Phare acted as the Chief Negotiator for the Government of Northwest Territories for the negotiation of the transboundary water agreements. The POLIS Water Sustainability Project has been an advisor and convener with many different collaborative watershed groups in B.C. and Ontario, and has been part of the Forum for Leadership on Water (FLOW) since its inception.

11 Note that these are all major topics with substantial bodies of associated literature and critiques; a detailed exploration is beyond the scope of this paper.

12 United Nations Division for Social Policy and Development Indigenous Peoples. (2007). United Nations Declaration on the Rights of Indigenous Peoples. Retrieved from https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html

13 Office of the High Commissioner on Human Rights. (2007). Declaration on the rights of Indigenous peoples. Retrieved from http://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx

14 Notes for an Address by The Honourable Jody Wilson-Raybould. (2016). Assembly of First Nations Annual General Assembly Canada. Niagara Falls, Ontario. Retrieved from https://drive.google.com/file/d/0B_bPXJbq-wgWenpoa2NIRmgwT2NlWkx-3enNSWXJELTFSSzc4/view

15 The Supreme Court of Canada maintains that the Crown must act honourably in all of its dealings with Indigenous peoples. The Honour of the Crown gives rise to different duties in different circumstances. For instance, it infuses the processes of treaty making and treaty interpretation (e.g. requiring honourable negotiation). It also "requires that [Aboriginal] rights be determined, recognized and respected, which in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests." See: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at paras 18-25. It has been argued that the Honour of the Crown applies more broadly and demonstrates a commitment to justice and fairness that should infuse all actions and decisions by individuals who represent the Crown in Canada. See: Arnot, D. (2010, June). *The Honour of First Nations–the Honour of the Crown: The Unique Relationship of First Nations with the Crown*. Paper presented at The Crown in Canada: Present Realities and Future Options conference, Ottawa, ON. Retrieved from http://www.queensu.ca/iigr/sites/webpublish.queensu.ca.iigrwww/files/files/conf/Arch/2010/ConferenceOnTheCrown/CrownConferencePapers/The_Crown_and_the_First_Nations.pdf

16 Hudon, M.-E. (2004). *The Council of the Federation and Canadian intergovernmental relations*. Retrieved from the Library of Parliament website: https://lop.parl.ca/Content/LOP/ResearchPublicationsArchive/bp1000/prb0419-e.asp

17 These processes in the NWT have included drafting the *Wildlife Act*; the *Northwest Territories Lands and Resources Devolution Agreement*; the *Alberta-Northwest Territories Mackenzie River Basin Bilateral Water Management Agreement*; and development of the *NWT Water Stewardship Strategy* (including formal

memorandums of understanding between the territorial government and Indigenous governments).

18 Reference Re Securities Act. 2011 SCC 66. Retrieved from https://scc-csc.lexum.com/scc-csc/scc-csc/en/7984/1/document.do

19 Isaac, T. (2016). *Aboriginal Law* (5th ed., pp. 45). Toronto, ON: Carswell.

20 Hogg, P. W. (2012). *Constitutional Law of Canada: 2012 Student Edition* (5th ed., pp. 46). Toronto, ON: Carswell.

21 Hunt, C. (2011). Cooperative federalism and the securities act reference: A rocky road. Retrieved from http://canliiconnects.org/fr/commentaries/36295. See also Hills, R. M., Jr. (1998). The political economy of cooperative federalism: Why state autonomy makes sense and 'dual sovereignty' doesn't. *Michigan Law Review, 96*(4), 813-944.

22 Lederman, W.R. (1981). Some forms and limitations of co-operative federalism. In W. R. Lederman (Eds.), *Continuing Canadian constitutional dilemmas: Essays on the constitutional history, public law and federal system of Canada* (pp.335). Toronto, ON: Butterworth.

23 Walters, M. (2017). Rights and remedies within common law and Indigenous legal traditions: Can the covenant chain be judicially enforced today? In J. Borrows & M. Coyle (Eds.), *The right relationship: Reimagining the implementation of historical treaties* (pp. 207). Toronto, ON: University of Toronto Press.

24 Borrows, J. (1997). Wampum at Niagara: The royal proclamation, Canadian legal history, and self government. In M. Asch (Eds.), *Aboriginal and treaty rights in Canada: Essays on law, equality, and respect for difference* (pp. 170). Vancouver, BC: University of British Columbia Press.

25 For example, these shared spaces could build in Indigenous decision-making and dispute resolution mechanisms and processes.

26 For example, as Ardith Walkem describes, *"From an Aboriginal perspective, our Aboriginal (Original) Title to the lands, water and resources, together with the jurisdiction an responsibility to manage and guard the water resource flows from the fact that the Creator placed our Nations upon our traditional territories, together with the traditional laws and responsibilities to care for and protect those lands."* See Walkem, A. (2004). Lifeblood of the land: Aboriginal peoples' water rights in British Columbia. Surrey, BC: EAGLE Publishing.

27 See, for example: *Interprovincial Co-operatives and Dryden Chemicals Ltd. v. R.*, 1976 1 S.C.R. 477; *R. v. Crown Zellerbach Canada Ltd.*, 1988 1 S.C.R. 401; *Friends of the Oldman River v. Canada (Minister of Transport)*, 1992 1 S.C.R. 3; *Fowler v R.*, 1980 2 S.C.R. 213; *R. v. Hydro Quebec*, 1977 3 S.C.R. 213

28 For example, in the case of Thaidene Nene Park, the Lead Negotiator of Thaidene Nene, Lutsel K'e Dene First Nation stated, *"We anticipate the conclusion of Thaidene Nene before the finalization of the Akaitcho final lands and resources agreements. At the end of the day, the larger land resource agreement supersedes the establishment agreement between Parks Canada and Lutsel K'e Dene First Nation, and changes can be made to the establishment agreement in accordance with the final land claim agreement."* Canada. Valour Building. House of Commons. Standing Committee on Environment and Sustainable Development. (2016). 42nd Parliament, 1st Session, meeting no. 25. Retrieved from the House of Commons website: http://www.ourcommons.ca/DocumentViewer/en/42-1/ENVI/meeting-25/evidence

29 Several shared decision-making agreements contain this type of "parallel assertion statement" outlining each party's perspective on questions of jurisdiction.

30 The legal concepts around fettering (when a decision-maker fails to exercise the discretion conferred upon them) are a significant field of administrative law. While an important point of discussion, fettering is not a barrier to what is being proposed in this paper. For more detail see: de Villars, A. & Jones, D. P. (2014). Principles of Administrative Law (6th ed., pp. 206-207). Toronto, ON: Carswell; Phare, M. A. & Miltenberger, M. (2017). *Report to the National Energy Board modernization panel* (pp. 23, 33). Retrieved from the Centre for Indigenous Environmental Resources website: http://www.yourcier.org/report-to-the-national-energy-board-modernization-panel-2017.html

31 This is consistent with UNDRIP Article 18, *"Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions."*

32 Indigenous Foundations. (n.d.). Bands. Retrieved from http://indigenousfoundations.arts.ubc.ca/bands/; Coates, K. (2008). *The Indian Act and the future of Aboriginal governance in Canada*. Retrieved from the Centre for First Nations Governance website: http://fngovernance.org/ncfng_research/coates.pdf.

33 See Phare, M. A. & Miltenberger, M. (2017). *Report to the National Energy Board modernization panel* (pp. 33). Retrieved from the Centre for Indigenous Environmental Resources website: http://www.yourcier.org/report-to-the-national-energy-board-modernization-panel-2017.html; Future laws include: *Waters Act, Environmental Protection Act*, *Environmental Rights Act*, *Territorial Parks Act*, and *Forest Management Act*.

34 For further details on the history, key elements, and important clauses in the agreement, see The Forum for Leadership on Water (FLOW). (2016). *Transcending boundaries: A guidebook to the Alberta-Northwest Territories Mackenzie River Basin bilateral water management agreement*. The Gordon Foundation and Forum for Leadership on Water. Retrieved from http://poliswaterproject.org/polis-research-publication/transcending-boundaries-guidebook-alberta-northwest-territories-mackenzie-river-basin-bilateral-water-management-agreement/

35 Aboriginal Steering Committee members include representatives from Dehcho First Nations, Gwich'in Tribal Council, Inuvialuit Regional Corporation, Kátlodééche First Nation, North Slave Métis Alliance, Northwest Territory Métis Nation, Sahtu Secretariat Incorporated, Salt River First Nation, and Tlicho Government. The Akaitcho Territory Government attends some meetings as an observer.

36 Transboundary water agreements. [Web page]. (n.d.). Retrieved from http://www.nwtwaterstewardship.ca/transboundary

37 *Co-governance is understood here as two or more self-governing jurisdictions agreeing to share authority to make and enforce decisions*. See: Wilson, P. (2013). *Blue paper: Water co-governance in Canada*. Retrieved from the Forum for Leadership On Water (FLOW) website: https://docs.wixstatic.com/ugd/c3d5ce_b5d7609f5430425fae-71c87dfb6b36c5.pdf

38 In a 2015 survey with over 500 respondents representing all levels of government, Indigenous peoples, academia, watershed boards and NGOs, and industry and industry practitioners, 77 per cent of respondents indicated they strongly agreed or agreed that co-governance with Indigenous governments in local watershed entities is a winning condition for effective watershed

governance. See: Brandes, O. M., Morris, T., & Archer, J. L. (2016). *Illumination: Insights and perspectives for building effective watershed governance in B.C.* Victoria, BC: POLIS Project on Ecological Governance, University of Victoria. Retrieved from http://poliswaterproject.org/polis-research-publication/illumination-insights-perspectives-building-effective-watershed-governance-b-c/

39 First Nations Leadership Council. (2013). *Advancing an Indigenous Framework for Consultation and Accommodation in B.C.* Retrieved from http://fns.bc.ca/wp-content/uploads/2016/10/319_UBCIC_IndigActionBook-Text_loresSpreads.pdf

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41 For a related discussion on how the Great Bear Rainforest Agreement created boundaries such that the range of consultation/accommodation is smaller and less critical, see Curran, D. (2017). *'Legalizing' the Great Bear Rainforest agreements: Colonial adaptations towards reconciliation and conservation*. Manuscript in preparation.

42 Griggs, J., & Dunsby, J. (2015). *Step by step: Final report for the shared decision-making in B.C. project*. Retrieved from the Simon Fraser University Centre for Dialogue website: https://www.sfu.ca/content/dam/sfu/centre-for-dialogue/Watch-and-Discover/SDM/SDM_Final_Report.pdf

43 Ibid at 42.

44 See Haida example in appendix for a notable exception.

45 Ibid at 26.

46 Ibid at 10.

47 See, for example, Curran, D. (2017). Leaks in the system: Environmental flows, Aboriginal rights and the modernization imperative for water Law in British Columbia. *UBC Law Review, 50*(2), 233-291.; Simms, R., & Brandes, O. M. (2016). *Top 5 water challenges that will define B.C.'s future*. Retrieved from the POLIS Water Sustainability Project website: http://poliswaterproject.org/polis-research-publication/top-5-water-challenges-will-define-british-columbias-future/

48 For a more detailed discussion see Brandes, O. M., & Curran, D. (2017). Changing currents: A case study in the evolution of water law in western Canada. In S. Renzetti (Ed.), *Water policy and governance in Canada* (pp. 45-67). Cham, Switzerland: Springer International Publishing.

49 Province of British Columbia. (2008). Living Water Smart: British Columbia's Water Plan. Retrieved from http://www2.gov.bc.ca/assets/gov/environment/air-land-water/water/water-planning/livingwatersmart_book.pdf

50 See, for example: British Columbia Assembly of First Nations. (2013, December 2). Submission letter to the BC Ministry of Environment, Water Stewardship Division. Retrieved from https://engage.gov.bc.ca/app/uploads/sites/71/2013/12/BC-Assembly-of-First-Nations.pdf; The First Nations Summit. (2013). *A Water Sustainability Act for BC: Legislative proposal*. Retrieved from https://engage.gov.bc.ca/app/uploads/sites/71/2013/12/First-Nations-Summit.pdf; Joe, N., Bakker, K., & Harris, L. (2017). *Perspectives on the BC Water Sustainability Act: First Nations respond to water governance reform in British Columbia*. Retrieved from the UBC Program on Water Governance website: https://open.library.ubc.ca/cIRcle/collections/facultyresearchandpublications/52383/items/1.0347525

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55 See also Clogg, J., Smith, G., & Carlson, D. (2017). *Paddling together: Co-governance models for regional cumulative effects management*. Vancouver, BC: West Coast Environmental Law. Retrieved from https://www.wcel.org/sites/default/files/publications/2017-06-paddlingtogether-report-final.pdf

56 Griggs, J., & Dunsby, J. (2015). *Step by step: Final report for the shared decision-making in B.C. project*. (pp. 13). Retrieved from the Simon Fraser University Centre for Dialogue website: https://www.sfu.ca/content/dam/sfu/centre-for-dialogue/Watch-and-Discover/SDM/SDM_Final_Report.pdf

57 See Collaboration Agreement between B.C. and CSFNs and CSTC (Section 4). (2015). Retrieved from the B.C. Government website: http://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/aboriginal-people/aboriginal-peoples-documents/cstc_-_collaboration_agreement_-_signed_april_2015.pdf

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60 Arctic Council. (2017). The Arctic Council: A backgrounder. Retrieved from http://www.arctic-council.org/index.php/en/about-us

61 *Neskonlith Indian Band v. Salmon Arm (City)*, 2012 BCCA 379.

62 The Halalt First Nation went to the B.C. Supreme Court against District of North Cowichan's proposed project to pump groundwater from the Chemainus River aquifer. The Supreme Court ruled in favour of Halalt on basis of inadequate consultation. The Court also ruled that the Halalt had a good prima facie case in support of its claim of Aboriginal title to land encompassed by the project and an arguable case for a proprietary interest in the groundwater of the Chemainus Aquifer. However, the Court of Appeal reversed this decision, concluding that the duty to consult and accommodate had been met. The project was modified to have a narrower scope. See *Halalt First Nation v. British Columbia (Environment)*, 2011 BCSC 945.Retrieved from http://www.courts.gov.bc.ca/jdb-txt/SC/11/09/2011BCSC0945.htm

63 See forthcoming report: Columbia Basin Trust & the POLIS Project on Ecological Governance. (2017). *Case studies in*

community engagement in watershed governance: Achievements & insights from the upper Columbia River Basin. Manuscript in preparation.

64 As enabled under the *Local Government Act or Community Charter*.

65 See Hunter, R., Brandes, O. M., & Moore, M-L. (2014). *The Cowichan Watershed Board: An evolution of collaborative watershed governance*. Retrieved from the POLIS Water Sustainability Project website: http://poliswaterproject.org/polis-research-publication/cowichan-watershed-board-evolution-collaborative-watershed-governance/

66 Truth and Reconciliation Commission of Canada. (2015). *Calls to action*. Retrieved from the Truth and Reconciliation Commission of Canada website: http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf

67 These are very brief summaries of very complex negotiations and processes, and the descriptions do not attempt to capture all of the details of these cases. Further, our research was document- rather than interview-based so examples have not been directly verified with those involved in the process.

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81 Canadian Parks Council. *Pimachiowin-Aki World Heritage Site initiative*. Retrieved from http://www.parks-parcs.ca/english/pdf/aboriginal/17MB CPC CaseStudies.pdf

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Suggested citation: Phare, M-A., Simms, R., Brandes, O.M., Miltenberger, M. (2017). *Collaborative Consent and Water in British Columbia: Towards Watershed Co-Governance*. POLIS Project on Ecological Governance and Centre for Indigenous Environmental Resources. Available at: www.poliswaterproject.org/polis-research-publication/collaborative-consent-water-british-columbia-towards-watershed-co-governance/

POLIS WATER SUSTAINABILITY PROJECT

The POLIS Water Sustainability Project develops cutting-edge research to improve freshwater decision-making and management. We share solutions with those working on the ground (and in the water), including communities, experts, four levels of government (local, Indigenous, provincial, federal), and non-governmental and Indigenous organizations. By combining practical expert research with community action, our team works to increase understanding of freshwater issues and to drive law, policy, and governance reform to generate change towards a sustainable freshwater future.

The POLIS Water Sustainability Project is a focused initiative of the University of Victoria's POLIS Project on Ecological Governance. We are housed at the University of Victoria's Centre for Global Studies as one of its ongoing interdisciplinary projects.

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