



Creating a Blue Dialogue Webinar Summary *January 15th, 2018*

Collaborative Consent and Revitalizing Indigenous Laws: Pathways to Indigenous Water Governance and Co-Governance

Attendance

Approximately 175 participants, including First Nations, federal, provincial, and local government staff; students and researchers; private sector professionals; environmental NGOs.

Introduction

In recent years, governments at all levels in Canada have stated their commitments to reconciliation and building nation-to-nation approaches with Indigenous Peoples. Both the federal and B.C. governments have committed to implementing the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). Fresh water offers an important opportunity around which to start building these new relationships and consent-based governance approaches.

Research demonstrates that co-governance between Indigenous and non-Indigenous governments is a winning condition for watershed governance in B.C. However, key questions about how to realize co-governance persist, such as: How can governments share authority and work together in practice when there may be overlapping responsibilities, contested control, conflicting values, and differing legal systems?

Beyond co-governance, Indigenous nations are engaging in a broad range of diverse water governance strategies. Numerous potential pathways exist for nations to actively engage in water governance, including revitalization of Indigenous water laws.

In this webinar, Rosie Simms (POLIS Water Sustainability Project), Michael Miltenberger (North Raven), and Simon Owen (Indigenous Law Research Unit, University of Victoria) shared ideas on two pathways towards Indigenous water governance and co-governance approaches: collaborative consent and revitalization of Indigenous laws.

Guest Speakers

Rosie Simms is a water law/policy researcher and project manager at the University of Victoria's POLIS Water Sustainability Project. Her work has taken her from Panama to the Canadian Arctic and focuses on water governance, resource management, and Indigenous governance and rights.

Michael Miltenberger is the principal of North Raven. He works with Aboriginal and Crown governments, ENGOs, industry, and the private sector providing strategic political advice. He spent 20 years as an MLA in the Northwest Territories Legislature.

About the Series

Hosted by the POLIS Water Sustainability Project at the Centre for Global Studies, University of Victoria, *Creating a Blue Dialogue* brings together expert water practitioners and thinkers, as well as emerging water leaders, to engage with innovative ideas on water policy and governance in Canada. By creating an online community of interest, the webinar series strengthens the national capacity to engage with and solve problems, and raises awareness about emerging Canadian water issues, best practices, and policies.

Simon Owen has practiced Canadian law in several Indigenous territories, mostly in the areas of criminal defence and *Indian Act* band governance. Now, as a senior researcher with the University of Victoria’s Indigenous Law Research Unit, he works with communities to recover, revitalize, and reintegrate Indigenous legal traditions to their place at the heart of safe and self-governing nations. Simon holds law degrees from the University of Victoria and University of British Columbia.

Part 1: Collaborative Consent and Water in British Columbia: Towards Watershed Co-Governance

Rosie Simms (POLIS) & Michael Miltenberger (North Raven)

Background on the Report “Collaborative Consent and Water in British Columbia”

The 2017 report *Collaborative Consent and Water in British Columbia: Towards Watershed Co-Governance* lays out a viable model for achieving a critical shift towards more equitable nation-to-nation relationships between Indigenous and non-Indigenous governments, with a specific focus on freshwater governance in B.C. The report takes a detailed look at collaborative consent, how it differs from other collaborative and partnership processes, and includes case studies on how elements of the approach have been used in B.C., Canada, and internationally. This report emerged as a joint effort between the POLIS Water Sustainability Project and the Centre for Environmental Resources (CIER) and builds in the authors’ collective lived experiences working in watershed governance and Indigenous initiatives in British Columbia, the Northwest Territories (NWT), and beyond. It is important to note that this is a discussion paper and it is not intended to be prescriptive; different communities will choose how they best move forward in the governance space.

Current Legal/Political Context and New Approaches to Decision-Making

The changing legal and political context in B.C. and Canada is creating a window of opportunity to bring about new approaches to decision-making. In particular, both Canada and, more recently, the Province of British Columbia have announced their support and intention to implement the *United Nations Declaration on the Rights of Indigenous People* (UNDRIP). The declaration has 46 wide-ranging provisions, including a key provision related to consent and the governance of land and water (See Box 1). The federal government has also accepted all of the Truth and Reconciliation Commission’s Calls to Action, including the call for all levels of government to adopt and implement UNDRIP framework for reconciliation.

It is a clearly stated priority for governments at all level to advance down the path of reconciliation through the framework laid out by UNDRIP—and this sets the stage for a fundamentally different approach to decision-making for land and water. Collaborative consent is proposed as one pathway to deliver on these commitments to action, with water being a key place where this new approach can be applied.

Collaborative Consent and Its Hallmarks

Collaborative consent is a mutual consent process through which Indigenous and non-Indigenous governments commit to working together with the goal of achieving each other’s consent, whether that is to decisions, policies, laws, or plans. Collaborative consent does not mean that all parties are involved in each other’s decisions at all times, but that together they decide where collaboration is necessary (or not). Collaborative consent does require both parties to adjust their institutions, governance regimes, and timelines to create shared space to deal with problems and shared concerns. Seven hallmarks of collaborative consent have been identified, drawn from examples of existing collaborative initiatives:

Box 1

UNDRIP Article 32.2

“States shall consult and cooperate in good faith with the indigenous peoples’ concerned to their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their land, territories and other resources...”

1. **Collaborative Consent is fundamentally based on trust, respect, and diplomacy between partnering governments.** Governments must treat each other with mutual respect as partners with an ability to exert jurisdiction within their own sphere. Both parties must come with a real commitment to finding mutually acceptable outcomes and to not proceed over the disagreement of their partners.
2. **All governments recognize each other as legitimate authorities.** By coming to the table and being part of the decision-making process, each government exerts their authority and recognizes that the others hold relevant jurisdiction, but do not necessarily need to agree about the scope or basis for that authority. In this way, these processes can proceed even if there are very fundamental uncertainties and tensions remaining, such as unceded territory and unresolved land title and right claims.
3. **Collaborative consent tables are decision-making tables.** Representatives from the governments involved must have the authority to participate and make decisions on the matter at hand. This requires both Crown and Indigenous nations to go through their own internal processes to decide who should sit at the table on their behalf and make decisions.
4. **The scope of issues that are under consideration can be extensive and ultimately must be satisfactory to all parties.** Collaborative consent can be applied to anything from the project level to higher-level law and policy development. What the process looks like and how it is designed will look very different depending on the place, the issue and the scale.
5. **Collaborative consent starts at the very front end of a process and all governments commit to remaining at the table for the long haul.** Collaborative consent is a never “over”: it is a long-term, iterative, and on-going process of engagement to rebuild trust and relationships. It requires all governments involved to remain committed to staying at the table. The process extends from negotiation through to implementation.
6. **Each government’s interests must be dealt with in a satisfactory manner from their own point of view.** All interests are valid and welcome at the table. No government can decide for any other government if their interest has been met: this has to be self-defined.
7. **The process generates real outcomes.** Collaboration is not an end in and of itself, but rather a process that can actually reach a measurable improvement on the ground and in the water.

The Northwest Territories Story

Collaborative consent did not happen overnight in the NWT: the co-drafting agreement took place after years of negotiation between governments. The idea for co-drafting legislation emerged after the realization that nothing would get done if the Indigenous and territorial governments did not work together. In order to build a foundation of trust between the governments, a table was set up in 2005 in order to co-draft the *Species at Risk Act* and the *Wildlife Act*. According to Michael Miltenberger, there is no legal reason why co-drafting should not take place: the only prerequisite is political will.

Collaborative Consent Applications in the B.C.

Box 2

Key Points about Collaborative Consent

- It is not the same as consultation and accommodation
- It is not a veto
- It is not limited to the NWT; other places can do this too
- It is not just one meeting – it involves ongoing engagement

Water Sustainability Act

An application of the collaborative consent approach in the B.C. water governance context is in the implementation of B.C.'s *Water Sustainability Act* (WSA). The WSA, although it has major flaws including the lack of recognition of Indigenous water rights, provides a real opportunity to build new relationships and apply different approaches going forward. For example, collaborative consent can be used in developing water sustainability plans under the Act, which could involve creating a co-chaired model from the outset, from plan development to implementation, with Indigenous nations bringing their laws and authority to the table.

How Does Collaborative Consent Help Us Meet UNDRIP?

- It builds long-term, ongoing governance relationships on a foundation of mutual consent.
- It engages with Indigenous nations through their own representative institutions.
- It ensures Indigenous nations are actively involved in determining and developing priorities and strategies for lands and waters within their territories.
- It can help Indigenous governments and public governments work together to map out a way forward in critical environmental and social issues.

For more information, please refer to the report *Collaborative Consent and Water in British Columbia: Towards Watershed Co-Governance* (POLIS/CIER, 2017) available at <https://poliswaterproject.org/polis-research-publication/collaborative-consent-water-british-columbia-towards-watershed-co-governance/>

Part 2: Water Laws: Lessons from Indigenous and Colonial Stewardship **Simon Owen (Indigenous Law Research Unit)**

Revitalizing Indigenous laws and legal traditions is an important part of post-colonial water governance. Indigenous legal traditions are deeply grounded, reasoned ways of managing the needs of human communities within specific territories, including relations between human and non-human beings and with the land itself. The Indigenous Law Research Unit (ILRU) and Environmental Law Centre, both based in the University of Victoria's Faculty of Law, are working with communities in three British Columbia watersheds to articulate principles and processes regarding how water is governed and managed within Indigenous, as well as colonial, legal traditions. Indigenous water laws, authoritative and adaptable to changing circumstances, are important to uphold in their own right, and in an inter-societal context, also respond to the limitations and the possibilities of the *Water Sustainability Act*. Indigenous community partners in this project are the Lower Similkameen Indian Band, Cowichan Tribes, and Tsilhqot'in National Government.

Common Myths about Indigenous Law

- **Indigenous societies as lawless.** Contrary to continuing colonial lies about *terra nullius*, Indigenous societies have always had, and continue to have, sophisticated, intellectually reasoned, reasonable, coherent, and authoritative ways of managing needs and responding to problems. These are *law*.
- **Indigenous laws as custom.** Custom is an element in every legal tradition, including colonial legal traditions, but laws are always more than *just* custom. Indigenous legal orders include diverse sources, resources, and methods of legitimization.
- **Indigenous law as sacred.** Again, concepts of the sacred are observable in all legal traditions, but to conceive of Indigenous laws as 'just' sacred is to perpetuate the colonial freezing of law. To effectively respond to contemporary challenges, Indigenous laws include debate and dissent, and continue to adapt and change across time.

- **Indigenous law as a single legal tradition.** Indigenous legal orders are diverse and distinct, engaging with universal human issues in particular ways through the application of principles and practices that are grounded in specific territories and human communities.

What are Indigenous Laws?

1. Indigenous laws as *legal traditions*

Indigenous laws are more than just rules and practices. Legal traditions concern the nature of law, its organization, and its role in society.

2. Indigenous laws as *law*

Indigenous laws are both diverse and adaptable. Law is complex and imperfect, and requires continual public engagement, deliberation, and dissent.

3. Indigenous laws as *vital*

Indigenous laws may not be fully intact, visible, or even functioning today, but can be recovered and revitalized even after the immense loss and damage they have suffered in the colonial period.

Many resources exist for Indigenous laws research, including (but not limited to) Elders, knowledge keepers, personal memories and direct experiences; stories, ceremonies, narratives, songs, practices, rituals, customs and conventions; dreams, dances, art, land, nature, artefacts, petroglyphs, scrolls; Oral histories and collectively owned oral histories by families, clans, and society; language, historical descriptive accounts by outsiders; witness testimony, trial transcripts; published anthropological and historical research; written works by community members: poems, fiction, stories, and legends; and published collections of stories.

The ILRU methodology analyzes oral histories and narratives within specific Indigenous legal traditions to build preliminary frameworks of law that respond to specific research questions. This work supports more informed conversations with community members to deepen the legal knowledge and understandings that result in final research products, including analyses, casebooks, and glossaries of Indigenous legal terms.

Phases of ILRU Research Projects

All ILRU research is done at the invitation of Indigenous communities

Phase 1: Engage with communities to identify research goals and specific questions

Phase 2: Bring research questions to textual materials to develop preliminary framework and analysis

Phase 3: Carry out community focus groups to create an integrated framework and analysis

Phase 4: Community consultation and validation of analysis

Phase 5: Implementation, application, and critical evaluation

Question & Answer Period

NOTE: Merrell-Ann Phare, another co-author of the report "Collaborative Consent and Water in British Columbia," provided additional thoughts during the question and answer period via the webinar chat box. Her comments are included below.

How can stewardship groups who don't have any authority but who are working on water support the implementation of this concept and build meaningful partnerships with First Nations?

Rosie Simms: First Nations should be included at the very outset of any collaborative process and help shape the design, guiding priorities, and principles. It is essential for non-Indigenous watershed organizations and governments to make meaningful effort to understand First Nation's rights, history in

the watershed, and current activities/and interests. It is important to try to understand the goals of the Indigenous nations involved and how they might benefit through their participation in that collaborative initiative. There needs to be flexibility in the design to accommodate the nation's needs and priorities, and consideration given to capacity and support needed for the nation's participation.

What is the role of traditional governance structures, which are not recognized, and the issue that Crown governments tend to only engage with the bodies and the leaders that they recognize and fund?

Michael Miltenberger: Change is coming. Minister Wilson-Raybould has in fact put forward a challenge to Indigenous governments to self-organize. While Indigenous governments did not create the systems that are currently in place across the land or the structures of governance, they are now being asked to help solve that problem. The opportunity is coming to First Nations and that discussion is going to get resolved in the coming years as we build off of the support and the opportunity created by the nation-to-nation implementation of UNDRIP.

Merrell-Ann Phare: In my view, one of the greatest negative legacies of colonization is the fracturing of Indigenous Nationhood where that has happened. A great challenge facing Indigenous Nations is organizing themselves to be able to collaborate in governance as we are proposing. The Truth and Reconciliation Commission suggested there might be 50 to 60 nations in Canada at the time of colonization, but how that looks today is something Indigenous Nations must define. I think the greatest need is for tiered systems, that can work with public governments.

Who gets the revenues for collaborative "resource" management?

Merrell-Ann Phare: In the NWT, the public and Indigenous governments negotiated a regional (territory-wide) resource revenue sharing agreement, where revenues are shared *in addition* to whatever benefits may flow to a local nation further to an Impact and Benefit Agreement, for example.

What were the key understandings reached in the four-year process that facilitated the NWT agreement?

Merrell-Ann Phare: The key understandings were:

- The importance of traditional knowledge as a key partner to science in assessing and making decisions.
- The end goal for the use of water by humans (that it must remain clean and productive for all uses—for example, human, fish, wildlife—for all times).
- That the commitments in the land claims to water *must* be able to be met under the water strategy and the bilateral water agreements. The four-year process created the driving vision for the negotiations, and set the collective vision for the NWT use of water, plus created the relationships necessary for water governance in the NWT.

Who gets called when people do not comply with the agreements?

Merrell-Ann Phare: At the on-the-ground Indigenous nation, local, or municipal level, services agreements can address shared services including water, waste, fire, and policing. Assuming they want to work collaboratively, as governments. Collaborative governance tables could be used to determine this.

In the NWT, who decides what are the tenets of Indigenous science and knowledge?

Merrell-Ann Phare: The traditional knowledge tenets are being created by the Indigenous governments that work with Government of the NWT or that sit on the committees that manage the transboundary agreements.

Other Discussion Comments and Themes

- Co-governance and collaborative consent efforts need to be funded: there is an inherent need for funding of research and community development, as well as funding to increase local capacity within Indigenous communities.
- Indigenous peoples' governance models have been impacted inter-generationally and need reinvestment as well as revitalization.
- Political will is a prerequisite for a co-governance approach.
- Attention should be paid to rural localities with regards to water issues.
- Solutions to water issues must be informed by Indigenous culture and knowledge.
- Clean water and clean air must be the first priority in all negotiations.

Interested in More Webinars?

To view past *Creating a Blue Dialogue* webinars visit www.youtube.com/POLISWaterProject. Previous topics include "Aboriginal Co-Governance of Water and Watersheds," and "Environmental Flows and Healthy Watersheds: Towards Protection in Canada and B.C."

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