Water governance and Indigenous governance: Towards a synthesis

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Abstract

In Canada, Indigenous peoples have sui generis rights and millennia of stewardship on their traditional homelands. However, non-Indigenous understandings of those sui generis rights, let alone knowledge of Indigenous history, Indigenous knowledge, and understanding of Indigenous governance and self-determination goals, is generally poor in Canadian society. This paper explores the conceptual gap that exists between underlying principles, values and norms of Indigenous governance within the specific context of contemporary water governance in Canada. The province of British Columbia, Canada is used as an empirical setting to illustrate the issues considered. In this province, numerous organizations involved are attempting to collaborate with First Nations peoples to address water issues. This paper questions the underlying assumptions in the collaborative governance literature relative to assertions surrounding self-determination found in Indigenous governance scholarship. We conclude (1) that both the scholarship and the practice of water governance do not sufficiently address concerns relating to Indigenous governance, Indigenous pre-and post-colonial history, and varying concepts of self-determination, and (2) the ability of collaborative processes to address current and emerging governance challenges in the water realm depends in part on the extent to which assumptions held by non-Indigenous and Indigenous peoples can be reconciled.

Introduction

Globally, it is recognized that many of the world's water problems have their roots in mismanagement and inappropriate behaviours, in other words, in failures of governance (United Nations World Water Assessment Programme 2003). As a result, environmental governance has flourished as a subject of scholarly inquiry in many fields (Duit, *et al.* 2010). An important trend in environmental governance (both in theory and in practice) is recognition among scholars and practitioners of the changed role of the state. In many jurisdictions, in the context of water, governments are, and likely will continue to be, central actors. However, it is now widely accepted that governments alone – using the traditional regulatory tools of the state – will not be able to address the world's water problems on their own (Aylward, *et al.* 2005; UNWWAP 2003). This has led to the widespread adoption of new ways of governing the environment, notably collaborative approaches wherein the actors involved come together to solve problems jointly (Holley, *et al.* 2012). This shift in the way governance for water is occurring has profound implications for how and if Indigenous peoples choose to play a role in state or non-Indigenous water governance processes.

In Canada, water-related vulnerability in Indigenous [1] lands is linked to poor infrastructure, threats to the quality and quantity of water from human development, and even climate change (de Loë and Plummer 2010). The ability of Indigenous peoples to respond effectively to these challenges in Canada is compromised by a host of concerns relating to capacity and the legacy of colonialism (Walkem 2006). This too is a common phenomenon around the world. For example, in Latin America, Indigenous water rights and ability for Indigenous people to apply Indigenous knowledge to water both are threatened by the encroachment of industrial development (Boelens, *et al.* 2010). In New Zealand, the Maori face obstacles to participation in decision making including managerial legitimacy, colonial dislocation, and historical efforts to assimilate them into mainstream society (Coombes 2003). Similar challenges are experienced by Indigenous peoples in Australia (Carter 2008), Nigeria (Akpabio 2011), Philippines (Pinel 2009), South America (Craps, *et al.* 2004; Lostarnau, *et al.* 2011) and India (Singh, *et al.* 2010).

When Indigenous people are discussed in the mainstream collaborative water governance literature, they are often portrayed as one of many stakeholders or actors who ought to be included in collaborative processes (Jackson, *et al.* 2012; Tan, *et al.* 2012). Often, the same rationale for and approach to collaboration with stakeholders or interest groups is assumed to be relevant when applied to collaboration with Indigenous peoples. In contrast, a prominent argument in Canadian Indigenous governance literature is that Indigenous peoples have *sui generis* rights based on pre-existing nationhood prior to colonial contact (Borrows 2005; Dalton 2006; Ladner 2004; Turner 2006a). This unique set of rights held by Indigenous nations sets them apart from other stakeholders, a term used to describe actors who have a stake or interest in the outcome of a particular decision. In a multitude of cases, Indigenous peoples have not relinquished rights and responsibility to their traditional homelands, and their potential authority and responsibility, and unresolved title to the land may exist. This has significant implications for the role of Indigenous nations as the authority or rightful decision makers regarding questions about land and resources. Thus, Indigenous peoples/nations stand apart from non-Indigenous actors in the context of decisions of environmental governance.

This paper explores the implications for Indigenous peoples of the growing use of collaborative approaches to water governance. On the surface, this trend would seem to be positive, in the sense that more inclusive decision making should, in theory, better address the needs of a wider range of people, including marginalized people. However, we argue that both the theory and practice of collaborative environmental governance are not necessarily compatible with the self-governance goals of Indigenous people.

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[1] **Canadian Terminology for Indigenous Peoples:** The term *Indigenous* is used to refer to people who occupied a territory prior to colonization or the formation of nation states (Coates 2004). The *UN Declaration on the Rights of Indigenous Peoples* affirms that Indigenous peoples "are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such" (United Nations General Assembly 2007, 1). In Canada, *Aboriginal* is a legal term referring to Inuit, Métis, and First Nations, the distinct rights of whom are recognized Section 35(1) of the Canadian *Constitution Act, 1982*. In this paper, we use the term *First Nations* when referring to BC's Indigenous peoples. First Nations typically refers to Aboriginal people in Canada who are not Inuit or Métis. This is the identifier used by many Indigenous people in BC and is used in this paper because it is consistent with the First Nations label in data sources used.

There certainly is extensive literature on the importance of including relevant perspectives in collaborations, including those of Indigenous people (e.g., Berkes 2008; Cullen, *et al.* 2010; Jackson, *et al.* 2005). Nonetheless, as we discuss below, for the most part this literature fails to truly engage with concepts of Indigenous governance. This paper calls into question key underlying assumptions in the collaborative governance literature relative to concepts and assertions surrounding self-determination found in Indigenous governance scholarship. We argue that the theory and practice of collaborative governance must recognize the distinct perspectives, goals and rights of Indigenous peoples. Thus, our audience in this paper is the practitioners who are engaged in collaboration around water issues, and the scholars who are drawing on those experiences to define good practices and to build theory.

Through a brief review of mainstream collaborative water governance and Indigenous governance literatures, we explore assumptions that shape views on collaboration with Indigenous peoples. We then use the province of British Columbia (BC), Canada as real world example to ground our arguments. In BC, where very few treaties have been settled between First Nations and the Provincial or Federal governments, and many First Nations consider their traditional territories unceded and continue to assert various forms of self-determination (Penikett 2006). Thus, BC is an ideal jurisdiction for drawing insights about the position of Indigenous peoples in collaborative governance processes. These insights are specific to Canada, but may be relevant in other jurisdictions where collaborative governance is being practiced in the territories of Indigenous peoples.

Collaborative Governance and Indigenous Governance: A Brief Survey

The literature of collaborative environmental governance is extremely diverse, reflecting both the reliance of scholars on empirical experiences (Ansell and Gash 2007) and the many fields of scholarship involved in creating this body of literature. Many terms are often used as synonyms of collaboration include "co-management" and "partnerships". These are labels that capture different forms of interaction among diverse actors working together or co-operating under different degrees of formality and power sharing (Plummer, *et al.* 2006). However, we argue that they describe quite different approaches. Thus, we use the term "collaboration" in the way it is conventionally used by people who align with the deliberative democratic perspective. In this paper we define collaborative governance as a

> *sophisticated, emergent and enduring form of interaction in which two or more groups pool understanding and/or tangible resources to address a set of problems which neither could solve alone (after Gray 1985). It is a process in which organizations and groups are required to re-examine basic assumptions, beliefs, attitudes and values through iterative cycles of knowledge exchange, dialogue, deliberation and negotiation (Fish, et al. 2010).*

Rationales for collaboration in environmental governance (broadly) include building capacity for self-management in communities, improving policy knowledge, creating strategies suited to particular situations, empowering actors, and building social, intellectual and political capital, (Fischer 2000; Innes and Booher 2010). In the field of water management, specifically, rationales for collaborative approaches to water governance are similar to those of environmental governance. They include

bringing various stakeholders together to work towards consensus on facts and to resolve conflicts (Vugteveen, *et al.* 2012); drawing on local knowledge to inform decision making (Raymond, *et al.* 2010; Taylor and de Loë In press); addressing dependencies and interactions related to scale, and attempting to solve issues related to diverse and unequal interests (Fish, *et al.* 2010). Participants in collaborative processes are labeled with a variety of terms, including “stakeholders” (Leach, *et al.* 2002; Phillipson, *et al.* 2012), “actors” (Ingram 2008; Rogers and Hall 2003; Shrubsole 2004) and “players” (Ansell and Gash 2007; Lemos and Agrawal 2006). These labels reflect the deliberative, pluralistic perspective typical of this literature.

In promoting collaboration as a way of addressing water governance problems, proponents typically assume that the basic principles underlying the engagement of “stakeholders” can be applied to Indigenous peoples. This assumption reflects a deeply-held belief that Indigenous peoples *are* stakeholders. This certainly is evident in the literature, where the tendency is to group Indigenous peoples with other stakeholders, actors or players (Fraser, *et al.* 2006; Jackson and Morrison 2007). For example, in their discussion of cross-sector collaboration with Indigenous people in Indigenous-corporate collaborations, Murphy and Arenas (2010) classify Indigenous people as “fringe stakeholders”, rather than as nations or governments. In a Canadian context, First Nations are often assumed to be local actors (Norman and Bakker 2009) or stakeholders (Stringer, *et al.* 2006). Much less common are publications that explicitly characterize First Nations as *nations* (an example is Takeda and Ropke 2010).

In the Indigenous governance literature, in contrast, Indigenous peoples are generally not discussed as stakeholders or actors, but rather as peoples, nations or governments (Alfred 2009; Irlbacher-Fox 2009; Shackeroff and Campbell 2007; Turner 2006a). Indigenous governance is a far-reaching term that describes a field of scholarship which, in general terms, addresses subjects of Indigeneity, Indigenous knowledge, self-determination, Indigenous nationhood, colonialism, and race. It also deals with the challenges and solutions to the continued marginalization of Indigenous people (Corntassel 2003; Smith 1999). The following definition of self-determination guides the discussion in this paper:

> *Aboriginal self-determination in Canada refers to the right of Aboriginal peoples to choose how they live their shared lives and structure their communities based on their own norms, laws, and cultures (Dalton 2006, 14).*

At a global level, Indigenous self-determination and self-governance have a broad range of meanings and implications for Indigenous people and nations. Generally speaking, discussions of self-determination centred around the re-assertion of Indigenous control or jurisdiction of pre-contact lands and rights, and the reinvigoration of Indigenous ways of doing and governing, Indigenous languages, knowledge, culture and spirituality (Alfred 2009; Battiste 2000; Borrows 2005; Irlbacher-Fox 2009; McGregor 2004; Powderface 1992; Turner 2006a; Turner and Berkes 2006). The definition provided above is useful because of the Canadian focus of this paper and its general alignment with the perspective that is common in the Indigenous governance literature. However, given the many possible perspectives on what constitutes self-determination that come from the many different Indigenous

nations in Canada, it is important to note that this definition is one among many and used only to frame this discussion.

Particularly within Canadian political context of the Indigenous governance literature, Indigenous people are considered to be sovereign nations or governments. This assumption that Indigenous people are not stakeholders, but rather nations, stems directly from the fact that Indigenous people lived within sovereign nations prior to colonial contact. In discussions of self-determination, this point is identified with regard to the *sui generis*, or unique, rights of Indigenous peoples (Turner 2006a). Some of the assumptions that underpin some Indigenous governance scholarship are (1) an Indigenous identity stems from the historical (and/or ongoing) existence of first peoples on the land (2) that there were and are legitimate, pre-existing Indigenous nations, (3) that the legitimacy of colonial states ought to be questioned, (4) that Indigenous world views, knowledges, ways of knowing and values may differ from Western or other mainstream ones, and (5) that unequal power dynamics continue to oppress Indigenous people, and their world views and knowledges (Alfred 2005; Deloria and Wildcat 2001; Paci, *et al.* 2002; Smith 1999; Spak 2005; Turner 2006b).

Collaboration in British Columbia Water Governance

What is the potential for a synthesis of these perspectives given the fundamentally different assumptions underlying collaborative environmental governance and indigenous governance? We argue that this synthesis is essential given the global trend towards "new" forms of environmental governance based on collaboration (Holley, *et al.* 2012). The example of British Columbia illustrates this reality effectively. Here we use BC's experiences as an illustrative example to establish the basis for the synthesis we are seeking. A detailed empirical analysis is provided in forthcoming publications.

In BC, the rights and title of many First Nations to their traditional territories are disputed both politically and within federal and provincial courts. Importantly, BC differs from other provinces in Canada in that the vast majority of First Nations have not signed historical or modern treaties with the Provincial and Federal governments. Many First Nations assert that they have never ceded their land to the colonial government and that their pre-contact nations, and corresponding traditional territories, are legitimate and exist still today (Phare 2009; Turner 2006a; Union of BC Indian Chiefs 2010). In contrast, the governments of BC and Canada view themselves as having a legitimate right to make decisions regarding land by virtue of the powers assigned to them by Canada's constitution. This is demonstrated most concretely in court cases involving First Nations rights to land and resources, e.g., Haida Nation v. BC (Minister of Forests), [2004] 3 S.C.R. 511., Taku River Tlingit First Nation v. B.C., S.C.J. No. 69, 2004 SCC 74[2]; and Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010. [3]

Provincial-level water governance in BC

In British Columbia, the *Water Act* [RSBC 1996] is the main vehicle through which the provincial government has made decisions about rights to access water. Recognizing the many deficiencies in this

[2] The Haida and Taku cases were heard concurrently by the Supreme Court of Canada and dealt with the Crown's duty to consult and accommodate Aboriginal peoples in the case of yet-unproven rights and title claims.

[3] The Delgamuukw case discussed but made no ruling on the dual claim to land by the Crown and by Aboriginal peoples. The ruling made statements supporting the use of oral history as legitimate testimony.

statute, the Provincial government initiated a participatory approach in December 2009 with the explicit goal of reforming the BC *Water Act*. This approach to the reform of the *Act* included gathering and synthesizing expert and public opinions as well as information from case studies, literature, interviews, scientific data, and best practices. A stated goal of the Ministry of Environment was involving First Nations in the reform processes (British Columbia Ministry of Environment 2010). To collect and collate feedback on the ideas on the proposed *Water Act* reforms, the Province hosted an online blog where citizens and First Nations could comment, and town hall-style meetings in several locations in BC, where citizens and First Nations could speak. Three of these meetings were held for First Nations specifically, and were open to many First Nations.

Relative to historical practices, this represents a new and different approach to involving First Nations on in provincial-level policy making. However, this move to a more participatory style of water reform characterizes BC's First Nations as citizens of the province, and as one group of stakeholders among many – rather than as nations. This assumption of First Nations as stakeholders was viewed as inappropriate by many First Nations (e.g., British Columbia Assembly of First Nations 2010; Coldwater Indian Band 2010; First Nations Summit 2010; Kitimaat Village Council 2010; Okanagan Nation Alliance 2010; Sinixt First Nation 2010; Treaty 8 First Nations 2010). The tension between these incompatible perspectives on First Nations is captured in the following quotations from a letter to the BC Minister of Environment from the Union of BC Indian Chiefs:

> *The Water Act Modernization process continues British Columbia's history of denying Aboriginal Title and asserting provincial rights to ownership and jurisdiction over water. Implementing the New Relationship Vision in revising the Water Act would necessitate a completely different approach, addressing Indigenous Nations' jurisdiction at every level and including the provincial government working with each First Nation in BC…The current WAM process pays "lip service" to Aboriginal Title and Rights without actually addressing Indigenous jurisdiction (Union of BC Indian Chiefs 2010, 5).*

Regional-level collaborative water governance in BC

Differences in assumptions between First Nations and organizations involved in water governance are also occurring at the regional level in BC. To illustrate, there are numerous organizations involved in collaborative approaches to water governance within their watersheds. When concepts of collaboration are extended to First Nations, often for reasons of empowerment or inclusiveness, the assumption often is that First Nations are "stakeholders" is widespread. This is reflected in the rationale behind including First Nations in the context offered by a non-Indigenous key informant involved in one of these organizations in eastern BC:

> *[First Nations] are a part of our communities, an equal part of our communities, we should be treating them as stakeholders (Anonymous, pers. comm., 2011)*

One of the First Nations in that area of BC is the Ktunaxa Nation Council whose *Qat'muk Declaration* asserts a clear expression of Ktunaxa sovereignty and stewardship principles (Ktunaxa Nation Council 2010):

> *the Ktunaxa Nation Council, on behalf of the Ktunaxa Nation: Affirms that having been created in interdependence with the land, its living things, and the spirit world, the Ktunaxa possess and are entitled to enjoy our inherent and preexisting sovereignty over our land and our lives thereon;*

The language used and assertions made in this excerpt of the *Qat'muk Declaration* stand in contrast to those found in the non-Indigenous key informant's comments. The key differences are the assumptions made regarding the views of First Nations as stakeholders or as nations. These differences are more than pertinent to the pursuit of collaborative approaches to water governance because collaboration implies a willingness to cooperate for mutual benefit by two or more parties. This condition is unlikely to result when parties fundamentally misunderstand the Indigenous peoples with whom they wish to collaborate.

Conclusion

A broad consensus exists in British Columbia that the *Water Act* is in need of major reforms to better address environmental, social and economic concerns. However, conflicting assumptions and positions over title and rights to the land in BC make a collaborative approach to water reform difficult. Understanding and reconciling differing assumptions held by Indigenous and settler nations is thus crucial to achieving collaborative governance that is compatible with the position that Indigenous peoples hold in Canada. New ways of governing are being sought around the world because traditional, top-down, state-driven approaches to environmental governance have proven themselves unable on their own to address contemporary environmental challenges effectively (Duit and Galaz 2008; Durant, *et al.* 2004; Holley, *et al.* 2012; Holling and Meffe 1996; Kettl 2002). Thus, the fact that scholars of collaborative governance, and practitioners working on the ground, continue to view Indigenous peoples as stakeholders rather than as nations is problematic. There is little reason to believe that Indigenous peoples will be willing to set aside Indigenous perspectives, and we do not suggest this. Therefore, the challenge is for those promoting collaborative approaches to water governance to find creative ways to reconcile the underlying assumptions of collaborative governance with those of Indigenous peoples. BC provides one real world setting in which this challenge currently manifests, but numerous other examples exist across Canada and around the world.

In this paper, we suggest that meaningful and truly mutual collaboration with Indigenous peoples has the potential to further the many environmental and social objectives identified in water governance scholarship. What that translates to in a practical sense will take many different forms in different countries, and must reflect the needs and interests of Indigenous peoples and nations. For example, some Indigenous nations may choose not to take a collaborative approach to water governance, and may instead assert sole jurisdiction over their lands and waters, while others may defer management of water to the colonial state. Regardless of contextual variability, water governance scholars and

practitioners alike must reconsider the set of assumptions regarding Indigenous peoples, pre-contact rights to the land and *sui generis* rights.

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