



CIER

Centre for Indigenous  
Environmental Resources

# Indigenous Water Rights in Federal Freshwater Governance

Submission to the Standing Committee on  
Environment and Sustainable Development for its  
Study on Freshwater

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## 1.0 Introduction

The [Centre for Indigenous Environmental Resources](#) (CIER) has worked with Indigenous communities and all other levels of government across Canada for nearly 30 years. In that time, we have partnered to deliver hundreds of projects that advance Indigenous rights, interests, and priorities across their lands, waters, and communities. We are governed by a board of national Indigenous leaders, we are not political, and we are not core funded. Our work is largely on the ground – we do not often participate in government engagement processes.

However, the current moment stands out as a potentially transformative opportunity to recognize Indigenous water rights and strengthen their implementation at the federal level. The imperative has never been more clear: increasingly common floods, droughts, and wildfires, as well as deteriorating water quality, are impacting communities across the country, and Indigenous nations are often disproportionately impacted. Indigenous peoples are resilient and know their watersheds best, yet they are often excluded from decision-making processes.

This is one important aspect of a broader issue: **our systems of water governance are inadequate**. Water is incredibly jurisdictionally complex, flowing across borders and through jurisdictions that do not align with watershed boundaries. In the face of this complexity, good water governance requires strong collaboration through intergovernmental leadership tables, shared decision-making mechanisms, and integrated data sets. Yet existing decision-making over water is fragmented and siloed. Federal and provincial governments make decisions about water without the processes in place to collaborate with Indigenous governments who are on the frontlines of combatting the ongoing water crisis and who hold inherent rights over the water on their territory.

It is our view that collaborative governance structures are critical to good water governance and to recognizing the inherent rights and authorities of Indigenous nations. In this brief, we discuss Indigenous water rights and suggest mechanisms for recognizing those rights, including collaborative governance and co-development. Next, we discuss learnings from existing collaborative models, including CIER's [Collaborative Leadership Initiative](#). We conclude with recommendations for concrete actions that can strengthen water governance in Canada.

We commend the Standing Committee on Environment and Sustainable Development for undertaking this much needed study.

## 2.0 Background

### 2.1 Indigenous Water Rights

The history of Indigenous water rights in Canada is complex and fragmented, particularly regarding the recognition of these rights under Canadian law. Generally, Indigenous rights to water fall into one of four categories:

- **Inherent rights:** Indigenous rights that are given by the Creator, including rights and responsibilities such as the laws of stewardship and reciprocity with nature, that cannot be altered or narrowed by other humans or their governments. These rights are not dependent

on recognition by Canadian courts or governments (this is why they are different than Aboriginal or treaty rights described below), but they are often disputed by the Crown unless there is an agreement that sets out how those rights will be implemented. Canada has acknowledged the existence of the “inherent right to self-government,” but requires agreements for implementation of that right.

- **Aboriginal rights:** Indigenous rights that stem from the use and occupation of territory since time immemorial and continue to this day; these rights have been recognized and affirmed by the Canadian Constitution since 1982, but often require litigation or negotiated agreements to ensure their implementation. These rights include travel and navigation, as well as rights to use water for domestic, spiritual, ceremonial, recreational, or cultural purposes. These rights could also include the right to use water for economic development. Aboriginal rights include Aboriginal title, although no Aboriginal title cases in Canada to date have included title to water.
- **Treaty rights:** Indigenous rights that are acknowledged or granted by a historic or modern treaty; these rights have been recognized and affirmed by the Canadian Constitution since 1982. No treaties in Canada specifically mention the right to water, but some case law has suggested that the treaties include the right to water necessary to satisfy the purpose of a reserve (which is to support the people that live there). This would include the right to use and manage water for domestic, agricultural, and all other water uses that might be necessary to live on reserve. Most modern treaties address the rights to water of the Indigenous nation signing the treaty, but frequently the underlying title to the water is kept by the Crown. Finally, there is a category of treaty rights that are “necessarily incidental” to the exercise of a treaty right; these suggest that rights to manage and use water exist if they are related to another treaty right such as fishing, hunting, or trapping.
- **Legislative rights:** Indigenous rights granted specifically to First Nations, Métis, and/or Inuit in legislation or Indigenous rights that are recognized in legislation. For example, powers available to First Nations under the *Indian Act*, *First Nation Lands Management Act*, *Impact Assessment Act*, etc.

**The most important right is the right to decide how water is used.** This is called “water governance” and is based on the fact that Indigenous nations have some jurisdiction over water. The existence and scope of this jurisdiction is not generally well-defined in Canadian law. As a result, other governments often do not understand – and some do not accept – Indigenous jurisdiction over water. This has had detrimental impacts on the protection, use, and management of water across the country.

## 2.2 Indigenous Water Rights Under Canadian Law

All Canadian water law is limited by pre-existing Indigenous water rights, although this is not generally acknowledged by most Crown governments. Indigenous inherent, Aboriginal, or historic treaty water rights remain largely unaddressed in Canadian law. The federal government’s longstanding commitment to “addressing native water rights” in the 1987 Federal Water Policy has resulted in provisions in most modern land claims that clarify Indigenous water rights, but this approach is not optimal, as many agreements have limited the scope of these rights.

Many Indigenous nations are in the process of litigation to prove their water rights, which is often costly and time consuming. Other Indigenous nations have taken a “just do it” approach, explaining their inherent water jurisdiction and expecting other governments and their citizens to abide by their laws and rules. Examples of this latter approach include the Kitchenuhmaykoosib Inninuwug Watershed Declaration<sup>1</sup> and the Water Declaration of the Anshinabek, Mushkegowuk and Onkwehonwe<sup>2</sup> adopted by the Chiefs of Ontario, which emphasizes their caretaking role regarding water.

The current federal government has suggested that it is not going to require Indigenous nations to prove their rights in court. This means that Indigenous nations can propose to negotiate and enter into water governance agreements with Canada (and potentially other willing jurisdictions) without having to take legal action. This presents an opportunity to focus on implementing Indigenous water rights (and responsibilities), rather than solely proving that they exist.

### 2.3 Policy Drivers

The discourse on Indigenous rights, authority, and self-determination in Canada has evolved rapidly in recent years. The role of Indigenous rights in water governance is an important part of this discussion. Major policy drivers include the **Truth and Reconciliation Commission of Canada’s (TRC) 94 Calls to Action**,<sup>3</sup> which has been endorsed by Crown governments across Canada. In particular, Calls to Action #45-57 call for the repudiation of “concepts used to justify European sovereignty over Indigenous peoples and lands” and restructuring of legal, governance and institutional structures in Canada to recognize Indigenous rights and authority. Another major policy driver is the **United Nations Declaration on the Rights of Indigenous Peoples Act**,<sup>4</sup> which commits the Government of Canada to harmonizing federal legislation with the United Nations Declaration on the Rights of Indigenous Peoples.

The federal government affirmed these commitments in relation to water in the 2021 Environment and Climate Change Canada (ECCC) discussion paper, **Toward the Creation of a Canada Water Agency**.<sup>5</sup> In this document, ECCC states: “The Government of Canada is committed to reconciliation with Indigenous peoples through a renewed, nation-to-nation, government-to-government, and Inuit-Crown relationship based on recognition of rights, respect, co-operation, and partnership as the foundation for transformative change. The Government of Canada’s commitment to reconciliation includes implementing the United Nations Declaration on the Rights of Indigenous Peoples, as well as other collaborative initiatives and actions.”

These commitments are important, but the challenge lies in implementation; effectively, in “doing reconciliation”. The next two sections briefly look at two methods for implementing these commitments, while subsequent sections discuss lessons learned from real-world examples.

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<sup>1</sup> [https://wildlandsleague.org/media/WildNotes\\_Winter-2013-KI-Watershed.pdf](https://wildlandsleague.org/media/WildNotes_Winter-2013-KI-Watershed.pdf)

<sup>2</sup> <https://static1.squarespace.com/static/54ade7ebe4b07588aa079c94/t/54ea50c2e4b0feaa4772eaaf/1424642242464/COO-water-declaration-revised-march-2010.pdf>

<sup>3</sup> [https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Calls\\_to\\_Action\\_English2.pdf](https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Calls_to_Action_English2.pdf)

<sup>4</sup> <https://laws-lois.justice.gc.ca/eng/acts/U-2.2/>

<sup>5</sup> [https://www.placespeak.com/uploads/6321/Canada\\_Water\\_Agency\\_Discussion\\_Paper.pdf](https://www.placespeak.com/uploads/6321/Canada_Water_Agency_Discussion_Paper.pdf)

## 2.4 Collaborative Governance

Collaborative governance requires Indigenous and Crown governments to work together to develop and implement a shared vision for water management in Canada. It requires *shared decision-making* over waters that flow across different jurisdictions. This does not mean a uniform approach to water management, but rather one that incorporates and respects the authority of each government. In practice, it could mean that the federal government:<sup>6</sup>

- Recognize the water jurisdictions of Indigenous nations through a commitment to direct implementation of Indigenous rights through co-governance;
- Create decision-making tables where representatives have the authority to participate fully and make decisions at the table;
- Commit to ensuring Indigenous (indeed, all government) interests are dealt with in a satisfactory manner from their own point of view;
- Base relationships on respect, trust, and the art of diplomacy between governments;
- Embrace a creative, open, and solution-oriented approach that focuses on finding common, productive ground; and,
- Generate measurable improvements to environmental, social, and economic realities in Canada's watersheds.

The newly established Canada Water Agency provides a logical pathway for advancing collaborative water governance with Indigenous nations. The Agency should act as both a coordinating body within the federal government and a mechanism for intergovernmental collaboration on water across the country.

## 2.5 Co-Development

In the context of Indigenous-Crown relations, 'co-development' is used to describe a collaborative process of designing and developing legislative, program, and policy initiatives undertaken by the Government of Canada and provincial and territorial governments in partnership with Indigenous nations.<sup>7</sup> Parties engaged in co-development work together on the matter at hand (such as a plan, policy, or law) throughout the entire development process, crafting acceptable options, until mutual agreement is reached on a final version. Co-development is an important tool under the framework of collaborative governance. Recent examples at the federal level include co-development of federal Indigenous fiscal policies,<sup>8</sup> the *Indigenous Languages Act*,<sup>9</sup> and the *First Nations Clean Water Act*.<sup>10</sup>

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<sup>6</sup> Modified from Phare, M-A., Simms, R., Brandes, O.M., Miltenberger, M. (2017). *Collaborative Consent and Water in British Columbia: Towards Water Co-Governance*, POLIS Project on Ecological Governance and Centre for Indigenous Environmental Resources. Available at: <http://poliswaterproject.org/polis-research-publication/collaborative-consent-british-columbias-water-towards-watershed-co-governance/>

<sup>7</sup> For more on co-development principles, see: <https://www.itk.ca/wp-content/uploads/2022/11/ICPC-Co-Development-Principles.pdf>

<sup>8</sup> <https://www.afn.ca/wp-content/uploads/2018/03/A-New-Approach-Co%E2%80%90development-of-a-New-Fiscal-Relationship.pdf>

<sup>9</sup> <https://www.afn.ca/uploads/sca-2018/Documents/Dialogue%20Sessions/Day%201%20-%20December%204%2C%202018/01%20Languages/01%29%20Languages%20Powerpoint.pdf>

<sup>10</sup> <https://www.canada.ca/en/indigenous-services-canada/news/2023/12/bill-c--first-nations-clean-water-act-short-title-or-an-act-respecting-water-source-water-drinking-water-wastewater-and-related-infrastructure-on-f.html>

If there is interest from Indigenous nations, there are a number of co-development opportunities that the federal government could explore related to water law and policy. These include:

- Co-develop and co-implement the new Canada Water Agency’s detailed mandate, strategic, and implementation plans;
- Co-develop long-term funding programs for Indigenous nations to participate in basin and watershed governance;
- Co-develop long-term basin and watershed governance agreements;
- Co-develop water legislation (such as an updated *Canada Water Act*) and policies (such as a new federal freshwater policy); and,
- Co-design water programs to ensure they address all long-term water issues and needs.

### 3.0 Collaborative Models

There are established models that the federal government can learn from as it considers how to build a collaborative approach to water governance that recognizes and upholds Indigenous water rights. Several of these models are detailed below.

Some of these collaborative models have produced good results in integrating Indigenous concerns in some areas of management. However, the final decision maker is usually still the relevant Crown government. True collaboration requires new approaches that are aimed at both **jointly creating an agreed upon foundation** for the co-development of laws or policies, and **collaborating on implementation** through co-development of institutions, programs, and other mechanisms.

#### 3.1 CIER’s Collaborative Leadership Initiative

The [Collaborative Leadership Initiative](#) (CLI) is process developed by CIER to build collaboration on shared water challenges between Indigenous and non-Indigenous elected leaders and their administrations. CLI is a facilitated process that provides resources and expertise to build trust, strengthen relationships, and advance action towards true reconciliation. To date, CLI has largely focused on working with Indigenous and municipal leaders because (1) most water decisions are made at the local level and (2) these two levels of government often have no structured mechanism for collaboration. The CLI process, however, can be adapted to foster collaboration between Indigenous and non-Indigenous governments at all levels. The CLI builds on successful approaches implemented in other jurisdictions, including the Northwest Territories, South Africa, and, most recently, Manitoba. The process is structured around three phases:

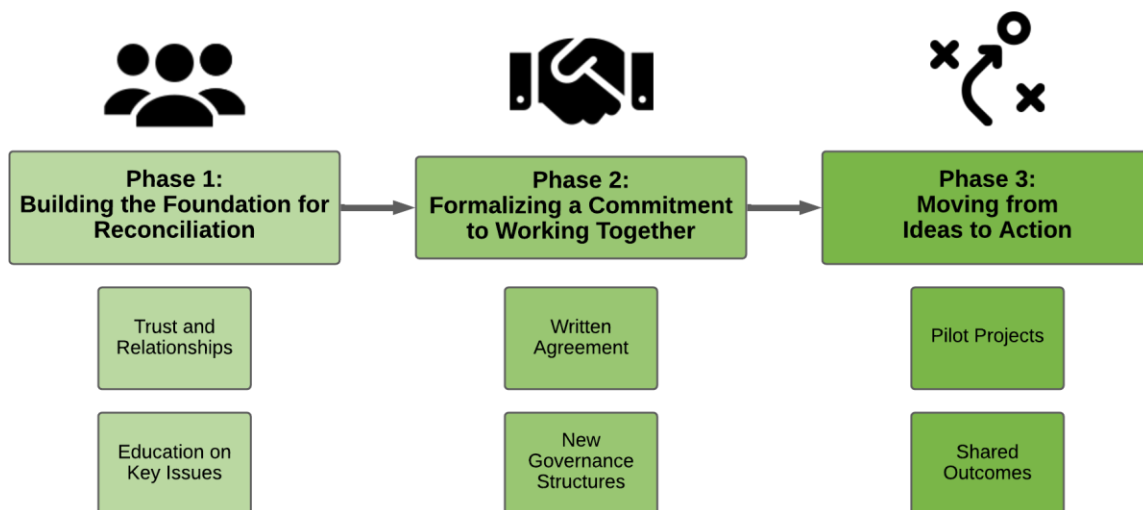


Figure 1. The CLI process

In 2017, CIER implemented the CLI model in Manitoba.<sup>11</sup> Working with the Winnipeg Metropolitan Region and the Southern Chiefs’ Organization, the CLI process brought together elected leaders from 11 Indigenous governments and 16 municipalities for the first time in nearly 150 years. Through a series of gatherings, the leaders built trust, learned about each other’s communities and water challenges, and began to think like a region. This process led to the signing of a historic intergovernmental agreement between the jurisdictions in 2019.

CLI Manitoba advanced the development of a reconciliation framework while building a co-governance table where government-to-government decisions are made. Having elected decision-makers at the table was a critical factor in its success. Through the CLI process, the leaders established productive working relationships and have taken tangible action to address shared priorities that will continue to advance the region for years to come. This includes building natural infrastructure projects, developing shared databases, and undertaking joint studies and pilot projects. The leaders worked towards a range of shared priorities, with water – particularly the health of Lake Winnipeg – at the centre of their efforts.

Based on the success of the CLI process in Manitoba, CIER secured funding from the [BHP Foundation](#) to implement the CLI process with partners in other regions across Canada. This five-year project recently passed its mid-way point and is generating valuable learnings about building collaborative water governance rooted in reconciliation.

### 3.2 Wildlife Legislation in the Northwest Territories

Co-development of the Northwest Territories *Species at Risk Act* (2009) and the *Wildlife Act* (2013) showcases a legislative co-drafting process that can provide key lessons to the federal government, particularly as it begins modernization of the *Canada Water Act*.

<sup>11</sup> For more information, see a documentary on the CLI Manitoba process here: <https://www.youtube.com/watch?v=PNmgaewOpSA&t=4s>.

To create the *Species at Risk Act* and to modernize the *Wildlife Act* after years of stalled negotiations, the Government of the Northwest Territories (GNWT) initiated a process that was different from conventional legislative drafting processes. It began with political leadership from the GNWT reaching out to the elected leadership of Indigenous governments to secure interest in, and agreement with, a co-drafting approach at a government-to-government level. A Joint Working Group (JWG), comprised of Indigenous and GNWT representatives, was established to lead the co-drafting process, including to propose goals and objectives for the project. When drafting the legislation, a legal drafter participated in the JWG's discussions to ensure the wording reflected the JWG's goals and objectives, as well as the agreed legislative proposal. The drafter presented draft text to the entire table for discussion and approval, after which the Minister introduced the draft Bill to the Legislature with the full support of the JWG.

The process was different from conventional legislative drafting processes, as it moved beyond consultation to consensus-based decision making.<sup>12</sup> This called for governments to be equally represented around the table with the authority to make decisions, and committed to the process until the end result was achieved.<sup>13</sup> Equal representation and decision-making authority from all governing parties ensured that all interests were taken into account and built a sense of ownership and shared responsibility. The result of this process was new wildlife legislation that was unanimously endorsed by all participants in the legislative development process and was supported wholeheartedly by the GNWT.<sup>14</sup> The legislation aligns with Indigenous rights, including land claims, and commits to accommodating the rights and interests of Indigenous peoples in the management of wildlife in the NWT.<sup>15</sup>

### 3.3 First Nations Clean Water Act

As mentioned above, the federal government has begun to explore collaborative approaches to federal law and policy development, including the recent development of Bill C-61, the proposed *First Nations Clean Water Act*. This process was undertaken in response to a settlement agreement reached between the Government of Canada and a group of First Nations who filed a class action in 2021 alleging that Canada failed to meet its obligation to provide safe drinking water and wastewater services to First Nations. The settlement agreement required Indigenous Services Canada to work with First Nations to prepare a draft bill addressing the issues raised in that litigation.

The co-development process is still in progress, but it has so far achieved most of the desired outcomes (as required by the class action settlement agreement), as well as many other key collaborative water governance targets. Should an expanded mandate be secured, it will represent a fundamental change in decision-making – including the affirmation of self-governance in this area writ large across Canada – regarding safe drinking water for First Nations communities. In this sense, progress has been made in recognizing the authority of First Nations to be involved in the creation of a bill that would affect their rights. However, the co-development process had

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<sup>12</sup><https://www.researchgate.net/publication/319550563> Conservation and collaboration rethinking wildlife legislation in the Northwest Territories

<sup>13</sup><https://poliswaterproject.org/polis-research-publication/collaborative-consent-water-british-columbia-towards-watershed-co-governance/>

<sup>14</sup><https://www.willmsshier.com/docs/default-source/articles/article---nwt-wildlife-act---newsflash---id---november-2014.pdf?sfvrsn=4>

<sup>15</sup><https://www.justice.gov.nt.ca/en/files/legislation/species-at-risk/species-at-risk.a.pdf>;  
<https://www.justice.gov.nt.ca/en/files/legislation/wildlife/wildlife.a.pdf>



limitations that restricted the full potential of collaboration. They are summarized with recommended solutions in the table below.

Limitation	Recommended Solution
The cabinet mandate was unilaterally drafted by the Government of Canada, limiting the scope of the legislative drafting process.	The initial mandate, which gives the Minister instructions for the legislation, must be co-developed.
The two parties collaborated on a preliminary draft produced in advance by one party.	The text of the document must be co-drafted from the very beginning based on consensus reached at each stage of considerations.
Rationale for changes to the text of the proposed legislation that happen after the government introduces the Bill into the House of Commons are only privy to the Government of Canada under the pretext of parliamentary privilege.	Canada must clearly and reasonably define the scope of parliamentary privilege as it pertains to co-development. Parliamentary privilege is not as uniformly restrictive as it is sometimes portrayed.

Table 1. Limitations and recommendations regarding co-development of the First Nations Clean Water Act

## 4.0 Recommendations

This section provides recommendations for concrete actions that can strengthen water governance in Canada by recognizing Indigenous water rights and strengthening their implementation at the federal level.

### 4.1 Modernizing Laws and Policies

Federal water laws and policies, such as the 1970 *Canada Water Act* and 1987 Federal Water Policy, are outdated and not equipped to deal with 21<sup>st</sup> century water challenges. The Canada Water Agency could lead reform of these and other water laws and policies. CIER's recommendations are to:

- **Co-develop federal legislation and policies** in partnership with Indigenous nations through a process that is consent-based and rooted in government-to-government relationships.
- Establish the ability of the federal government to **create water co-governance agreements** with Indigenous governing bodies within the *Canada Water Act*. This provision will allow Canada to negotiate and address water co-governance with Indigenous governing bodies without litigation over water rights.
- **Mainstream Indigenous governments' participation in water governance mechanisms** throughout the *Canada Water Act*, including equal participation in intergovernmental committees and intergovernmental agreements.

## 4.2 Building Institutional Capacity

The federal government has led the establishment of a new Canada Water Agency, which is a good first step to building institutional capacity for stronger water governance and coordination across the country. The key to an effective Canada Water Agency will be in its implementation. To that effect, CIER's recommendations are that the Canada Water Agency should:

- Establish a Director General position with appropriate supports that is responsible for **intergovernmental coordination**, including dedicated Director-level capacity for coordinating with Indigenous nations.
- Lead the **co-development of long-term basin and watershed governance agreements** with Indigenous nations and provincial/territorial governments.
- Where appropriate, work with Indigenous nations and other levels of government to **co-develop key policies and initiatives** led by the Agency.

## 4.3 Stable and Secure Funding

The federal government has committed \$650 million over 10 years in their Freshwater Action Plan to “protect and restore water quality and ecosystem health in major watersheds across the country”.<sup>16</sup> There are steps the federal government can take to ensure that this and future funding supports the recognition and implementation of Indigenous water rights. CIER's recommendations are to:

- Provide **dedicated funding for collaborative water governance initiatives** by establishing collaborative governance as a funding priority in new and existing funding programs (similar to the priorities already identified in the Lake Winnipeg Basin Program and the Great Lakes Freshwater Ecosystem Initiative).
- Provide **funding to existing collaborative water governance bodies**, such as the Mackenzie River Basin Board and the International Joint Commission, to enable these bodies to modernize their governance structures to recognize and uphold Indigenous water rights.
- Provide **funding for establishing new collaborative water governance bodies** that will be enabled via new provisions in a modernized *Canada Water Act*.

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<sup>16</sup> <https://www.canada.ca/en/environment-climate-change/news/2024/01/federal-government-opens-the-door-to-projects-that-help-keep-canadian-fresh-water-clean-and-healthy.html>