

Collaborative Consent **AND** Water in British Columbia

TOWARDS WATERSHED CO-GOVERNANCE

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EXECUTIVE SUMMARY

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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.
- 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

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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.





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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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CIER, the Centre for Indigenous Environmental Resources, is a national First Nation directed environmental non-profit organisation. We offer research, advisory, and education and training services to Indigenous communities, governments and private companies through our two program areas: Building Sustainable Communities and Protecting Lands and Waters.

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