

Moving towards Meaningful Co-Governance:
Engagement with First Nations in Ontario's Great Lakes Initiatives

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Abstract

Across Canada there has been movement towards the adoption of principles of collaboration in water governance which should in principle be more supportive of meaningful co-governance roles for Indigenous peoples. While the meaningful engagement and involvement of Indigenous peoples in decision-making has been recognized as a necessary precondition of collaborative water governance, its realization in practice has been limited. By exploring the policy process during the development and implementation of the Great Lakes Protection Act, 2015 in Ontario, this paper explores the strengths and ongoing challenges of engagement processes between First Nations and colonial government in Ontario's water governance system. Ongoing challenges that are preventing the realization of true co-governance with First Nations in Ontario's water system are identified, including: capacity challenges, limited recognition of First Nations as rights-holders, challenges with knowledge sharing, limited engagement with First Nations at a strategic level and challenges in developing trusting relationships, amongst others. While there are indications that the relationship between First Nations and colonial governments in Ontario is moving closer towards principles of co-governance, meaningful shared governance will not be achieved without substantial learning for all parties and shifts in power structures.

Key words: Collaboration, Water Governance, Co-Governance, Indigenous rights, First Nations Engagement and Consultation

Foreword

This major paper explores my three areas of concentration – environmental governance and policy in Canada; the Duty to Consult with Indigenous peoples; and Great Lakes governance in Ontario. It explores water governance and policy in Ontario, which connects to broader environmental governance policies across Canada. It demonstrates my understanding of the duty that colonial governments hold to meaningfully include and recognize Indigenous rights and responsibilities for water in decision-making. I do my best in this research to avoid generalizing and to recognize the incredible diversity within and between First Nations in Ontario and Canada. The themes that emerged during the development and implementation of the Great Lakes Protection Act, 2015 certainly cannot be generalized to all Indigenous peoples, provincial government staff or other levels of government. However, this research does provide a useful framework for understanding the broader challenges that exist in engagement processes between these two sovereign peoples in the context of decision-making for water. This research will be of importance to First Nations communities and government, as well as to staff working in water governance and management in Ontario and elsewhere who are committed to engaging and increasing First Nations peoples' meaningful, rights-based participation in water policy and planning initiatives.

1.0. INTRODUCTION

Rationale

Across different levels of Canadian government there has been movement towards the adoption of principles of collaboration in the governance of water resources, mirroring global trends towards the inclusion of diverse actors and an integrated approach. Collaborative decision-making for water resources, while attractive in its principles, is not without its challenges. The systems governing Canada's water resources are complex and contain a wide diversity of actors with overlapping and sometimes competing goals, priorities and worldviews.

Indigenous peoples live in many regions of the world where collaborative decision-making for water is now being implemented as best practice, including in Canada. Indigenous peoples in Canada and Ontario have been clear about their desire to be meaningfully involved in decision-making over water resources.¹ There is evidence of new and emerging standards for engagement with First Nations within colonial water governance processes that support nation-to-nation relations and meaningful co-governance roles for Indigenous peoples. While the meaningful engagement and involvement of Indigenous peoples in decision-making has been recognized as a necessary precondition of collaborative water governance, its realization in practice has been limited.²

This paper explores some of the central challenges and successes of engagement processes between First Nations and colonial government in Ontario's water governance system. It questions whether current processes for engagement are reflective of true collaborative water governance that supports First Nations rights and responsibilities to water, as well as rights to self-government. Finally, it explores the ways in which the current water governance system could move towards true co-governance that is supportive of First Nations rights and responsibilities to water, with the goal of achieving improved decision-making outcomes for all.

The paper is divided into four parts. The first section is a literature review that explores why the meaningful inclusion of First Nations is important for effective collaborative water governance. The second section is a policy evaluation of Ontario's Great Lakes Protection Act (GLPA, 2015) that sets the context for the case study. The third section outlines some of the successes and challenges for meaningful engagement with First Nations in collaborative decision-making for the Great Lakes that emerged through the development and implementation of the GLPA, 2015, organized under six recommendations made by Von der Porten (2016) for effective First Nations and state engagement. The fourth section highlights lessons learned for collaborative water governance, drawn from the literature review, policy evaluation and interviews with respondents.

The GLPA, 2015 case study is explored to better understand some of the successes and challenges for effective engagement between First Nations and the Crown and its representatives (the federal, provincial and territorial governments) as Canada moves towards visions of true

¹ Simms (2015); UOI (2015);

² Simms (2015); McGregor (2008)

collaborative water governance frameworks that respect First Nations rights, responsibilities and desire for participation in decision-making over water resources. I do my best in this research to avoid generalizing and to recognize the incredible diversity within and between First Nations in Ontario and Canada. The themes that emerged during the development and implementation of the GLPA, 2015 certainly cannot be generalized to all Indigenous peoples, provincial government staff or other levels of Canadian government. However, this research does provide a useful framework for understanding the broader challenges that exist in engagement processes between these two sovereign peoples in the context of decision-making for water.

Similar research has been conducted by Simms et al. (2016) that evaluated the scope and potential of collaborative watershed governance in British Columbia to be inclusive of Indigenous peoples at a strategic level. Four key governance issues were identified: “(1) there are fundamental contestations over jurisdiction and tensions with the province; (2) the colonial governance framework for water is fragmented and often implicitly or explicitly excludes Indigenous laws and knowledge; (3) capacity and funding are persistent barriers; and (4) there is a deeply rooted lack of trust between First Nations and colonial governments.”³ Saenz Quitian (2016) has pointed to the importance of early and ongoing involvement in watershed planning, capacity building, transparency and the creation of new channels for participation with regards to effective engagement of Indigenous peoples in the Australian context. Regarding environmental governance more broadly, the lack of observation of First Nations rights and jurisdiction, as well as the struggle to be involved at the strategic decision-making level have been well documented.⁴

A similar independent review of the engagement processes between First Nations and colonial government has been conducted for British Columbia’s Water Sustainability Act (WSA) as well as for the Northwest Territory’s Water Strategy. The collaborative watershed planning approach taken during the development of the WSA has been widely criticized for falling short of adopting a full Indigenous water governance or co-governance process. These criticisms point to a new standard across Canada for engagement, which recognizes that robust, meaningful co-governance roles for First Nations are necessary for collaborative water governance processes to work. Calls for nation-to-nation relations in water governance between First Nations and colonial governments are supported by authors like Brandes (2009); Von der Porten (2013); Simms (2011); Nowland (2007); Wilson (2013) and others.

The research that follows has built upon these findings in the collaboration and water governance literature by focusing on Ontario First Nations experience with the development and implementation of the GLPA, 2015. This research will be of importance to First Nations communities and government, as well as staff working in water governance and management in Ontario and elsewhere who are committed to engaging and increasing First Nations peoples’ meaningful, rights-based participation in water policy and planning initiatives.

³ Simms (2016)

⁴ Dalton (2013); Kotaska (2013); McGregor (2012); Von der Porten (2013)

Theoretical Approach

This paper takes a holistic, rights-based approach to Indigenous involvement in collaborative decision-making for water to better understand the engagement that occurred prior to, during and following the implementation of the GLPA, 2015 between the Ministry of Environment and Climate Change (MOECC) and First Nations in Ontario. Before proceeding, it is important to recognize that Indigenous peoples around the world have been ‘researched to death’ by outsiders,⁵ often being subjected to extractive research practices that have not benefited themselves or their communities. In response, some scholars have proposed that non-Indigenous researchers direct their gaze away from exclusive focus on Indigenous communities and individuals and instead direct research towards colonial institutions and structures themselves as the object of study.⁶

As a non-Indigenous person working in academia, I recognize the importance of work done by advocates like Smith (2012) and Evans (2009) to inform my own approach and research methodology. This has led me to select the MOECC as the object of study of this research to better understand engagement processes between First Nations and colonial government in Ontario and Canada more broadly. The approach taken in this research is to learn *from* and not *about* Indigenous peoples,⁷ directing the gaze of the research project towards colonial institutions in water governance like the MOECC to better understand how governance processes might become more inclusive of Indigenous needs, responsibilities and goals relating to water, and in turn how Indigenous approaches might better inform collaborative decision-making processes.

Research Methods

Data for this project were obtained using a mix of qualitative methodologies, including a literature review, case study and in-depth interviews. I undertook these research activities during the period of May 2016 to July 2017. The methodological approach underlying data collection is a holistic, retrospective method similar to that used by the Government of Northwest Territories (NWT) in an independent review of the NWT Watershed Strategy.⁸ A retrospective approach is defined as “an observational study that deals with events that have occurred in the past” ...by collecting “historical records or by asking individuals to remember previous experiences or exposures.”⁹

The literature review is supplemented by the examination of a specific case of policy development led by Ontario’s MOECC for the GLPA, 2015. This case was chosen because it is one of the most recent pieces of legislation in place for the protection of Ontario’s Great Lakes and demonstrates the current government’s commitment, at least in principle, to collaborative decision-making. I also attended as an observer one meeting of the Great Lakes Guardian

⁵ Smith (2012)

⁶ Evans (2009)

⁷ Simpson (2001)

⁸ GNWT (2015)

⁹ McKenzie (2005)

Council (GLGC) as well as a conference in Toronto for the Great Lakes, which allowed me to connect with several individuals from the MOECC who were open to contributing towards the research process.

The policy analysis is followed by an in-depth analysis of interviews with several key actors. Interviewees were recruited through a purposeful sampling strategy based on their knowledge and involvement in Ontario's Great Lakes governance framework or in First Nations engagement. All interviews were digitally recorded and transcribed. Written or oral consent was obtained from all respondents, and each respondent was provided with time to review drafts of this paper.¹⁰

In total, 101 documents were analysed and twelve actors were interviewed. The documents analyzed include publications and websites by relevant actors, as well as documents from academic, organizational and online sources. The program NVIVO was used to code documents and interviews for relevant themes. Coding was done using an inductive approach resembling 'grounded theory', where codes and categories emerge from the data itself rather than from pre-conceived hypotheses, and where the researcher maintains simultaneous involvement in data collection and analysis throughout the research process.¹¹

The development of codes and categories was guided by a mix of principles, similar to Blumer's 1969 depiction of 'sensitizing concepts', which were identified in advance through the literature review and document scan.¹² These principles come from Von der Porten's (2016) six recommendations for effective engagement with Indigenous peoples, and include:

1. Approach or involve Indigenous peoples as self-determining nations rather than as one of many collaborative stakeholders or participants
2. Identify and engage with existing or intended environmental governance processes and assertions of self-determination by Indigenous nations
3. Create opportunities for relationship building between Indigenous peoples and policy or governance practitioners
4. Choose venues and processes of decision making that reflect Indigenous rather than Eurocentric venues and processes
5. Provide resources to Indigenous nations to level the playing field in terms of capacity for collaboration or for policy reform decision making
6. Find ways to support Indigenous nations in their own continued environmental decision making and self-determination¹³

These principles were used as a point of departure to form interview questions and served as a lens which guided initial coding of transcriptions and documents. As codes and later categories

¹⁰ Carlson (2010)

¹¹ Charmaz (2006)

¹² Charmaz (2006)

¹³ Von der Porten (2016)

emerged through a grounded theory analysis of the data, they were organized according to the guiding categories identified by Van der Porten (2016).

Interview Respondents

First Nations	5
International Joint Commission	2
Ministry of Environment and Climate Change Ontario	3
Media	1
Not-for-profit	2

*A total of 12 interviews took place. One respondent matched the criteria for more than one category.

Terminology

The historic and legal arrangements in Canada between Inuit, Metis, and status, non-status and self-governing First Nations and the Crown are diverse and complex. For the purposes of this paper, the term **Indigenous Peoples** is used when speaking more generally and the term **First Nations** is used in reference to status First Nations in Canada. The term **colonial government** is used to refer to the federal and provincial governments in Canada historically and at present.¹⁴

Collaborative decision-making is defined as a process in which stakeholders and First Nations are consulted, informed and engaged regarding decision-making for water without necessarily holding substantive authority.¹⁵ Many have in contrast advocated for approaches reflective of true **collaborative water governance** or **co-governance**, where Indigenous and colonial governments jointly share decision-making authority over water.¹⁶ Co-governance is framed understood as the highest standard of collaborative decision-making, where First Nations are ‘empowered’ and recognized as rights-holders, and where power imbalances are challenged.

While the terms **water governance** and **water management** are often used interchangeably, this paper distinguishes between the two by framing water management as a subcategory of water governance, in that it deals with the on-the-ground ways in which water is used and regulated.¹⁷

Rather than strictly focusing on the legal requirements of the Duty to Consult, the term **engagement** is used to refer to all interactions between government and Indigenous peoples. Engagement cannot be said to have a beginning or an end, and involves an ongoing process that, if carried out effectively, enables the Duty to take place. In practice, engagement processes and the legal requirements of the Duty do not necessarily need to be distinguished from one another. As one respondent explained, “*for me, there is no difference between engagement and consultation; engagement is just part of the continuum of that law.*”

Acronyms

COO	Chiefs of Ontario
IJC	International Joint Commission
GLGC	Great Lakes Guardian Council

¹⁴ Simms (2011)

¹⁵ Simms (2015)

¹⁶ Kotaska (2013)

¹⁷ Nowlan (2010)

GLPA, 2015	Great Lakes Protection Act, 2015
IWRM	Integrated Water Resource Management
MOECC	Ontario Ministry of the Environment and Climate Change
PTO	Political Territorial Organization
SCC	Supreme Court of Canada
UOI	Union of Ontario Indians

2.0. REVIEW OF THE LITERATURE

Shifts in Water Governance

Governance has been defined as ‘beyond the government’,¹⁸ taking place at multiple scales and levels, utilizing various resources and instruments, and involving multiple different actors.¹⁹ It is the “means for achieving direction, control and coordination of individuals and organizations with varying degrees of autonomy to advance joint objectives.”²⁰ This paper takes a broader perspective on governance, reflecting Ladner’s (2003: 125) explanation that “within the parameters of Indigenous thought, governance is ‘the way in which a people live best together’ or the way a people has structured their society in relationship to the natural world.”²¹ Water governance takes these principles and applies them to decision-making for water resources.

Historically, global trends for water governance have favoured top-down approaches, with most of the power over decision-making remaining in the hands of the state.²² This form of decision-making has been deeply criticized in natural resource management since the 1970s, leading to a gradual movement away from centralized, single agency control over water resources and towards the involvement of multiple centres of interaction.²³

Alongside this shift, there has been increasing recognition of the importance of collaboration when it comes to governing water resources.²⁴ Collaboration is characterized by several principles, including a willingness to reconsider attitudes and assumptions; a model of decision making by consensus; increased representation and inclusiveness of diverse actors; and enduring relationships amongst parties. Scholars have suggested that collaboration can contribute to more effective conflict resolution; respond to the characteristics of increasingly networked, complex societies; improve stakeholder knowledge and relations; and respond to deficiencies in approaches that rely solely on technical knowledge.²⁵ Collaboration and the inclusion of diverse

¹⁸ De Boer (2013)

¹⁹ De Boer (2016)

²⁰ Imperial (2005)

²¹ Ladner (2003)

²² Benson (2013)

²³ Ludwig (2001); Ritten (1973); Cervoni (2013); Cook (2014)

²⁴ Imperial (2005);

²⁵ Von der Porten (2013)

actors in watershed decision-making have been touted as “preconditions” of effective and equitable water governance.²⁶

In Canada, collaborative principles are increasingly becoming the norm in federal and provincial governance models for water resources. This movement away from top-down approaches has been well-documented, with a shift towards more inclusive models of collaborative decision-making that operate at the watershed scale and increase the involvement of local actors.²⁷

In Ontario it has long been acknowledged that reform of water governance is necessary.²⁸ In response, the Provincial government has committed to work more closely with First Nations, Metis, municipalities, the US government, international bodies and other stakeholders including industry, environmental organisations and the public to improve decision making outcomes for water resources. One of the six principles guiding Ontario’s 2012 Great Lakes Strategy is “collaboration and engagement.” A second principle guiding this Strategy is the “recognition of First Nations and Metis communities” – demonstrating that the province has shown, at least on paper, a renewed commitment to working with First Nations peoples towards shared water goals.²⁹

First Nations Involvement in Decision Making over Water

In many ways, the shift towards collaboration in water governance holds the potential to be supportive of the increasing recognition of the roles, rights and responsibilities that Indigenous peoples have when it comes to decision-making over water resources. In recognizing the diversity of First Nations in Ontario and Canada, it is necessary to avoid making simplistic claims about what governance or water means to Indigenous peoples. There is no singular form of Indigenous water governance, and the term can only be used to broadly describe Indigenous conceptualizations and representations of water. However, the cultural, spiritual and socioeconomic values of water and self-governance have been widely documented by Indigenous scholars and are referred to throughout this paper.³⁰ Scholars have advocated that collaborative approaches hold the potential to be ‘natural fits’ that could be more inclusive of Indigenous approaches to water governance.³¹

There continue to be power dynamics, however, that influence the degree of involvement and influence that Indigenous Peoples have on collaborative water decision-making processes. Indigenous Peoples’ relations with colonial governments in Canada are marked by a legacy of colonialism that lives on today and that is impacted by a range of contrasting interests, structures of governance, political economic relations, power dynamics, legislation and dominant

²⁶ Plummer (2004)

²⁷ Brandes (2014); Rizvi (2013)

²⁸ Mitchell (2014); Conservation Authorities (2012)

²⁹ Ontario (2012)

³⁰ McGregor (2009); Blackstock (2001); Wilson (2014)

³¹ Wilson (2004); Rizvi (2013)

discourses.³² In many ways, collaborative decision-making has become yet another front in which the political struggles of Indigenous People for the recognition of their rights to resources and self-governance are taking place. These can become sites of conflict as much as they are places of cooperation.³³

Canada's water governance system is already characterized by numerous difficulties including high levels of fragmentation, lack of intergovernmental coordination, and inadequate enforcement and monitoring.³⁴ These characteristics are compounded for First Nations who must navigate the historical and institutionalized complexities of a colonial system that in many ways continues to work against them.³⁵ Some added challenges include lack of adequate and transparent access to information; lack of consideration for the diverse spiritual, cultural relationships, laws and different forms of governance that First Nations maintain; the struggle to be involved at the strategic level in decision-making; and difficulties with ongoing misunderstandings about the roles and meanings of traditional knowledge.³⁶

Both Indigenous and non-Indigenous scholars recognize that while the trend in Canadian policy across various levels of government has been towards increasing recognition and respect for First Nations rights and responsibilities to water, there remain major gaps between policy and practice. True models of collaborative governance that support First Nations-led environmental leadership have yet to be seen in practice in Ontario.³⁷ Attempts at co-governance more broadly in Canada have often been criticized for doing very little to challenge power imbalances between Indigenous peoples and the state, with Indigenous participation often being reduced to forms of tokenism that do not constitute meaningful engagement.³⁸

Collaborative Decision-Making versus Co-Governance

While collaborative decision-making and co-governance are often used as umbrella terms to reflect a wide range of governance arrangements for water resources,³⁹ this paper makes important distinctions between the two. In the context of First Nations and colonial government relations, collaborative decision-making is defined as a process in which various stakeholders and First Nations are consulted, informed and engaged regarding decision-making for water resources without holding substantive authority within this process. In such processes, First Nations are not recognized as Nations, and there is potential to perpetuate long-standing colonial and historic power imbalances.⁴⁰

³² Hirsch (2017); Cornwall (2004)

³³ Bowie (2013)

³⁴ Nowlan (2010)

³⁵ Nowlan (2010); Simms (2011)

³⁶ Simms (2011)

³⁷ McGregor (2008)

³⁸ Nadasdy (2003); Natcher (2005); Tipa (2006)

³⁹ Kotaska (2013).

⁴⁰ Simms (2011)

Many First Nations have in contrast advocated for approaches reflective of true collaborative water governance or co-governance, where Indigenous and settler governments jointly share jurisdiction and decision-making authority over water resources.⁴¹ Co-governance can be understood as the best practice when it comes to collaborative decision-making models, where First Nations are ‘empowered’ and recognized as rights-holders and Nations. Co-governance implies that Indigenous and colonial governments work together on a nation-to-nation basis to co-create shared decision-making models for water in ways that challenge existing power dynamics between these sovereign peoples.

Why Meaningful Inclusion?

The need for a greater role of Indigenous peoples has been well documented in the collaborative water governance literature.⁴² This paper makes four central arguments for the meaningful inclusion of First Nations in decision-making for water resources matters. The first is that First Nations, in Ontario and elsewhere, have clearly expressed their desire to have decision-making authority over water resources, including full and active participation in planning initiatives for Ontario’s Great Lakes.⁴³ Second, the involvement of First Nations in decision-making for water resources can greatly improve the quality of policies and management practices, based on the knowledge and experience of those involved.⁴⁴ Third, governance and legal shifts across Canada now mandate a higher standard for engagement and consultation as the nation moves, at least in principle, towards reconciliation and de-colonization.⁴⁵ Fourth, decision-making is often best suited to those individuals most impacted by potential planning outcomes, making a compelling case for involving First Nations given their close relationship and rights to water.⁴⁶

Indigenous Water Rights

“Indigenous rights to, and in, water flow from the relationship of Indigenous peoples to our traditional territories. Our right to water is an inherent right arising from our existence as Peoples and includes a right to self-determination with the power to make decisions, based on our laws, customs and traditional knowledge to sustain our waters, for life and future generations.”⁴⁷

As sovereign peoples who were never conquered by the Crown or its representatives, First Nations peoples in Canada continue to hold meaningful rights and responsibilities when it comes to the governance of this nation’s water. Aboriginal rights stem from the people’s close relationship and sense of responsibility, proffered to them by the Creator, towards the land and waters.⁴⁸ They include all activities that are elements of the practices, customs or traditions that have and continue to be integral to the distinct culture of an Aboriginal community.⁴⁹ They have

⁴¹ Kotaska (2013)

⁴² Phare (2009); Tupa (2006); Von der Porten (2013)

⁴³ UOI (2015); Ontario (2012)

⁴⁴ Hirsch (2017); Demeritt (2015)

⁴⁵ Kotaska (2013); Borrows (1997); Wilson (2014)

⁴⁶ Morton (2012)

⁴⁷ Phare (2009: 4)

⁴⁸ Phare (2009)

⁴⁹ Ontario (2017)

been enshrined in the Canadian Constitution, the highest legal document of this country, and they have been upheld by various court rulings. Rights to water have been confirmed by the SCC in cases such as *R. v. Van der Peet*, and can include the use of water for domestic, travel, ceremonial or recreational purposes.⁵⁰ The Chief Justice of the Supreme Court of Canada herself has confirmed the continued existence of such rights to land and water in her interpretation of s.35 (1) of the Constitution Act, 1982.⁵¹

First Nations peoples also hold inherent rights when it comes to self-governance, which they possessed before European contact⁵² and which they never relinquished. Under s.35 of the Constitution Act, these are freestanding rights possessed by First Nations to manage activities that occur within their territories, and by extension include rights to govern the use of and engagement with water. These rights to water and self-governance were never extinguished, meaning that the current federal government and all its representatives, including the provincial government, have a legal obligation to respect and enforce Indigenous water rights.⁵³

Both the rights to water and self-governance have been confirmed by international law, although in practice there remain many conflicts in Canadian law and governance that prevent the full realization of these rights. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) sets out minimum standards for Indigenous peoples, which includes the right to self-government and which obliges government to employ principles of ‘free, prior and informed consent’ (FPIC) before making any decisions that could affect Indigenous rights (UNDRIP, Articles 4, 19 and 32).⁵⁴ While Canada did not originally ratify UNDRIP, the nation’s objector status to the declaration was removed in 2016. Canada now fully supports the declaration without qualification,⁵⁵ which strengthens many First Nations rights claims across the country.

The confirmed and continued existence of First Nations water and self-governance rights means that in principle, First Nations should have a meaningful seat at the table when it comes to the governance of this nations water resources. It also means that when it comes to water governance, First Nations peoples cannot be treated as simply one of many stakeholders involved in the process of watershed decision-making. First Nations people’s rights, both to the water and in terms of self-governance, are *sui generis*⁵⁶ – meaning that they are quite literally “of their own kind or class.”⁵⁷ First Nations peoples do not just have a *stake* in water governance in Canada, they have unique *rights* to this governance. Legally speaking, the relationship between First

⁵⁰ Ontario (2017)

⁵¹ *R v. Van der Peet* [1996]

⁵² *R v. Van der Peet* [1996]

⁵³ Phare (2009)

⁵⁴ UN (2008)

⁵⁵ INAC (2017)

⁵⁶ *R v. Guerin* [1984]

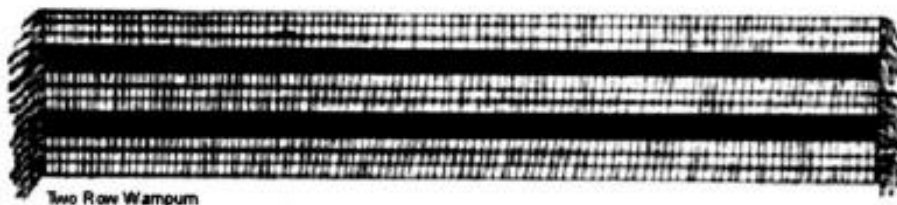
⁵⁷ See Black’s Law Dictionary, 6th ed. (St. Paul, Minn.: West, 1990) at 1434.

Nations peoples and the Crown should be guided by principles of nationhood, with government-to-government negotiations guiding collaborative decision-making over water resources.

Forming one of the oldest areas of government policy, the relationship between these two sovereign peoples – the Crown and its representatives (including the provincial government) and First Nations – is undeniably marked by an ugly history. Scholars have documented how First Nations people have been blocked from meaningfully participating in decision-making over water across various levels of government, leading to their exclusion in the governance of waters they have used for millennia to live and sustain themselves.⁵⁸ Colonial processes that have led to the social, economic and geographic disadvantage of First Nations in Canada echo on today, with very real implications for their ability to participate meaningfully in water governance.

The Vision Put Forth by Wampum

Many Indigenous and non-Indigenous people hold the vision for Canada’s water future that was first expressed visually by the Two Row Wampum Belt. Through the seventeenth century, wampum belts were introduced to European settlers by the Haudenosaunee League of Five Nations. The belts were meant to codify strong and lasting relations between equal allies,⁵⁹ and served as a reminder of the diplomatic agreements reached between the nations. The Two Row Wampum outlines two parallel purple lines that represent the First Nations canoe and the European ship as they travel down the same river, with each comprising the laws, customs and traditions of the respective people.⁶⁰ The vessels have been described as travelling side by side down the river of life, never interfering with one another. Modern interpretations of the wampum belts reaffirm principles of coexistence rather than integration, suggesting that both First Nations and settlers could maintain a separate, respectful and autonomous existence⁶¹ as “distinct political entities.”⁶²



The Two Row Wampum is a powerful vision that holds the potential to guide future relations in watershed governance between the Crown and First Nations peoples in Canada and its provinces and territories. Collaborative governance for water in Canada necessitates the recognition of First

⁵⁸ Armstrong (2013); Bakker (2016)

⁵⁹ Gehl (2014)

⁶⁰ Parmenter (2013)

⁶¹ Muller (2007)

⁶² Turner (2006)

Nation rights to self-determination, land and water, while respecting decision-making that is truly nation-to-nation between two sovereign peoples with many overlapping goals.⁶³

The Duty to Consult

The Duty to Consult has very specific meanings in the Canadian context that have been shaped in recent years by the courts, connoting a legal duty on the part of the federal government and its representatives (including the provinces and territories) to consult and accommodate Aboriginal peoples with proven or claimed Aboriginal or treaty rights when those rights might be impacted by decision-making.⁶⁴ These rights are considered to be held by communities rather than individuals or organizations, and thus the Duty is owed by the Crown to the “rights bearing community.”⁶⁵ The Duty is constitutionally protected by s.35 of the Canadian Constitution,⁶⁶ and its meaning in practice has been defined in pivotal court cases such as Sparrow, Tsilhqot’in, Haida, Taku River Tlingit and Mikisew cases, amongst others.⁶⁷ Because resource management generally falls under the purview of the provinces, it will often be the provincial government in this context who owe the Duty. Only new developments can trigger the Duty.⁶⁸

An important distinction should be made between the Duty to Consult and public or stakeholder engagement and consultation. The term “stakeholder” connotes individual actors, like members of the public, who can affect or are affected by the actions of corporations and governments.⁶⁹ Unlike stakeholders, Aboriginal and treaty rights require that First Nations peoples have a special relationship with the Canadian government and that there must be parallel and separate consultation processes that respectfully acknowledge and adequately uphold these constitutionally protected rights.

Standards for “adequate” consultation are still in the process of being defined by the courts, and are usually determined on a case by case basis that takes into consideration the strength of the right and the severity of the impact in question. At the lower end of the requirement, the provision of notice of a project to impacted First Nations might suffice. At the higher end of the requirement, companies or government may be required to “accommodate” First Nations, which could involve a change of plans or financial compensation. In no case does the Duty provide First Nations with a veto over projects.⁷⁰ Procedural aspects of the Duty may be delegated by government to third parties, such as corporations, however it is ultimately the Crown who is responsible for ensuring the Duty is met.⁷¹

⁶³ Stevenson (2006)

⁶⁴ Newman (2014)

⁶⁵ Newman (2014)

⁶⁶ Constitution Act [1982]

⁶⁷ McLachlin C.J.C. in Haida Nation v. BC [2004]; Mikisew Cree First Nation v. Canada [2005]

⁶⁸ Newman (2014)

⁶⁹ Jacobs (2015)

⁷⁰ Driedzic (2010, April 19)

⁷¹ Jacobs (2015)

Does the Duty Apply to Legislation?

While the Duty to Consult has been well established for individual projects that might impact Aboriginal or treaty rights, there remain unanswered questions about whether the Duty applies to the enactment of legislation by the Crown and its representatives. Decisions such as the *Tsilhqot'in* case imply that the Duty may be triggered in any case where the Crown is making a decision they know, or ought to know, will impact Aboriginal and treaty rights.⁷²

Until quite recently, the courts had explicitly left this question for another day. However, in 2014 it was decided that the Crown did have a Duty to Consult the Mikisew Cree First Nation when it introduced legislation that could adversely impact the Mikisew's treaty and rights, setting the first precedent in Canada for a duty to consult on legislation.⁷³

There are many advocates of this broader application of the Duty to Consult, who refer to the United Nations Declaration on the Rights of Indigenous Peoples [UNDRIP] article 19, which was adopted by the UN General Assembly in 2007. This section states 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, prior and informed consent [FPIC] before adopting and implementing legislative or administrative measures that may affect them.” Given Canada's decision in 2016 to support UNDRIP without qualification, the concept of FPIC has gained traction for advocates and the Canadian courts. There is some indication that the courts are now moving towards the embodiment of its values in settling disputes.⁷⁴

Engagement practices and the Duty to Consult: What is the difference?

Engagement practices and the Duty to Consult do not necessarily need to be distinguished from one another in practice. As one respondent explained, “*for me, there is no difference between engagement and consultation; engagement is just part of the continuum of that law.*” Strictly speaking, the Duty to Consult is a legal term that implies a directional relationship, whereby government makes decisions or become aware of decisions that might impact Aboriginal or treaty rights, and then consult with the impacted First Nation. The Duty is based on Aboriginal and treaty rights and must be directed towards the “rightsholders” – who are First Nations, not individuals or organizations. The Duty can be said to have a beginning (when a project or decision in consideration triggers the Duty) and an end (once the project is approved or rejected).

Engagement includes the ongoing processes by which the Duty to Consult becomes fulfilled. Engagement between First Nations and government cannot be said to have a beginning or an end, and rather involves an ongoing process that, if carried out effectively, enables the Duty to take place successfully. Engagement can include all interactions between government and First Nations, including First Nation individuals, organizations and communities – it is not limited to “rightsholders.” Effective engagement includes ongoing processes of open dialogue, relationship

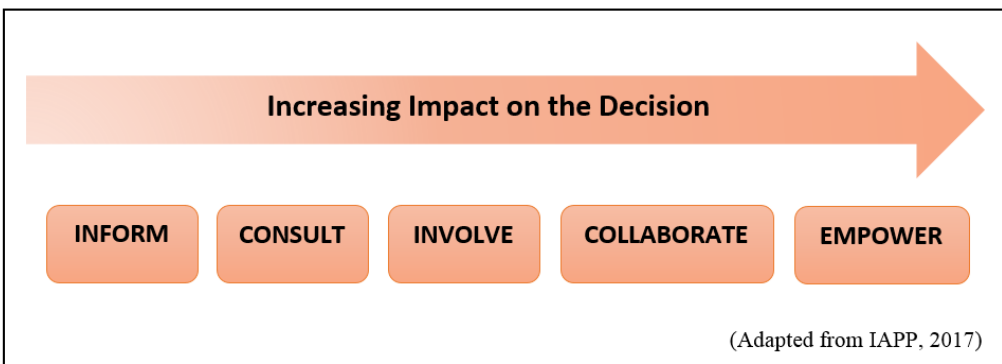
⁷² Jacobs (2015)

⁷³ *Courtoreille v. Canada* [2014]

⁷⁴ *Simon v. Canada* [2013]

building and early and ongoing communication between government and First Nations. This promotes concepts of “working together” between government and First Nations when it comes to decision-making, which can promote ‘win-win’ solutions for all parties.

Engagement between First Nations and colonial governments can take many forms. The International Association for Public Participation (IAPP) demonstrates how participation can range from simply informing affected groups all the way to empowering them. While this spectrum has been developed for *public* participation, the same ideas can be applied to relations between colonial governments and First Nations. On the one end, colonial governments might simply ‘inform’ First Nations about relevant decisions to fulfill the Duty to Consult. In the middle, ‘involving’ First Nations in decision-making might be more in line with the duty to ‘accommodate.’ At the far end of the spectrum, ‘empowering’ First Nations would necessitate sharing decision-making authority over water resources in an exercise of true co-governance.



Engagement processes and the Duty to Consult can work hand in hand to maintain the honour of the Crown and to encourage reconciliation processes between Aboriginal peoples and the Crown, which can be in the best interest of all parties moving forward. Engagement and the Duty are about honour and reconciliation, and the obligation runs both ways.

3.0. CASE STUDY: GLPA, 2015

The Great Lakes

Canada is a nation blessed with vast amounts of freshwater resources, most of which are held in the Great Lakes basin in the province of Ontario. Today, these lakes are known as Lake Superior, Erie, Huron, Ontario and Michigan. The lakes, which together account for nearly 20 per cent of the world’s freshwater, are a precious natural resource with incredible environmental, social, cultural, historical and economic significance. Over nine million Ontarians, nearly 90 per cent of the province’s population, live in the Great Lakes basin.⁷⁵

⁷⁵ ECCC (2016)

This is, however, a relatively recent history of the lakes. Since time immemorial, the Great Lakes basin has supported 120 First Nations and Tribes, who used the water for hunting, fishing and traveling, as well as for practicing recreational and cultural activities. In the past these lakes held different names than they do today – for instance, Lake Superior has historically been referred to as ‘Gichigami’ by the Anishinabek Nation, whose meaning translates to ‘big water’.⁷⁶ Today, there are 66 First Nations within the Great Lakes watershed basin in Ontario, who continue to rely on these watersheds for many aspects of their everyday life.⁷⁷

The State of the Lakes

While the state of the Great Lakes has greatly improved across several indicators since the 1970s, there are new and emerging threats that are overwhelming old solutions to effective watershed governance and management. Threats to the Great Lakes are numerous and include industrial spills, the disposal of toxic waste, habitat destruction, algae growth, invasive species, new chemical contaminants, threats to water quantity and climate change.⁷⁸ The US Environmental Protection Agency (EPA) and the World Wildlife Foundation (WWF) have stated that the overall condition of the Great Lakes is fair but deteriorating.⁷⁹ Many First Nations in Ontario have shared their traditional knowledge of the lakes, which further confirms the degrading state of the Great Lakes and the presence of new and emerging threats to the waters.⁸⁰ The Environmental Commissioner of Ontario (ECO) has been calling for several years on the Ontario government to demonstrate a greater commitment to protect and restore the health of the Great Lakes.⁸¹

Legislation

The provincial government has authority for water, as described in s.109 of the Constitution Act, 1867, which grants them proprietary rights over land and by extension, water. However, the federal government also holds authority over particular water issues, such as international trade, commerce, fisheries, navigation and shipping. The policy sphere for Ontario’s Great Lakes is dense due to the involvement not only of various levels of government – federal, provincial, municipal and First Nations – but of many other actors, including US government, the IJC, and Conservation Authorities.⁸² The waters are shared by two countries, eight American states and two Canadian provinces. In Ontario, there are 16 provincial ministries with responsibilities for the Great Lakes.

The sheer volume of policies, plans and programs designed to regulate, manage, protect and remediate the Great Lakes in Ontario – often formed between various levels of government, First

⁷⁶ UOI (2008: 3)

⁷⁷ UOI (2015)

⁷⁸ ECCC (2016)

⁷⁹ EPA (2011); WWF (2015)

⁸⁰ Resolution 08/87 (2008:3)

⁸¹ ECO (2006); ECO (2015)

⁸² De Boer (2016)

Nations, various stakeholders and the US – leads to a complex framework for watershed governance that is difficult to navigate. The first official legislation for the Great Lakes emerged in 1909, when the Boundary Waters Treaty (BWT) was signed between Britain on behalf of the Canadian government and the US, granting all parties the authority to approve or deny proposed developments on the Great Lakes basin and other shared waters. The BWT led to the creation of the International Joint Commission (IJC), which had its first meeting in 1912 and which has been accredited for resolving more than 100 matters between Canada and the United States.⁸³ In 1972, both governments and the IJC signed the Great Lakes Water Quality Agreement (GLWQA), which was amended in 1978, 1987 and most recently in 2012. The 1987 GLWQA designated 43 Areas of Concern (AOCs) in parts of the lakes most degraded by human activity, mandating the creation of Remedial Action Plans (RAPs) to address these issues. Of these, 12 are located entirely in Canada and five are shared between Canada and the US.⁸⁴

In 1985, the Great Lakes Charter was created to protect and conserve the Great Lakes waters, and was reaffirmed in 2001 with the Great Lakes Charter Annex. The Annex involved much broader public consultation processes, however, First Nations were not mentioned or included in the decision-making process.⁸⁵

The move towards more collaborative decision-making and the inclusion of First Nations voices led to the Water Policy Forum in 2008. This program consulted with First Nations leadership and senior technicians for a period of four years regarding issues related to watershed management. This consultation period is said to have informed much of the current legislation in place in Ontario's water governance system, including Ontario's Great Lakes Strategy (2012), the Canada-Ontario Agreement (COA) on Great Lakes Water Quality and Ecosystem Health (2014), and the Great Lakes Protection Act (2015).

According to UOI, the "Great Lakes Strategy is Ontario's plan of what they want to do with the lakes overall; the Great Lakes Protection Act is the provider of the tools; and the COA is the leverage of federal dollars and expertise. All three – plans, tools and leverage – work together."⁸⁶ Within these pieces of legislation, there are several themes specific to First Nations, including a more holistic view of water, the opportunity to use Traditional Knowledge, the opportunity for increased First Nations representation and engagement, and improvements to ecosystem health.⁸⁷

Case Study: GLPA 2015

In late 2011, the incoming Liberal government tasked Ontario's Ministry of Environment and Climate Change (MOECC) with the development and implementation of a Great Lakes Protection Act. The concept had been in development for some time, and the commitment came

⁸³ IJC (2017)

⁸⁴ ECCC (2017)

⁸⁵ UOI (2015)

⁸⁶ UOI (2015)

⁸⁷ UOI (2015)

after years of pressure from lobby groups who argued that new legislative tools were necessary to address new and emerging threats to the Great Lakes.

The MOECC, created in 1972, is one of 30 provincial ministries in Ontario. With a budget of \$322 million and 2021 employees, the MOECC is tasked with working towards “healthier communities and economic prosperity through the protection of Ontario’s air, land and water.” The MOECC’s responsibilities include:

- Using science and research to develop policies, legislation, regulations and standards
- Enforcing compliance with environmental laws
- Working with other governments, Aboriginal groups and organizations, industry, stakeholders and the public
- Monitoring and reporting to track environmental progress over time
- Modernizing the environmental approval processes⁸⁸

In 2012, Ontario’s Minister for the Environment followed up on the commitment by introducing Bill 100, the Great Lakes Protection Act, to Ontario’s Legislature. It would not be until late 2015 that the third iteration of the Act, Bill 66 – *The Great Lakes Protection Act (2015)* would receive Royal Assent in Ontario’s Legislature. The two central purposes of Bill 66 are to protect and restore the ecological health of the Great Lakes and to create opportunities for individuals and communities to become involved in Great Lakes protection and restoration initiatives.⁸⁹

Amongst other things, the Bill establishes the Great Lakes Guardian Council (GLGC), a forum for identifying priority actions and potential partnerships for the Great Lakes-St. Lawrence Basin. The forum is designed to support information sharing between Great Lakes partners, and is required to meet at least once yearly. It allows for the establishment of targets relating to the Great Lakes, sets out procedures for the establishment of Geographically Focused Initiatives (GFIs) and mandates progress reports every three years. Bill 66 includes a derogation clause that protects existing Aboriginal and treaty rights, and mandates that if Traditional Knowledge is offered by First Nation and Metis communities, it must be considered by the Ministry.⁹⁰

⁸⁸ Ontario (2017)

⁸⁹ MOECC. (2015). Bill 66: An Act to Protect and Restore the Great Lakes-St. Lawrence River Basin.

⁹⁰ MOECC (2015).

This case study focuses on the ongoing and developing relationship between MOECC staff and First Nations in Ontario in the development and implementation of Ontario’s Great Lakes legislation. The GLPA, 2015 offers unique insight into this process, given that its development spanned a period of over three years.

Development: Who Influenced the Act?

How Bills become Law in Ontario

One of the central tasks of the Legislative Assembly of Ontario is the passing of bills into law, using a multi-stage model originating from Britain. A Bill is “an idea written in legal language and presented for consideration to the Legislative Assembly by a Member of Provincial Parliament.”⁹¹ This could involve a proposal to create a new law, or to change existing laws in Ontario.

Following the first reading of the bill, where it is presented to the Legislature by the responsible Member of Parliament, it is printed in English and French and is made available to the public on the Legislative Assembly’s website.¹ Depending on which ministry is responsible for the bill, it may also be made available for public comment on the Environmental Registry for a minimum of 30 days, as mandated by Ontario’s Environmental Bill of Rights.

The GLPA, 2015 is a unique piece of legislation because it was introduced to the legislature on three separate occasions, having failed to make it through all three readings on the first two attempts. Three separate versions of the bill were created over a period of nearly four years – Bill 100, Bill 6 and finally Bill 66, which is the GLPA as it exists today.



(Adapted from: Hynes, S., & Johnston, L. (2011). How an Ontario bill becomes law. Legislative Assembly of Ontario.)

Determining who ultimately had influence on the development of the GLPA, 2015 is a complex exercise that involves uncovering the power and relations that underlie the influence that each actor had on the public policy process.

Prior to 2011, the main impetus for the Act came from a coalition of environmental groups, who collectively called themselves the Great Lakes Protection Act Alliance (GLPAA). Members of the group include Environmental Defence, Ecojustice, and Ducks Unlimited, amongst others.⁹¹

⁹¹ GLPAA. (2015). Submission to Standing Committee on General Government.

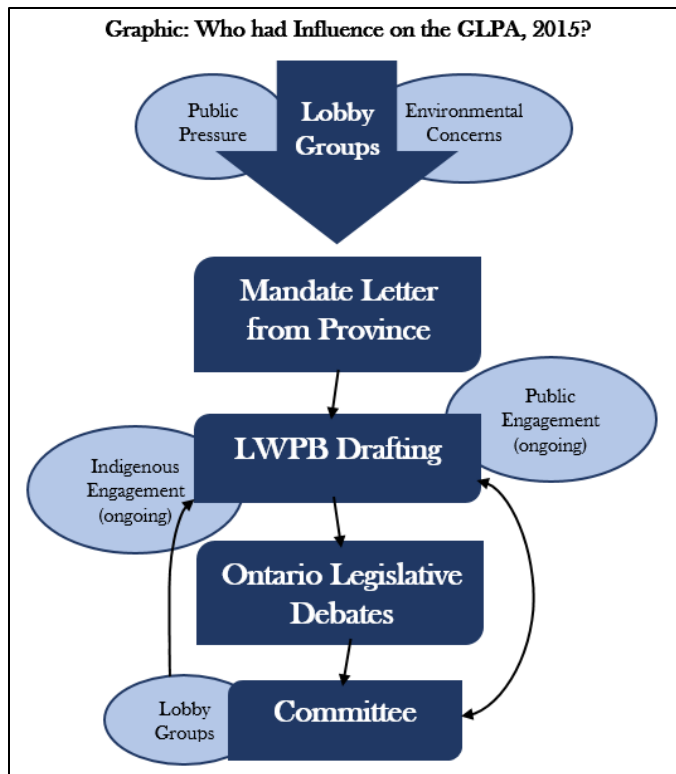


Figure 1. Key players who had influence over the GLPA, 2015

Once the GLPA was mandated in the provincial government’s throne speech, drafting of the legislation fell to the Land and Water Policy Branch (LWPB) within the MOECC. Figure 1 shows a simplified version of some of the key players who had influence in the development and implementation of the Act, including lobby groups, industry, the public, and Indigenous peoples. The Act’s development was stalled several times due to changes in Provincial government leadership and the prorogation of Parliament, so that in the end three different versions of the Bill were brought forward between 2012 and 2015 – Bill 100, Bill 6 and finally, Bill 66, *The Great Lakes Protection Act (2015)*.

It is the duty of the responsible ministry – in this case, the MOECC – to carry out relevant public and First Nations consultation and engagement. As MOECC staff explained, First Nations engagement did not start and stop with the GLPA, 2015 – engagement and relationship building are ongoing exercises in which staff are continuously involved. Engagement for the GLPA was conducted as one piece of a larger conversation on water policy, including the COA and the Great Lakes Strategy. Some of the consultation and engagement initiatives that the Land and Water Policy Branch was involved with from 2008 to 2016 include listening sessions, Great Lakes sessions, community visits, phone calls and ongoing teleconferences.⁹²

Although First Nations are invited to attend public consultations, there is a standard within the MOECC to conduct a separate, exclusive process for engagement with First Nations. In the case of the GLPA, 2015 this process started prior to the drafting of the legislation, and continued in some capacity through to the implementation of the Bill. According to MOECC staff, the Minister attended several listening sessions in Ontario, one of which was First Nations specific, prior to drafting the legislation. Ultimately, it is up to the responsible ministry to decide how feedback from public and First Nations engagement will be incorporated into legislation.

Staff at the MOECC explained that typically the MOECC would send out an email to the Chief and Council as well as technical operators of First Nation’s across Ontario. One respondent explained that the MOECC has been working on maintaining good First Nations contact lists for

⁹² MOECC (2016)

many years now. Calls are also made to regional organizations such as the COO and UOI, and regular teleconferences are hosted for those interested. Engagement initiatives include meeting with communities that make such requests and extending invitations to stakeholder meetings.

Comments submitted on the Environmental Bill of Rights website (EBR) are posted on the Environmental Registry. Following passage of the Act, the MOECC also published a post providing an explanation regarding how the Act was strengthened through public and First Nations engagement. According to MOECC, the importance of First Nations and Metis engagement and Traditional Knowledge was a common theme that emerged during engagement. The MOECC states that *“in addition to the measures already included in the proposed Act... the Act now includes clear provisions for First Nations and Metis engagement. In addition, where TEK is offered, the Minister is required to take it into consideration when carrying out certain activities under this Act.”*⁹³

	Date Posted	Length of Posting	Comments
BILL 100	June 6, 2012	60 days	Unknown
BILL 6	February 25, 2013	60 days	101 comments: 48 in writing and 53 online
BILL 66	February 18, 2015	60 days	71 comments: 30 in writing, 41 online

Several concerns about the legislation emerged throughout the lobbying process. These included concerns over:

- Duplication with other policies, plans and programs
- A lack of accountability for the GLGC
- No significant funding or budget attached to the legislation
- The lack of enforceable targets and timelines
- The potential for increased regulation that could negatively impact farmers and business
- How the MOECC would enforce the legislation, particularly given their budget cuts
- Confusion over definition of Geographically Focused Initiatives (GFI), a tool introduced in the Act for achieving any objectives set out in the Act
- The potential for downloading costs and responsibilities to municipalities and others
- The quality of public consultations that took place
- The lack of respect for landowners
- The focus on small initiatives rather than larger problems, such as big polluters

While it is outside the scope of this paper to evaluate the effectiveness of the policy process and implementation of the GLPA, 2015, several outcomes from the legislation are noted here. Since the GLPA, 2015 came into effect two years ago, the GLGC has met three times in Toronto and once on Manitoulin Island.⁹⁴ The Grand Chief of the Anishinabek Nation, Patrick Madahbee,

⁹³ EBR (2015)

⁹⁴ Ontario (2017)

was named co-chair of the GLGC, and is also the co-chair of a working group for the development of a virtual information sharing platform for the Great Lakes.⁹⁵ There has been no announcement yet on the development of a GFI.

4.0. CHALLENGES FOR ENGAGEMENT

The challenges and successes that emerged during the case study and in-depth interviews are presented in the paragraphs that follow, and themes are organized according to Von der Porten's six principles for effective engagement. While the themes have been organized in this way, it is important to keep in mind that there is significant overlap between themes, and that every challenge and success brought up will in some way influence and be influenced by other themes.

1) Approach or involve Indigenous Peoples as self-determining nations rather than as one of many collaborative stakeholders or participants

Indigenous peoples make up a small portion of Canada's population today, but it is important to reflect on the fact that they occupied these lands, implemented their own laws and governed their territories long before European settlers arrived. The SCC has consistently reminded us that Aboriginal peoples were never conquered by settlers or their governments. According to international law, the honour of the Crown (and its representatives) requires Canada to determine, recognize and respect Aboriginal rights.⁹⁶

In environmental management scholarship, Indigenous peoples are still commonly discussed as stakeholders, interest groups or minorities. Placing Indigenous peoples as one of many equivalent stakeholders in collaborative management processes conflicts with how many Indigenous peoples see themselves: as "people who exist in nations that have not been relinquished by colonial governments."⁹⁷ As rightsholders, First Nations are entitled to a distinct consultation process that is separate from public consultation – public notices and open houses for the public fall short of satisfying the legal obligations to consult.⁹⁸

In interviews with respondents there was general support for a distinct, parallel process of engagement for First Nations. For this research, the MOECC provided a detailed list of the consultation and engagement activities that occurred between their Ministry and First Nations in Ontario over the last several years. These include listening sessions, Great Lakes session, community visits, phone calls and ongoing teleconferences.⁹⁹ While it is evident that these meetings are taking place, it remains unclear how much influence they are having on political processes.

⁹⁵ UOI (2017)

⁹⁶ McLachlin (2004)

⁹⁷ Von der Porten (2015: 135)

⁹⁸ Jacobs (2015); Jollymore, 2016

⁹⁹ MOECC (2016)

Respondents from the MOECC used language that is supportive of rights-based, nation-to-nation relations between government and First Nations. Emphasis was placed on “working together” rather than just engaging, as well as referring to First Nations as “partners”. The question then becomes – how much does changing language reflect shifting power structures?

As explained in the RCAP (1996: 25), while Canadian governments are “coming gradually to accept the idea of shared sovereignty and Aboriginal self-government, they have been loath to hand over the full range of powers needed by genuinely self-governing nations or the resources to make self-government a success.” In other words, colonial governments are “using the phraseology of Aboriginal self-government, but denying its substance.”¹⁰⁰ As Van der Porten (2015) explains, the distinction between rightsholders and stakeholders in collaborative environmental management is more than just semantic. To truly respect Indigenous rights, government must collaborate with First Nations peoples on a nation-to-nation basis that recognizes their sovereignty and right to self-governance.

While those working within the MOECC clearly demonstrate that there is a separate, parallel process for engaging with First Nations that is respectful of their status as rightsholders, respondents generally agreed that this does not yet constitute true nation-to-nation collaboration.

Government staff may genuinely wish to engage with First Nations in a way that is meaningful – however, they are constrained by the colonial structures within which they are operating. Interviews showed general support for Indigenous self-government, nation-to-nation collaboration and rights-based engagement; however, there is little doubt that power, authority and priority-setting remain for the most part in the hands of colonial government institutions like the MOECC.

However, within the MOECC, small indications of (possible) power shifts in decision-making for water are appearing – for instance, in selecting the Grand Chief as the Co-Chair of the GLGC, the Ministry is demonstrating a strong commitment to sharing power and distinguishing First Nations status as rightsholders.

Recognizing First Nations as rights-holders implies that government has an obligation to engage not just on a project by project basis, but at a strategic level that respects First Nations status as Nations. The landscape is not yet clear when it comes to consultation and engagement for legislation that could affect First Nations rights. There is some indication that the courts are moving towards applying the Duty to Consult to the development of legislation, however, for now this question has been left by the courts for another day.

Intuitively, First Nations involvement in the development of legislation could help ease the burden of the Duty to Consult at the project level. This is because higher level consultation and engagement can help set the landscape and best practices for water management. Many have argued for just this – with regards to environmental management, that meaningful consultation

¹⁰⁰ Penner (1987: 22-23)

and engagement on higher level policies, plans and programs is preferable over engagement on each project and minor permit.¹⁰¹

As one First Nation respondent explained, consulting on higher level legislation involves a whole different type of workload that the MOECC is not used to taking on. *“People still largely think of [engagement] on a project by project basis. That’s just not going to cut it anymore.”*

There is indication that within the MOECC this is the direction things are moving. When the MOECC consulted and engaged on the GLPA, 2015 it was done in the context of one conversation that bridged the Great Lakes Strategy and the Canada Ontario Agreement. This process, which melded three separate initiatives tied to the Great Lakes, was a new tool for the Ministry, because typically with policy it is common to talk about one initiative at a time. According to one respondent from the MOECC, they *“needed an approach for the policy staff to ensure they didn’t lose sight of those other initiatives.”*

It is evident that over the last ten years, the MOECC has developed higher standards for what effective engagement between government staff and First Nations should look like. There is increasing recognition of First Nations status as rights-holders and some indication that nation-to-nation collaboration could become feasible in the future. However, as evidenced in interviews with actors, the current decision-making framework for water is still far from embodying true co-governance, and substantial changes will need to take place before it will move in this direction.

2) Identify and engage with existing or intended environmental governance processes and assertions of self-determination by Indigenous nations

Despite often genuine efforts on the part of government staff to effectively engage with First Nations, these efforts can quickly become futile if they are not developed with a clear understanding of the Indigenous nations they are working with. For effective engagement to take place, government staff must be well versed in the historical, jurisdictional, cultural and legal realities of the First Nation’s they are working with. Several respondents expressed that within the MOECC and provincial ministries more generally, there are currently a lack of education opportunities for staff to learn more about these realities. This issue is compounded by the rapidly changing legal expectations regarding relations between First Nations and colonial governments.

Respondents generally agreed that education and increased awareness are key components to effective engagement processes between government staff and First Nations. It was suggested that the MOECC implement mandatory in-house education, so that incoming leadership receive the training they need to effectively engage with First Nations, while also easing the burden of transitioning leadership.

¹⁰¹ Hill Sloan (2008); Hanna (2012)

One effective way of educating government staff and increasing awareness of First Nations history, culture, history and rights is by organizing gatherings on the land, as was done with the Manitoulin Island gathering during the implementation of the GLPA, 2015. Another identified issue is the lack of in-house expertise within the MOECC when it comes to treaty awareness, translators and engagement specialists. Some respondents expressed that the MOECC either lacks the resources or the commitment to invest in effective engagement processes, which necessitates in-house expertise.

Education can be particularly challenging when government staff find their own norms and worldviews confronted. For instance, amongst the Anishinabek Nation, women are responsible for the protection of water. This can be a confronting concept for government staff who have pledged to be non-discriminatory in their work around things like gender roles. Government staff might be confronted with concepts that challenge their own worldview, making education and awareness an ongoing challenge requiring openness and goodwill.

Another challenging aspect of engagement involves identifying who should be engaged in any context. Identifying who is authorized to represent an Indigenous group can be complicated by internal power disputes or the presence of umbrella political organizations.¹⁰² MOECC staff explained that over the years they have been actively working on maintaining better contact lists for First Nations across the province. As Ball (2008) reminds us, researchers and policy makers need to “be mindful that no individual or body represents all the interests or points of view within a community.” It was brought up several times that staff at the MOECC need to contact not only Chief and Council and Regional Organizations, but also people working on the ground – including women, youth and Elders.

It was consistently brought up that effective engagement is a process, one that the MOECC is constantly improving upon and expanding. As one First Nation respondent explained, the *Ministry is like a child learning to speak the language of engagement and consultation.*” Provincial ministries across Ontario are at different stages of development when it comes to First Nations engagement. Some departments have relatively large and well-established Indigenous Affairs Departments while others have absorbed First Nations engagement into their general operations. According to multiple respondents, some ministries are better than others when it comes to engaging with First Nations in Ontario. One respondent explained that *“it is really ridiculous that each ministry has to figure [engagement] out for themselves. But it is definitely an improvement that each ministry is moving towards having a place where it is clear this relationship can start.”* Another First Nation respondent stated that *“I think there’s improvement. If you have someone who is active in these liaison types of roles, that can only be a good thing.”*

While there is some notion of minimum standards for the Duty to Consult as defined by the courts, there remain many different interpretations of how it should be carried out in practice.

¹⁰² Driedzic (2010)

Government in each provincial jurisdiction have responded to the Duty by creating consultation policies. For instance, in 2006 Ontario published the Draft Guidelines for Ministries on Consultation with Aboriginal Peoples Related to Aboriginal and Treaty Rights, which remains in its draft form. While each province has at least a draft consultation guide in place, guidelines vary greatly depending on the jurisdiction of the proposed project. These guidelines also vary regarding whether they consider the Duty to apply to the development of legislation.¹⁰³

There was some agreement that there has been movement away from minimum requirements for the Duty to Consult within the MOECC towards openness for co-leadership and co-creation. This is evidenced by new institutions like the GLGC, where the Grand Chief of the Anishinabek Nation is co-chair. According to one respondent, these are new frontiers for Ministry staff, who are still grappling to understand what these principles mean in practice.

Respondents questioned the effectiveness of top-down approaches to consultation and engagement. One MOECC policy advisor stated that *“if you’re going to develop a protocol of how to work with people, you need to develop it with the people.”* Another First Nation respondent affirmed that communities are increasingly sharing their experiences and developing protocols that make sense for each of their regions in Ontario. Each community has their own protocols, natural laws, rules and guidelines. Increasingly, communities are developing their own consultation and engagement protocols, which define for industry and government the terms upon which the community expects to be consulted and engaged.

3) Create opportunities for relationship building between Indigenous peoples and policy or governance practitioners

The importance of relationship building for effective engagement is well documented.¹⁰⁴ Building meaningful relationships between diverse actors can result in increased mutual understanding and improved governance outcomes.¹⁰⁵ Trusting relationships take time to build, and require many key elements to be satisfied, such as geographic proximity, funding, open communication, flexible programs of activity and the willingness of participants to take personal risks.¹⁰⁶ Building trust can be particularly challenging for Indigenous and state actors, who must confront a history of colonialism and a legacy of distrust that in many ways lives on today.

Respondents iterated the importance of meaningful relationships for effective engagement many times. Overall, there was a sense that the relationships being formed between MOECC staff and First Nations are still in their early development. MOECC staff and First Nations expressed a strong willingness to keep developing these relationships to further advance joint water objectives.

¹⁰³ Bains (2016)

¹⁰⁴ Goetze (2005)

¹⁰⁵ Van der Porten (2015)

¹⁰⁶ Ball (2008)

One First Nations respondent expressed that over the past year and a half, there have been major developments in terms of relationship building between their community and members of the provincial government. According to the respondent, *“it’s not at the co-management stage, but we’re leading up to that. All the work that we’re doing is a combined effort leading to that point.”* A senior policy advisor at the MOECC explained that *“It is a learning curve all around. Our ministries learn with First Nations, and First Nations learn with us, so there’s reciprocity.”*

For effective relationship building to take place, many respondents reiterated the importance of early and ongoing involvement. Early involvement implies that engagement does not have a beginning or an end, and that government cannot simply approach First Nations when they must fulfill the legal requirements of the Duty to Consult. Engagement should be an ongoing process focused on developing and strengthening relationships between government and First Nations. As one respondent explained, *“this really has to be a relationship that is fed and continual... beyond the scope of two or three years, but decades. That’s a whole other type of workload that I don’t think people expected to have to take on, but we’re asking them to see it that way.”*

Early engagement also implies that government take a flexible approach early in the process that allows for co-creation of policy, rather than dictating policy objectives on their terms and then consulting with First Nations on government-driven legislation.

One key way of ensuring these critical relationships develop is by guaranteeing First Nations a ‘seat at the table.’ Guaranteed involvement at the board and council level enables the development of relationships with government, and can also help First Nations to develop allies across various sectors. Jollymore (2016) supports the need for cross-sectorial relationship building, given that aligned organizations can become more effective by working together, which can help to overcome the ‘silo effect’.¹⁰⁷ For instance, the GLGC moves away from a sector by sector approach, and involves actors from industry, government, not-for-profits and First Nations.

Legislation that mandates First Nations involvement can help to institutionalize relationships, making collaborative processes less reliant on individuals while easing the burden of transitioning leadership on both sides.¹⁰⁸ One MOECC respondent explained that one of the strengths of the Great Lakes file is that staff have remained relatively consistent over the years, however, such consistency is far from guaranteed. The recent change in leadership for the position of Minister of Environment highlights the importance of institutionalizing these relationships, so that involvement is not dependent on individual leaders.

MOECC staff emphasized the importance of relationship building in their work with First Nations, explaining that there has been great progress in this area over the last ten years within their department. The GLPA, 2015 was identified as an important mechanism for formalizing the

¹⁰⁷ Rizvi (2013)

¹⁰⁸ Imperial (2005) and Leana (1999)

developing relationships between First Nations and government staff, by mandating First Nations board representation on the GLGC and by having the Grand Chief in Ontario sit as co-chair to the Council.

One major challenge that was identified in relationship building was time constraints. According to one respondent, *“I think it is important to remember that relationships take a really long time to build. If you’re going to really achieve something, you need to spend that time just getting to know each other, and sometimes getting to know one another can seem like a waste of time.”* Relationship building also requires a great deal of flexibility in terms of timelines and cultural practices that is not easily facilitated by government bureaucracy.

Another theme that emerged is the importance of keeping First Nation representation and engagement meaningful. The issue in question is how to define ‘meaningful’ engagement. According to Hirsch (2017: 149), approaches to participation can range from “instrumental ones related to participation as means to share knowledge and information, secure sustainability and cost-effectiveness, increase legitimacy and the quality of policies and outcomes, to those related to social justice, citizenship perspectives and participation as a right.” Depending on government’s approach to involvement, their definitions of “meaningful engagement” will shift.

It is critical that engagement does not occur simply to check boxes and make government look good, but that it is meaningful – that First Nations have rights-based, early and ongoing involvement in the political process so that their goals, priorities and needs can be addressed.

Some actors were skeptical of whether the engagement process that occurred prior to, during and after the development of the GLPA is truly meaningful. For instance, one First Nation respondent explained that although they were invited to the first two GLGC meetings, they never received any follow up information for subsequent meetings. According to the respondent, *“that’s what government does, they collect, they go away, they develop a strategy and then they say here we go, here’s our Great Lakes strategy... it’s like humouring us, we’ll take your ideas and that, but they never implement them and I don’t know why.”* Questions like this indicate that the MOECC is still far from achieving a standard of ‘working together’ that is truly reflective of water co-governance.

4) Choose venues and processes of decision-making that reflect Indigenous rather than Eurocentric venues and processes

The importance of co-developing processes and selecting venues that are reflective of Indigenous values and worldviews emerged throughout interviews with actors.

Respondents iterated the importance of selecting venues that are reflective of Indigenous worldviews. One way of achieving this is by having MOECC staff come to communities, which can engage government staff and First Nations in their joint work while helping both parties to find common ground. Having staff attend meetings in communities helps to balance the burdens of capacity limitations, while demonstrating a sincere commitment to engagement efforts.

Balancing the relationship also helps to grow cross-cultural awareness, so that Ministry staff can re-connect with the lands and waters they are working to protect and so that they can see first-hand how important the Great Lakes are for First Nations. As one First Nations respondent explained, *“You want to learn about how we’re going to fix the Great Lakes, then we need to be by the water. We’ve got to hear the water speak. It sounds spiritual, mystical, but it’s not. Not in our world.”*

Cornwall (2004) explains how the spaces that are selected for engagement reflect power relations between actors. Spaces of participation range from invited spaces, where the powerful invite others into a space and define what knowledge will be included or excluded from discussions. Claimed spaces are those created from below by civil society’s demand for inclusion. In between are collaborative spaces, which include arenas that combine state responsiveness with initiatives from civil society.

The GLGC Manitoulin Island gathering that took place in 2016 is one instance of the MOECC demonstrating an effort to balance the relationship and can be classified as a ‘collaborative space’ according to Cornwall’s (2004) definition. Several respondents explained that this meeting was useful for helping to build relationships and teach cross-cultural awareness.

The processes through which decision-making for the Great Lakes takes place are also important and generally tend to reflect dominant, western worldviews. For instance, there are major challenges relating to the timelines which bind provincial government staff in their policy work. According to one respondent, *“there is a mismatch between standard government policy timelines and the timelines that are appropriate for conversations and real buy-in from First Nations.”* Timelines are dictated by bureaucratic processes, such as budget cycles, elections, mandate letters and the legislative process. These timelines often do not work well for First Nations, who might require different time frames to have internal conversations with Elders, women, political leadership, policy staff and youth. Some communities may lack the capacity required to address engagement requests in a timeframe that works for government. Cultural events, such as Christmas or hunting season, can also impact timelines on both sides.

First Nations have had to develop new and uncharacteristic ways of thinking and speaking to engage in processes where western structures are dominant, creating power imbalances in these negotiations from the outset.¹⁰⁹ The onus has generally been on First Nations to adapt to government processes and venues, perpetuating colonial power imbalances and structuring negotiations against First Nation goals. The onus must shift so that colonial governments have a responsibility to respond to and learn about the many water governance processes and strategies that First Nations are developing.

Building on this point, one senior policy advisor explained that within the MOECC, new approaches have been taken – such as the development of a ‘water story’ – to try and more

¹⁰⁹ Kotaska (2013); Natcher (2005); Nadasdy (2003)

effectively engage with First Nations. According to the same respondent, it is becoming increasingly clear to policy staff that it is necessary to “*think of this through the lens of Indigenous eyes and communicate with First Nation communities through an oral sort of approach.*”

Authors like Kotaska (2013) have argued that actors must constantly question who is in control, and how and if Indigenous knowledges are being considered or privileged. This leads into the next part of the discussion, which focuses on knowledge-sharing and prioritizing Indigenous ways of knowing. Knowledge sharing implies a two-way relationship, where data used for decision-making is made available to the public and First Nations; but also, where Indigenous knowledges are shared with and meaningfully considered by government staff. The MOECC has taken strides in the GLPA, 2015 to ensure that if TEK is offered for decision-making, it must be considered.

However, there remain many important considerations when it comes to ‘using’ TEK for decision-making. TEK is not something that should be understood as ‘content’ – i.e. knowledge that can be packaged and transferred from one person to another – but rather as ‘process’, i.e. ‘Indigenous ways of knowing.’ The inclusion of TEK in decision making means including TEK processes and ways of knowing, which implies ongoing relationship building between ministry practitioners and those First Nations who ‘practice’ TEK. The stipulation in the GLPA, 2015 still seems to focus on TEK as ‘content’ rather than ‘process’ which will likely create difficulties when it comes to reconciling these two different ways of knowing (Western and Indigenous).

TEK needs to be understood as having different, but equal value to scientific knowledge. TEK presupposes a different way of understanding and approaching the world, but several studies have shown that TEK enables resource managers to make more informed decisions than with using scientific knowledge alone. Both are legitimate and valuable forms of knowledge, and yet TEK continues to take a backseat in decision-making over water.¹¹⁰ As one respondent explained, traditional knowledge holders might hold the equivalent of multiple PhDs, but western institutions do not recognize them in the same way, which is “*a discrimination on knowledge, because that knowledge is not understood to have the same value as a scientist’s knowledge.*”¹¹¹ Finally, discussions also need to be had regarding information that will be left off the table – instances where sharing TEK could do more harm than good. First Nations and colonial government must be sensitive to how information is used and shared, and must develop collaborative information-sharing agreements.

Some respondents explained that within the MOECC, decision-making can often occur in a ‘black box’, with insufficient information making it to the public or First Nations. It was explained that this is likely not the result of concerted efforts to avoid disclosing information, but rather a product of lack of capacity and willingness to transparently share information and

¹¹⁰ Berkes (2008)

knowledge. Sometimes, information is available, but layers of bureaucracy make it difficult for people outside of government to know where to look. Ministry staff need to consider not only ways of sharing information (i.e. posting it on their website or the EBR), but also ways of directing First Nations and the public towards this information.

The GLGC is currently working on a digital information sharing platform for Great Lakes data and knowledge, and have formed a working group that is co-chaired by the Grand Chief of the Anishinabek Nation. Digital platforms have been used successfully by other political bodies, such as the City of Vancouver and the IJC, and there is some potential that it could be used in the same way to facilitate information sharing on the Great Lakes and to increase public and First Nations involvement.

5) Provide resources to Indigenous nations to level the playing field in terms of capacity for collaboration or for policy reform decision-making

“We’re all in different places with respect to our healing, growth and capacity. [There are] communities that seriously lack in capacity, and that’s probably one of the biggest reasons why some communities just don’t engage in the consultation process.”

Capacity refers to the ability to effect social or institutional change.¹¹² The differing capacity of actors involved in decision-making can influence and often undermine collaborative processes when power is not distributed evenly.¹¹³ Capacity can dictate who is able to make it to the table when it comes to decision-making, and can further dictate which voices and concerns are prioritized.

There are significant differences between the capacities of First Nations in Ontario, with each community having different needs, priorities and being at different stages of reconciliation processes. This is not to say that First Nations are inherently ‘capacity deficient’ – First Nations have governed within their own systems of laws and knowledge, and continue to develop capacities to engage with and challenge colonial government.¹¹⁴ Nonetheless, capacity limitations with regards to staffing, funding, time, information management and technical expertise pose significant challenges to involvement in water decision-making.¹¹⁵ Actors stressed that differences in the capacities of communities can be a barrier to the effective inclusion of diverse First Nations voices in Great Lakes collaborative decision-making.

The Great Lakes basin in Ontario covers a vast amount of area – for those affected by these issues, it can become very difficult and expensive to attend engagement sessions. It is also challenging to inform all those potentially impacted by decisions that sessions are taking place, and there can be many issues with bureaucracy that might inhibit full and active participation.

¹¹² Fletcher (2008)

¹¹³ Von der Porten (2015)

¹¹⁴ Simms (2011)

¹¹⁵ Rizvi (2013)

Due to issues of capacity, it can often end up being the same First Nations who attend engagement sessions – those who can afford to, or those who already have established relationships with the MOECC. This can lead to a very limited perspective from diverse First Nations in Ontario. The MOECC provides funding for First Nations to attend engagement sessions, sometimes in the form of transfer payment agreements to organizations like COO or the UOI. However, the provision of funding on a case by case basis can become highly bureaucratic and does not address underlying issues that First Nations experience with regards to a lack of capacity.

Every community is unique with different needs and priorities, which can often mean that other issues – such as housing and education – will conflict with engagement in water policy. As one respondent explained, *“if housing is at the top of the list [of priorities], Great Lakes is at the bottom of the list.”*

One important consideration when it comes to discussions on capacity is the fact that while MOECC staff are being paid to attend engagement sessions, many First Nations must give up their own time to have their voices heard. This is time that is spent away from their communities and from other pressing and competing issues. While expenses might in some cases be covered by the MOECC, First Nations are still not being paid for their time unless they hold an official position, such as with their Chief and Council.

According to Morellato (2008), the Crown’s referral and engagement process can be characterized as “one of the greatest logistical difficulties facing Aboriginal communities today” (72). First Nations can become inundated with so many requests for meetings and input that their Chief and Council simply may not have the capacity to adequately address each issue. For some nations, this can mean prioritizing requests so that only the most pressing issues are addressed, and having to be strategic about which issues they have the greatest potential to leverage. It can also mean that time is taken away from much needed capacity building initiatives within the community. In similar research, Simms (2011) explains that communities often are torn between wanting to remain engaged with ongoing colonial government initiatives, while also striving to develop their own water plans and initiatives. While some nations have several staff dedicated to consultation and environmental coordination, others do not have a dedicated position for incoming engagement requests.

As one First Nations respondent explained, this can be advantageous for government or proponents who do not want to put in the work that is necessary for sincere and effective engagement. If requests for engagement go unanswered, it is easy to conclude that the First Nation is not interested in participating. According to one respondent, *“it’s probably the 100th email of a long list of emails that do not necessarily have a department to respond to them, nor the ability to respond given the time frame.”* It can take time for First Nations with limited capacity to screen all requests, elevate them accordingly, and consult with leadership and the community. The importance of following up on engagement requests was emphasized, rather

than accepting a standard log of requests as sufficient. According to the same respondent, “*the orientation on the matter must change,*” and government must address these capacity challenges by committing to engagement on a timeline that the First Nations capacity allows. It is not enough to invite First Nations to every engagement session and meeting without addressing underlying issues of capacity and ensuring that those First Nations *are able to attend* the sessions they are being invited to.

Collaborative decision-making is predicated on the ideal of interactions between equal partners. As Tupa (2006: 382) explain, equal status and participation cannot be realized in any system where “one partner has greater access to funding, staffing, expertise, statutory powers and functions. Before meaningful involvement of First Nations in collaborative decision making for water can be achieved, underlying issues of capacity must be addressed.

“Could it be better? Yes, in a perfect world, it could always be better. In a perfect world we would go out to each community and have a detailed conversation and come back to them, but it’s hard with the resources and the time to be able to actually do that.”

The MOECC’s operating budget is significantly lower than it was in the early 1990’s, even though their mandate has expanded significantly through this period.¹¹⁶ Several respondents explained that capacity issues affect not only First Nations, but also government staff working within tight budgets and timelines. First Nations will often make requests for government to come to their community to engage on land and water issues. According to several government practitioners, as much as possible these requests are accommodated. However, the MOECC itself is limited by funding and time constraints, making it impossible to accommodate all requests.

6) Find ways to support Indigenous nations in their own continued environmental decision-making and self-determination

This category is broader and more holistic than those previous, and is meant to demonstrate the link between the engagement work that occurs with the MOECC and First Nations in Ontario and broader reconciliation and de-colonization processes in Canada.

As Kotaska (2013) explains, despite systemic change the relationships between provinces and First Nations in Canada remains colonial. Power will not be yielded in one single decolonizing act, “but through many small acts in a process of ongoing reconciliation.” Some respondents connected the MOECC’s work on the water file with broader decolonization processes in Canada, stressing that work on the water file should be viewed as one small piece of a much larger puzzle as this country moves towards reconciliation. It was stressed that work on water needs to be considered in a way that is holistic and far-reaching, given that water is critical for all life and well-being on this planet.

¹¹⁶ ECO (2007); Ontario (2016)

Supporting First Nations in their own environmental decision-making and self-determination is an exercise in nation-to-nation governance that recognizes the unique rights that First Nations hold when it comes to water. True collaborative water governance requires nation-to-nation exercises between First Nations and colonial governments that are supportive of wider reconciliation processes in Canada, and that effectively ‘empowers’ First Nations to become involved in decision-making.

Finding ways to support Indigenous nations in their own environmental decision-making processes involves a great research and education exercise for government to determine whom should be consulted with, on what terms they wish to be consulted and whether First Nations led environmental governance processes are already in place. It also involves shifting the lens of capacity building towards colonial governments to find innovative, diverse ways of supporting the capacities of First Nations to engage in both government and their own environmental governance processes. Further, government must find new processes for knowledge-sharing and transparency that recognizes the importance of traditional knowledge and different worldviews.

Supporting Indigenous nations also means acknowledging how colonialization and power structures shape any relations between institutions like the MOECC and First Nations. The governance structure in many First Nations communities is an implanted institution that functions through the Indian Act System, with a band council structure that elects Chiefs and Councillors through a democratic process that according to some respondents, does not necessarily reflect the needs or opinions of a community.

Consultation processes typically begin by reaching out to a First Nation’s Chief and Council, either through email or by telephone, often with the inclusion of the community’s technical expertise in these conversations. Some respondents argued that this process reinforces colonial processes, by working within structures that were setup during the colonial project in Canada. As one respondent explained, the provincial government continues to “*negotiate and consult with their own institutions.*”

The Duty to Consult can only take place between impacted communities and the government, however the MOECC liaises regularly with organizations like Chiefs of Ontario (COO) and the Union of Ontario Indians (UOI). There were concerns that these organizations do not adequately reflect the needs and priorities of the diverse First Nations that live within the Great Lakes basin. Respondents emphasized the need to work not only with established political structures and organizations, but also with communities at the grass roots level.

It was suggested that more focus should be placed on supporting First Nations led decision-making and self-determination for water, such as the Anishinabek Nation’s Regional framework, which “ensures that Anishinabek communities can meet and discuss Great Lakes basin initiatives as a collective, share information and build on community partnerships with MOECC at the regional and local level” (UOI, 2017). The first series of roundtables took place between January

and March 2017 and the intention is to have ongoing meetings open to government at least quarterly.

Overall, the message from many respondents was clear: every institution, including the MOECC, working with First Nations needs to acknowledge and understand their role in wider reconciliation and decolonization processes across Canada. This means taking a holistic approach to work that links issues like water with other issues like housing and capacity. A holistic, rights-based and collaborative approach necessitates that government work to the best of their abilities to empower First Nations led environmental decision-making and self-determination wherever possible.

5.0. CONCLUSIONS

Interviews with key actors involved in decision-making for the Great Lakes in Ontario indicate that there is an established and evolving relationship between the MOECC and First Nations leadership. Evidence of this relationship is supported by the literature as well as First Nations and government documents.¹¹⁷ Over the past ten years, the standards within the MOECC for consulting and engaging with First Nations on issues of watershed governance have greatly evolved. The trend has been a movement away from box checking and minimum legal standards of the Duty to Consult towards higher levels and new forms of engagement between First Nations and the MOECC. In comparison to other ministries, practitioners generally considered the MOECC to be a leader in engagement and involvement of First Nations. However, while staff at the MOECC consider their approach to be wide ranging and comprehensive, their strategies are not uniformly accepted as appropriate or sufficient by First Nations in Ontario. The decision-making system used by the MOECC for the Great Lakes has collaborative elements, but has not yet reached a standard of ‘co-governance’ in decision-making. Various challenges and power imbalances still limit the input that First Nations have in the direction of Great Lakes policy and initiatives.

The shift towards collaborative decision-making for water within the provincial government’s MOECC has, as many scholars have theorized, been supportive of a stronger relationship between First Nations and colonial government. The system of collaborative decision-making has allowed more space for First Nations voices and priorities; has resulted in more meaningful consideration of the role of TEK in colonial decision-making; and has pushed government staff to balance capacity issues by hosting more meetings in Indigenous venues. Government staff have shown a commitment to sharing some power with First Nations, by using language supportive of nation-to-nation negotiations and by establishing the co-chair of the GLGC as the Grand Chief. While part of this success can be attributed to shifts within colonial governance, it is largely the result of the ongoing efforts and insistence on the part of First Nations to be meaningfully involved in Great Lakes decision-making. First Nations continue to demonstrate

¹¹⁷ UOI (2017)

their resilience in the face of colonial institutions, and have greatly developed their own capacities and expertise as well as created new Indigenous-led models for decision-making and information-sharing that are having powerful impacts on decision-making for the Great Lakes.

There remain many ongoing challenges that prevent this system of collaborative decision-making from achieving a true standard of water co-governance. Challenges emerged in conversations with actors involved in Great Lakes decision-making about the tensions and limitations of working within a colonial landscape in a way that is collaborative. These include:

Principle for Effective Engagement	Challenges Identified
1) Approach or involve Indigenous peoples as self-determining nations rather than as one of many collaborative stakeholders or participants	<ul style="list-style-type: none"> • Recognizing First Nations as rights-holders, not another stakeholder • Engaging with First Nations on a strategic level, not just project by project
2) Identify and engage with existing or intended environmental governance processes and assertions of self-determination by Indigenous nations	<ul style="list-style-type: none"> • Creating more opportunities for education and awareness
3) Create opportunities for relationship building between Indigenous peoples and policy or governance practitioners	<ul style="list-style-type: none"> • Developing trusting relationships • Early, ongoing engagement • Institutionalizing relationships
4) Choose venues and processes of decision-making that reflect Indigenous rather than Eurocentric venues and processes	<ul style="list-style-type: none"> • Hosting gatherings in Indigenous venues, not only Eurocentric venues • Creating flexible processes that support Indigenous processes • Knowledge sharing
5) Provide resources to Indigenous nations to level the playing field in terms of capacity for collaboration or for policy reform decision-making	<ul style="list-style-type: none"> • Addressing ongoing capacity challenges for First Nations and government
6) Find ways to support Indigenous nations in their own continued environmental decision-making and self-determination	<ul style="list-style-type: none"> • Recognizing the role of this work in larger decolonization processes

The challenges identified in this research all must be addressed for any colonial water governance system to move towards principles of true co-governance that is supportive of First Nations rights and responsibilities for water. While the MOECC is still far from achieving a standard of co-governance for water, government staff and First Nations are grappling with how to utilize some of the principles of co-governance in practice. Some positive developments have occurred – for instance, the GLGC that was established through the GLPA, 2015 places the

Grand Chief of the Anishinabek Nation in an equal position to that of the Minister of Environment, as co-chair. More gatherings are taking place on First Nations land in efforts to balance capacity challenges and create shared values and understanding. Interviews indicate that relationship building between First Nations and government staff is growing, and that there is an openness and willingness to continue developing these relationships into the future.

These are positive developments, but they do not guarantee that institutions like the MOECC are moving towards a model of true water co-governance that is supportive of First Nations rights, responsibilities and reconciliation. As explained by Bowie (2013: 93) in the context of co-management, “The debate ... centres on the question of whether problems inherent to co-management represent irreconcilable differences between western and Indigenous ways, or the growing pains of a new institutional landscape.” In other words, do the challenges that emerged in this research represent the growing pains of a ministry that is transitioning from collaborative decision-making for water towards a true model of co-governance? Many challenges still stand in the way of such a transition, and they will have to be addressed by government and First Nations as they continue working towards shared water goals.

It must be recognized that there is no quick fix that will satisfy all parties involved in any decision-making model for water governance. These are extremely complex issues that involve a wide diversity of actors with often competing goals, priorities and worldviews. The movement towards rights-based, nation-to-nation co-governance models of decision-making will take time and will be rife with challenges that emerge along the way for everyone involved. Based on the literature review, case study, document analysis and interviews with key actors, several important considerations are worth exploring.

- While the courts have left the question of whether the Duty to Consult with applies to the development of legislation, it is increasingly clear that the standard in practice is to involve First Nations at the strategic level of decision-making. This expectation has been clearly articulated in the literature and in independent reviews of the British Columbia Water Sustainability Act. The MOECC is moving in this direction, as demonstrated by the joint consultation process for the Canada-Ontario Agreement (COA), the Great Lakes Strategy and the GLPA, 2015.
- Collaboration and engagement with First Nations are approached from many different perspectives and held to different standards by actors in Ontario. Simply because the rhetoric of collaboration is used in these processes does not mean a standard of co-governance has been achieved. Colonial governments must continue to move towards ‘empowerment’ on the engagement spectrum to better support nation-to-nation negotiations with First Nations that disrupt existing power relations.
- It is clear that colonial governments cannot only focus on engaging First Nations in their own processes, but also in exploring ways that they can support First Nations in their own Indigenous-led water governance. For instance, the Anishinabek Nation has set up their own regional framework for environmental governance which the MOECC is regularly invited to

attend. Only when First Nations are able to engage with government on a more level playing field will true nation-to-nation governance of water become possible. It is important to keep in mind that capacity constraints will mean that diverse First Nations will be in different places with regards to levels of political organization, and colonial governments must put in added efforts to reach those First Nations experiencing capacity challenges.

- Relationship building takes time and openness. It is important that these relationships are institutionalized through structures like the GLGC to ensure continuity and that relationships are not dependent upon specific leaders.
- Indigenous departments within the Ontario government's ministries are all at different stages of development and hold different standards with regards to Indigenous relations. It is important that these departments are expanded and solidified and that shared norms and standards are developed, so that there is a place where the relationships between First Nations and colonial governments can begin.
- Education and awareness building opportunities need to be made available, and even mandatory, within colonial government institutions. This includes spending more time on First Nations land, such as occurred with the Manitoulin Island gathering with the GLGC.
- New institutions and platforms will be necessary going forward, like the GLGC and the proposed digital information-sharing space. There were suggestions that the GLGC could be expanded to meet more often and to expand who sits on the council (women, elders, youth). It is also important to look to what others are doing in this regard, and to share experiences with others working on similar issues.

This paper has taken the position throughout that a rights-based, co-governance role for First Nations in Ontario's Great Lakes decision-making is not only desirable, it is necessary for the full range of benefits of collaboration to be realized. There is indication that Ontario's MOECC and First Nations are incrementally moving towards such a model of decision-making, although this process is not without its share of challenges. It becomes important at this juncture to question – what could a system of true water co-governance look like? Is such a system even possible in Canada?

Throughout this research, one co-governance model that surfaced again and again is the Northwest Territories – Northern Voices, Northern Waters Water Stewardship Strategy. The strategy was co-created by an Aboriginal steering committee together with federal and territorial governments, and makes explicitly how Indigenous knowledges and forms of governance should be privileged throughout the plan.¹¹⁸ While it is outside the scope of this research to compare the Northwest Territories' water strategy with that in Ontario, this could certainly be a useful direction for future research.

Of course, there are limitations to this research. A master's degree places limits on the time frame for any research project, with this paper being no exception. It would have been useful to

¹¹⁸ GNWT (2015)

spend more time with contributors to this project, and to spend time on the land with First Nations to better understand and align myself with different worldviews.

As a non-Indigenous person conducting this work through the lens of academia, there are certainly limits to my understanding of Indigenous life, culture and ways of knowing. Any misrepresentations apparent in this research are of my own fault, and should not be attributed to any of the respondents who contributed to this work.

I do hope that this analysis will prove useful to those working in decision-making for the Great Lakes, and that collectively the shift will continue towards models of decision-making that better reflect co-governance, are supportive of reconciliation and help to empower those First Nations involved. We must keep in mind that while co-governance is possible, and while there are some indications that we are moving towards such a model in Ontario, this transition is far from guaranteed. Water co-governance will not be achieved without continued and concerted efforts on the part of all involved in Great Lakes decision-making to challenge and shift power structures and to empower First Nations involved in the protection and preservation of our shared Great Lakes for generations to come.

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