



Whole-of-River Protection for the Fraser River: A Scan of Legal Protections

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This Legal Scan was prepared at the request of Bev Sellars, member and former Chief of the Xatśūll First Nation, who initiated this work when she came to the ELC and asked us to explore what an Indigenous-led initiative to create legal protection for the whole of the River might look like. It is the work of many researchers with expertise in different disciplines. Initial legal research began with the law student researchers participating in the day long 2023 Research-a-thon in the Faculty of Law, University of Victoria organized by members of the Environmental Law Club. Law student researchers examined legal structures for river and water protection from around the world. This legal research was supplemented by students in Environmental Studies 411 (Environmental Solutions) in the winter 2023 semester who examined the state-of-the-Fraser River and pulled together scientific and other data on impacts to the River and its function.

All of this information was considered and built on by students in the Environmental Law Clinic Intensive in the winter 2023 semester, with assistance from articling students, to create this Legal Scan. While the subject matter was varied significantly, each ELC student categorized their research roughly into the following headings: Overview, Background, Governance, and Application to the Fraser River and attempted to limit their descriptions to two pages for each legal structure.

CAVEAT

This publication is a preliminary document designed to generate discussion, and as a resource for Indigenous governing organizations, First Nations organizations and individuals considering protecting entire rivers. We describe many of the colonial or state legal tools in use in British Columbia and some from other jurisdictions. However, this publication is not a complete and definitive inventory of such legal approaches. The purpose is to demonstrate a range of approaches as a contribution to whole-of-river protection initiatives.

This publication is not authoritative and may contain inadvertent errors and omissions. While it provides legal information, it is not legal advice and should not be relied upon as such. We encourage Indigenous governing organization, First Nations and anyone who reads it to contact legal counsel before taking any actions. Some of the tools discussed may not be valid in British Columbia or Canada, or for a particular circumstance or community. The final choice of tools will require further research and analysis.

Ultimately, every Indigenous community is different, and has an inherent right to choose how best to protect and preserve their relationship with rivers based on their own laws and culture.

COVER PHOTO: Photo by courtesy of Anthony Mack

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EXECUTIVE SUMMARY

A whole-of-river protection approach can safeguard river health and account for disruptions over an entire river ecosystem or watershed, from source to river mouth. This type of protection contrasts with the often-fragmented approach of colonial environmental law that is constrained by “jurisdiction” or inertia stemming from who has geographic or subject matter responsibility for the elements of the river, and failure to meaningfully address downstream impacts. Whole-of-river protection is intended to account for the diverse and interconnected river ecosystem and can respond to the complexity and cumulative nature of impacts.

As a globally important river, the Fraser River requires a whole-of-river approach. No one community, government or entity is taking care of the river, and impacts upstream and downstream from individual Indigenous communities are eroding the health of the Fraser River and infringing those communities economic, social, and spiritual reliance on the River.

The purpose of this Legal Scan is to introduce a variety of legal tools that may stimulate ideas and action for whole-of-river protection and ecosystem wellbeing for the Fraser River. There are 12 possible “tools” highlighted in this report, and three international examples:

- United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and *Declaration on the Rights of Indigenous Peoples Act* (DRIPA);
- Cumulative effects – *Yahey v British Columbia*;
- Legal Personhood – Aotearoa New Zealand’s Whanganui River (Te Awa Tupua);
- Water Sustainability Plans – British Columbia and the Xwulqw’selu Case Study;
- Joint Water Policy – BC-first Nations Water Table;
- Regional Agreements – Great Bear Rainforest Agreements;
- Joint Decision Making – Haida Gwaii Management Council;
- Municipal Agreement #1 – ÁTOL, NEUEL Memorandum of Understanding;
- Municipal Agreement #2 – Cowichan Watershed Board;
- International Cooperation – International Joint Commission
- Interjurisdictional Cooperation – Mackenzie River Basin Transboundary Water Master Agreement;
- Bilateral Agreements – British Columbia and Northwest Territories;
- International Mechanisms#1 – International Commission for the Protection of the Danube River;
- International Mechanism #2 – European Water Framework Directive;
- International Mechanism #3 – Matanza Riachuelo River Basin Authority.

Part I brings together a small part of the available data showing the decline in health of the Fraser River ecosystem and the numerous calls for a more integrated approach to its governance and management. Part II sets out legal tools and examples primarily operating in BC with one non-BC example. Part II (A) examines Indigenous rights such as UNDRIP and the new legal concern about

cumulative impacts. Part II (B) examines legal personhood for Rivers using the example from Aotearoa New Zealand of the Whanganui River. Part II (C) describes the state statutory approaches of water sustainability plans that can address upland activities as well as water quality and quantity. Part II (D) addresses various Indigenous-Provincial government arrangements for shared decision-making between Indigenous Nations and the Province of BC to demonstrate what long-term government-to-government agreements can achieve. These include the new Provincial-First Nations Water Table, a few of the longstanding shared governance agreements (Great Bear Rainforest and Haida Gwaii Management Council), and more recent collaborations with local governments. Part II (E) explores several multilateral governance agreements and the institutions flowing from them involving Canadian governments and large rivers or bodies of water, such as the longstanding International Joint Commission and the Northwest Territories-provincial agreements for waters flowing north into the McKenzie Basin. Finally, Part III introduces some prominent international examples from the European Union and Argentina where international law or court action has mandated a whole-of-river approach for specific rivers.

The choice of legal tools in Part II is oriented to those that include both watershed protection and shared governance possibilities between Indigenous and state governments or multiple parties, or that address multiple ecosystem elements. Legal tools that focus on one element of an ecosystem are not included. While laws such as the federal *Fisheries Act* or *Canadian Environmental Protection Act* address critical components of ecosystem health such as prohibiting pollution, they do not enable whole-of-river approaches. Establishing total pollution loads on a River-wide basis will be an important part of protecting the Fraser River, but relying on a single topic or impact will not address the multiple jurisdictional and governance issues facing the River.

Given the complexity of protecting a river as vast as the Fraser River that flows through many different Indigenous territories, has innumerable activities occurring within its watershed, and is affected by and can affect millions of people, this Legal Scan shows that most existing legal tools are not oriented to addressing multiple conditions of a river ecosystem. They do not cover water and land activities that have an impact on a river, and fail to create effective shared decision-making structures, which are particularly important in the BC context where there are multiple Indigenous and state legal orders. In addition, many of the state legal tools are jurisdictionally limited – either geographically or by subject matter – which created fragmentation in governance and management, the source of many of the current problems.

Many of the approaches described – such as UNDRIP, multilateral and transboundary agreements, cumulative impacts, ecosystem-based standards, and legal personhood – can be part of or influence a whole-of-river approach but are not the legal mechanism that will result in whole-of-river protection. As with the other whole-of-region protection and governance arrangements in BC, it is likely that new legal forms that can be implemented in both Indigenous and provincial/federal laws are necessary. The Great Bear Rainforest and Haida Gwaii Management Council are two unique whole-of-region regimes that resulted in provincial law reform for their implementation.

The sole existing provincial legal tool that could be oriented to a whole-of-river approach is a water sustainability plan (WSP) pursuant to the *Water Sustainability Act*¹ that can “create institutional and legal space for parallel governance”² arrangements and, in its implementation by regulation, may be able to provide state law protection for Indigenous water uses. A WSP could be an important part of establishing whole-of-river protection of the Fraser River.

¹ *Water Sustainability Act*, SBC 2014, c 15 [*Water Sustainability Act*].

² Deborah Curran & Oliver M Brandes, “Water Sustainability Plans: Potential, Options and Essential Content” (2019) POLIS Project on Ecological Governance & Environmental Law Centre, University of Victoria at 1 [Curran & Brandes].

PART I. CONTEXT: WHY THE FRASER RIVER NEEDS PROTECTION

The Fraser River is a river of global importance. It runs 1,375 kilometers from the Rocky Mountains to the Salish sea (Straight of Georgia) and has a drainage basin of 234,000 square kilometres spanning a quarter of British Columbia (BC).³ Indigenous peoples have lived in relationship with the Fraser River for over 10,000 years and this connection continues to this day.⁴ The Fraser River and its tributaries support “one of the most productive salmon fisheries in the world” and is also home to a wide variety of fish species including the critically endangered white sturgeon.⁵ The Fraser River flows through and is an integral part of a diverse array of ecosystems, including alpine tundra, grasslands, coastal rainforest, coniferous forests.⁶ Under colonial or state law, the Fraser River is a protected river pursuant to the *Water Sustainability Act*, and as a result it is the longest free flowing river in North America south of the Arctic.⁷ The Fraser River is incredibly important for Indigenous culture and ecosystem wellbeing – yet no one is taking care of the River as whole.

THE FRASER RIVER IS IMMENSELY IMPORTANT TO INDIGENOUS CULTURE

Many First Nations have fished the waters of the Fraser River for millennia, built vibrant communities along its shores, and structured their governance institutions in relation to River processes.⁸ The Fraser connects communities and has been known by many names including Setétkwe in the territory of the Secwepemc people, Ltha Koh in the territory of the Stl'at'en

³ J Lewis Robinson & Brandi Newton, “Fraser River” (13 March 2007), online: *The Canadian Encyclopedia* <<https://www.thecanadianencyclopedia.ca/en/article/fraser-river>> [J Lewis & Brandi Newton]; Fraser Basin Council, “About the Basin: A River Runs Through It – The Mighty Fraser,” online: *Fraser Basin Council* <https://www.fraserbasin.bc.ca/about_fraser_basin.html> [Mighty Fraser].

⁴ Mighty Fraser, *supra* note 3.

⁵ J Lewis Robinson and Brandi Newton, *supra* note 4; Ministry of Environment, Land and Parks, “White Sturgeon” (1997), online: <https://www2.gov.bc.ca/assets/gov/environment/plants-animals-and-ecosystems/species-ecosystems-at-risk/brochures/white_sturgeon.pdf>.

⁶ J Lewis Robinson and Brandi Newton, *supra* note 3.

⁷ *Water Sustainability Act*, *supra* note 1 at s 45, Schedule; Anne Casselman & Chris Linder, “The Health of the Fraser River” (31 May 2013), online: *Canadian Geographic* <<https://canadiangeographic.ca/articles/the-health-of-the-fraser-river/>> [Casselman & Linder].

⁸ Bruce I Cohen, “The Uncertain Future of Fraser River Sockeye Vol 1” (October 2012) at 5, online (pdf): <https://publications.gc.ca/collections/collection_2012/bcp-pco/CP32-93-2012-1-eng.pdf>; Stephen Bruyneel & Nolan Charles, “Xʷtəł'əm to Explore the Historical and Cultural Significance of the Fraser River through an Indigenous lens” (4 November 2022) Indigenous Partnerships Success Showcase.

people and Stó:lō in the territory of the Stó:lō people.⁹ The Fraser River Basin is home to more than 100 Indigenous communities.¹⁰ Of the eight Indigenous language families in BC, two – Athapaskan and Salishan – are represented in the Fraser River Basin.¹¹ All three major First Nations culture areas found in BC are represented in the Fraser River basin – Coast Salish, Plateau, and Sub-Arctic.¹²

The Fraser River is woven throughout the lives of Indigenous peoples. This relationship is reflected in the critical importance of Fraser River salmon to Indigenous communities along the River, and to their cultural practices and identity.¹³ Fraser River salmon were and are the “economic, cultural and spiritual heart” of Indigenous people living in the Fraser River Basin.¹⁴ Most First Nations traditionally had a salmon ceremony for the first salmon coming up the river. For example, certain First Nations would place the salmon “on a bed of boughs to introduce it to the Elders in a ceremony using intricately decorated wooden rods.”¹⁵ Fraser River salmon remain critically important to Indigenous food security, cultural practices, health, and economy.¹⁶

The traditional territories of Indigenous communities are embedded within the Fraser River Basin, and they have disproportionately felt the effects of the degradation of the river.

THE FRASER RIVER IS CRITICAL FOR BC’S ENVIRONMENTAL AND ECONOMIC HEALTH

The Fraser River is critical to BC’s environment and economy. This river, which drains into roughly a quarter of the land that is now called BC,¹⁷ is home to “some of Canada’s most biologically

⁹ Canadian Heritage Rivers System, “Fraser River” (1998), online: *Canadian Heritage Rivers System* <<https://chrs.ca/en/rivers/fraser-river>>.

¹⁰ John W Ferguson & Michael Healey, “Hydropower in the Fraser and Columbia Rivers: a Contrast in Approaches to Fisheries Protection” (May 2009), online: *Mekong River Commission*, <archive.iwlearn.net/mrcmekong.org/Catch-Culture/vol15_1May09/Hydropower-fraser.htm> [Ferguson & Healey].

¹¹ Fraser Basin Council, “Bridge Between Nations: A History of First Nations in the Fraser River Basin,” online (pdf): <www.neef.ca/uploads/library/8770_FBC2006_FirstNationsBooklet.pdf> at 10 [Fraser Basin Council].

¹² *Ibid* at slide 11.

¹³ Olivia Molden et al, “The Sociocultural Significance of Pacific Salmon to Tribes and First Nations” (2021) *Earth Economics*, online (pdf): <<https://static1.squarespace.com/static/561dcdc6e4b039470e9afc00/t/60c257dd24393c6a6c1bee54/1623349236375/The-Sociocultural-Significance-of-Salmon-to-Tribes-and-First-Nations.pdf>> at 16, 55.

¹⁴ Fraser Basin Council, *supra* note 11 at 12.

¹⁵ *Ibid*.

¹⁶ William I Atlas et al, “Indigenous Systems of Management for Culturally and Ecologically Resilient Pacific Salmon (*Oncorhynchus* spp) Fisheries” (February 2021), *Bioscience* Vol 71 No 2 at 187.

¹⁷ Curran & Brandes, *supra* note 2.

significant riparian and aquatic ecosystems.”¹⁸ The Fraser River Basin is the “economic engine” of the province¹⁹ in part because it is “an important component for fisheries and aquaculture industries.”²⁰

The Fraser River contains seven species of salmon that are critically important to Indigenous peoples in the area.²¹ The Fraser River is a spawning ground for commercially important varieties of Pacific anadromous salmon,²² including sockeye, pink, chum, coho and Chinook salmon.²³ In addition to being an important source of salmon, the Fraser River is also the “most productive bird habitat in Western Canada.”²⁴

Since the Fraser River is free flowing (un-dammed), all the plant matter, sediments, nutrients, and pollution the River collects can make its way downstream and flow into the Pacific Ocean.²⁵ The Fraser River reflects the landscape that surrounds it: Land management decisions within the Fraser River Basin impact the water and ecology of the River.²⁶ Since the Fraser River flows through such a diverse array of ecosystems, it is connected to the survival of a wide variety of plant and animal species.

THE FRASER RIVER IS UNDER EXTREME STRESS – NO ONE IS TAKING CARE OF THE RIVER

Despite the Fraser River’s immense “environmental, economic and cultural importance,”²⁷ it is “under extreme stress due to human activities relating to urbanization, ongoing resource extraction, agricultural and industrial development.”²⁸ A report by the Fraser Basin Council characterizes the issues the Fraser River faces as “climate change, threats to air and water quality, invasive species, diminished fish and wildlife habitat and declining agricultural lands,” all of which

¹⁸ See Marvin L Rosenau & Mark Angelo, “Saving the Heart of the Fraser: Addressing Human Impacts to the Aquatic Ecosystem of the Fraser River, Hope to Mission, British Columbia” (2007) Pacific Fisheries Resource Conservation Council at 1 [Rosenau].

¹⁹ Rosenau, *supra* note 18 at 22.

²⁰ Michael R. Ferrari et al, “Modeling Changes in Summer Temperature of the Fraser River During the Next Century,” (2007) J of Hydrology 336 at 337 [Ferrari].

²¹ Ferguson & Healey, *supra* note 10.

²² Anadromous describes “[f]ish that largely live their lives in the sea and migrate to freshwater to spawn” (Rosenau, *supra* note 18 at 12).

²³ Ferguson & Healey, *supra* note 10.

²⁴ Birds Canada, “Conserving Birds and Critical Habitat in the Fraser River Estuary, an Important Bird and Biodiversity Area,” online: *Birds Canada* <www.birdscanada.org/conserving-birds/fraser-river-estuary> [Birds Canada].

²⁵ Casselman & Linder, *supra* note 7.

²⁶ *Ibid.*

²⁷ Ferrari, *supra* note 20 at 336.

²⁸ Rosenau, *supra* note 18 at 1.

directly impact the health of the River Basin and the River itself.²⁹ These changes and resulting harms are being felt by many, including those who live adjacent to the Fraser River.

Additionally, the Outdoor Recreation Council of BC calls for “urgent action” to protect the heart of the Fraser, which is suffering from “urban encroachment, agricultural expansion, gravel removal, climate change, pollution, and commercial and industrial developments.”³⁰ The 2022 Heart of the Fraser Strategy Report summarized that the Fraser River is the site of numerous “cumulative habitat issues” including:

- Bank hardening (the replacement of complex habitat with invasive plants), “which increases water velocity along the shore;”
- Impassable flood infrastructure, which “prevents access to many sloughs and tributaries;”
- Riparian and island forest loss;
- Dikes, which increase the power of the river’s flow and lead to erosion; and
- Nutrient loading from agricultural runoff.³¹

Salmon are steadily declining in abundance and it is likely that habitat loss is a major driver of this decline.³² Additionally, increased water temperature in the Fraser River appears to be leading to salmon decline.³³ In 2010, the River’s “mean summer temperature [had] increased by 1.5°C since the 1950s and that 13 of the last 20 summers had been the warmest on record.”³⁴ These changes were “associated with extremely high levels of migration mortality in some [...] sockeye salmon stocks.”³⁵

In the face of a climate emergency, changes to the Fraser River are projected to continue. For example, the BC Ministry of Forests estimates that the snowpack in the Fraser River watershed will decline by at least 28 percent by the 2050s, which will dramatically alter the flows of the River.³⁶ Other changes include the already more intense freshets and winter floods.³⁷

²⁹ Fraser Basin Council, *supra* note 11 at 12.

³⁰ Tiffany Crawford, “BC’s ‘Most Endangered Heart of the Fraser’ River in Dire Needs of Protection: Report” *Vancouver Sun* (27 October 2022), online: <<https://vancouversun.com/news/local-news/b-c-s-most-endangered-river-in-dire-need-of-protection-report>>.

³¹ Pacific Salmon Foundation & Rivershed Society of BC, “Heart of the Fraser Strategy Session Report” (25 January 2022) at 8, online (pdf): <rivershed.com/wp-content/uploads/2022/02/HoFStrategySession_Report.R.01.25.2022.Rivershed1.pdf> [Session Report].

³² Riley J R Finn et al, “Quantifying Lost and Inaccessible Habitat for Pacific Salmon in Canada’s Lower Fraser River,” (2021) 12:7 *Freshwater Ecology* 1.

³³ Eduardo G Martins et al, “Effects of River Temperature and Climate Warming on Stock-Specific Survival of Adult Migrating Fraser River Sockeye Salmon (*Oncorhynchus nerka*)” (2011) 17:1 *Global Change Biology* 99 at 100.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ Casselman & Linder, *supra* note 7.

³⁷ Session Report, *supra* note 31 at 11.

OUR CURRENT GOVERNANCE APPROACH IS NOT WORKING AND SIGNIFICANTLY LACKING

There has been a great deal of investment in plans and initiatives to protect Fraser River salmon.³⁸ These plans and initiatives share certain characteristics, including a top-down approach, mandates from provincial ministries, “siloed coordination,” “unilateral implementation,” and a lack of First Nations involvement in program development.³⁹ According to the Pacific Salmon Foundation and the Rivershed Society of BC, “the approach to the salmon is not organized [and has] a lot of redundancy and overlap.”⁴⁰

In 2018, the Canadian Chamber of Commerce recommended that the federal and provincial governments establish a “task force, agency or committee” to manage the River.⁴¹ The Canadian Chamber of Commerce notes that strategic management of the Fraser River is challenging due to fragmented jurisdiction, listing 25 municipalities, 29 First Nations, and 20 provincial and federal ministries as interested parties.⁴² A fragmented approach does not address the interconnected nature of the Fraser River basin and can amplify jurisdictional challenges, which can slow critical protection work.⁴³

While the designation as a protected river under the *Water Sustainability Act* provides the Fraser River with some level of protection, it is not adequate.⁴⁴ The protection afforded by this designation is limited to a restriction on authorizing bank-to-bank dams anywhere along the Fraser.⁴⁵ The ongoing deterioration of the health of the Fraser River is evidence enough of the inadequacy of current governance and management regimes.

³⁸ Session Report, *supra* note 31 at 5.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ Canadian Chamber of Commerce, “Protecting the National Economy by Managing the Lower Fraser River” (2018) at 3, online (pdf): *Canadian Chamber of Commerce* <[chamber.ca/wp-content/uploads/publications/documents/Chamber%20Site/Protecting%20the%20National%20Economy%20by%20Managing%20the%20Lower%20Fraser%20River%20\(2018\).pdf](https://chamber.ca/wp-content/uploads/publications/documents/Chamber%20Site/Protecting%20the%20National%20Economy%20by%20Managing%20the%20Lower%20Fraser%20River%20(2018).pdf)>.

⁴² *Ibid.*

⁴³ See, for example, Rebecca Dyok, “New First Nations Law Intended to Protect Fraser River Sparks Dispute Over Territory” *Terrace Standard* (11 June 2020), online: <<https://www.terracestandard.com/news/new-first-nations-law-intended-to-protect-fraser-river-sparks-dispute-over-territory/>>.

⁴⁴ *Water Sustainability Act*, *supra* note 1 at s 45, Schedule.

⁴⁵ *Water Sustainability Act*, *supra* note 1 at s 45(1), Schedule.

THE COMPLEXITY OF THE FRASER RIVER REQUIRES A WHOLE-OF-RIVER APPROACH

Protecting the Fraser River requires a whole-of-river collaborative approach. This report provides some legal and quasi-legal tools to help address the decline of salmon and ecosystem wellbeing in the Fraser River through a whole-of-river lens. Due to the complexity of the problem, including the fragmented jurisdiction noted above, it is unlikely that one tool or solution will be adequate and new approaches will be required.

PART II. THE LEGAL TOOLS

A. INDIGENOUS RIGHTS

This section discusses two colonial legal avenues that place limits on the exercise of state authority and, in a limited way, uphold Indigenous rights such that they could support the development of a whole-river-protection regime. DRIPA and UNDRIP can be used as advocacy tools to support the need for enhanced protection and may present avenues for protection agreements. The recent *Yahey v BC* decision supports the use of a whole-of-river cumulative effects framework, and adoption of collaborative planning processes with Indigenous rights-holders.

DRIPA AND THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Overview

In November 2019, BC adopted DRIPA,⁴⁶ the purposes of which are:

1. To “affirm the application” of the United Nations Declaration on the Rights of Indigenous Peoples to the laws of BC;
2. Contribute to the implementation of UNDRIP; and
3. Support the affirmation of, and develop relationships with, Indigenous governing bodies.⁴⁷

DRIPA also requires that BC “take all measures necessary to ensure the laws of British Columbia are consistent with [UNDRIP].”⁴⁸ DRIPA, and the UNDRIP principles it supports, could provide persuasive advocacy tools for protecting the Fraser River. These legal instruments provide a basis that the Fraser River should be effectively protected to maintain the cultures and traditions of First Nations that are connected to the Fraser River. A s. 7 DRIPA agreement may also offer a possible mechanism for river protection.

⁴⁶ *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44 [DRIPA].

⁴⁷ *Ibid* at s 2.

⁴⁸ *Ibid* at s 3.

Background

The United Nations General Assembly adopted UNDRIP in 2007.⁴⁹ UNDRIP emphasizes the rights of Indigenous peoples to “maintain and strengthen their own institutions, cultures and traditions and to pursue their development in keeping with their own needs and aspirations.”⁵⁰ BC was the first province in Canada to commit to implementing UNDRIP, and DRIPA is part of that commitment.⁵¹ On March 30, 2022, the Province of BC released the first five-year DRIPA Action Plan outlining strategies and commitments for aligning BC laws and actions UNDRIP.⁵²

Governance

Much of UNDRIP is focused on recognizing Indigenous authority and control over lands, territories, and resources. Many UNDRIP articles relate to watershed governance (see Appendix A for the text of these articles) and address the right to the protection of culture, and economic and spiritual practices. Insofar these practices are linked to the Fraser River and its watersheds, these Articles may be engaged. Other Articles are expressly linked to watershed protection. For example, Article 29 articulates the right to the conservation and protection of the environment and Article 32 requires states to obtain the free, prior, and informed consent of Indigenous peoples prior to approving projects that affect lands, territories, and “other resources” particularly in connection with water.⁵³

BC’s application of UNDRIP through DRIPA has several elements. Section 7 of DRIPA is particularly important, because it expressly contemplates the Province of BC entering into agreements with Indigenous governing bodies to jointly exercise statutory decision-making power, or agreements requiring the consent of an Indigenous governing body before the exercise of a statutory decision-making power.⁵⁴ While these provisions demonstrate provincial recognition of Indigenous governance and rights, it requires the negotiation of individual, subject matter agreements not

⁴⁹ United Nations Department of Economic and Social Affairs, Indigenous People, “United Nations Declaration on the Rights of Indigenous Peoples” online (pdf): *United Nations* <social.desa.un.org/sites/default/files/migrated/19/2018/11/UNDRIP_E_web.pdf> [UNDRIP].

⁵⁰ United Nations Permanent Forum on Indigenous Issues, Press Release “Historic Milestone for Indigenous Peoples Worldwide as UN Adopts Rights Declaration,” online (pdf): <https://www.un.org/esa/socdev/unpfii/documents/Declaration_ip_pressrelease.pdf>.

⁵¹ The federal government has also brought its own UNDRIP legislation into force (see *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14).

⁵² Government of British Columbia, “Declaration Action Plan,” online: *Government of British Columbia* <<https://www2.gov.bc.ca/gov/content/governments/indigenous-people/new-relationship/united-nations-declaration-on-the-rights-of-indigenous-peoples/implementation>> [Declaration Action Plan]; Government of British Columbia, “Declaration on the Rights of Indigenous Peoples Act Action Plan 2022-2027” (2022), online: *Government of British Columbia* <https://www2.gov.bc.ca/assets/gov/government/ministries-organizations/ministries/indigenous-relations-reconciliation/declaration_act_action_plan.pdf>.

⁵³ UNDRIP, *supra* note 49.

⁵⁴ DRIPA, *supra* note 46 at s 7.

comprehensive governance approaches. To-date, the *Environmental Assessment Act* is the only colonial law that acknowledge the commitment to implementing UNDRIP.⁵⁵

The Province of BC amended the *Interpretation Act* in 2021 to include s. 8.1, which confirms that every Act and regulation in BC must be construed as being consistent with DRIPA.⁵⁶ However, DRIPA itself simply affirms the application of UNDRIP to the laws of B.C. It remains to be seen how the Articles will be applied to BC laws. As such, it is too early to say what impact DRIPA will have on resource or watershed management. While consent-based decision-making does create a framework for Indigenous Nations to engage with BC as recognized rights-holders, the ability to form consent-based agreements has only occurred for projects falling under the *Environmental Assessment Act*.⁵⁷

Additionally, the 2022-2027 DRIPA Action Plan states that the Province of BC will “complete and implement government-to-government agreements at recognize Indigenous self-government and self-determination,”⁵⁸ and will “[c]ollaborate with First Nations to develop and implement strategies, plans and initiatives for sustainable water management, and to identify policy or legislative reforms supporting Indigenous water stewardship, including shared decision-making. Co-develop the Watershed Security Strategy with First Nations and initiate implementation of the Strategy at a local watershed scale.”⁵⁹

Relevance for Fraser River Protection

Within the framework of UNDRIP, DRIPA and the Action Plan provide persuasive advocacy tools that may be used to advance any of the governance tools described within this Legal Scan. In the absence of legislative authority to enter into consent-based agreements with the Province, Indigenous Nations may still use the UNDRIP articles as a framework for their own agreements with each other and non-Indigenous actors within their territories. The recently announced Collaborative Engagement Agreement between the Taku River Tlingit First Nation and Canagold Resource Ltd. is one such example of a consent-based agreement between a Nation and a proponent in relation to a specific project.⁶⁰

⁵⁵ *Environment Assessment Act*, SBC 2018, c 51 at s 2.

⁵⁶ See *Interpretation Act*, RSBC 1996, c 238 at s 8(1)(3).

⁵⁷ The Tahltan Consent Agreement is the first agreement developed under s 7. It outlines a consent-based decision-making process between the Tahltan Central Government and BC in relation to revitalization of the Eskay Creek mining project. Importantly, the Agreement commits both parties to a consensus-seeking process but does not appear to ultimately prohibit BC from issuing a certificate under the *Environmental Assessment Act* if consent is not achieved. See *Environmental Assessment Act* ss 29(5)-(8) and Tahltan Consent Agreement s 9(1) and Part 10.

⁵⁸ Declaration Action Plan, *supra* note 52 at 1(3).

⁵⁹ *Ibid* at 2(7).

⁶⁰ See Taku River Tlingit First Nation, Press Release “Take River Tlingit Enter into a Historic Collaborative Engagement Agreement with Canagold for the New Polaris Site,” online (pdf): *Taku River Tlingit First Nation* <<https://trtfn.com/wp-content/uploads/2023/03/TRTFN-Press-Release-Marh-29th-2023.pdf>>.

CUMULATIVE EFFECTS: YAHEY V BRITISH COLUMBIA⁶¹

Overview

In 2021, the BC Supreme Court released its decision in response to a claim brought by the Blueberry River First Nation regarding BC's infringement of their Treaty 8 rights (*Yahey*). For this Legal Scan, *Yahey* is important for two reasons: (1) It is the first case to assess the cumulative effects of development on Indigenous rights, and (2) It is one of only a few cases that challenge a state regulatory regime, rather than a single decision made by that regime. In *Yahey*, BC's taking up of lands for industrial development, and its failure to address the cumulative effects of that development, were found to result in an infringement of an established treaty right.

Yahey supports the adoption of a cumulative assessment framework, particularly in relation to whether Indigenous rights holders can carry out activities across their territories and may lead to changes in how Provincial permitting regimes are managed. In a watershed context, the case supports use of a whole-of-river cumulative effects framework, and adoption of collaborative planning processes with Indigenous rights-holders.

Background

The Blueberry River First Nation is a member of Treaty 8 in northeastern BC.⁶² Treaty 8 recognizes the First Nation's right to hunt, trap and fish throughout its' treaty lands. However, significant industrial development, particularly for oil, gas and forestry, has taken place on the territory.⁶³ The Blueberry River First Nation argued that the extent of development had an impact on its ability to meaningfully practice its treaty rights, and that the cumulative effects from development breached the Treaty and infringed its rights.⁶⁴ The court concluded that 73% of the claim area was within 250 metres of an industrial disturbance, and 84% within 500 metres of an industrial disturbance.⁶⁵ Importantly, the court held that the Blueberry River First Nation's treaty rights had been infringed based on the "cumulative effects of industrial development."⁶⁶ This development had "significantly diminished the ability of Blueberry members to exercise their rights to hunt, fish and trap in their territory as part of their way of life and therefore constituted an infringement of their treaty rights."⁶⁷

⁶¹ *Yahey v. British Columbia*, 2021 BCSC 1287 [*Yahey*].

⁶² The original treaty was signed in 1899, Blueberry joined as an adherent in 1900.

⁶³ *Yahey*, *supra* note 61 at para 3.

⁶⁴ *Ibid* at para 3.

⁶⁵ *Ibid* at para 905.

⁶⁶ *Ibid* at para 3.

⁶⁷ *Ibid*.

Application to the Fraser River

Even in a non-treaty context, there is an argument that cumulative effects are affecting the Fraser River, which has an impact on the Indigenous communities that rely on the River and may have infringed their aboriginal rights. If an infringement is established, the onus is on the Crown to justify the infringement.⁶⁸

It is important to note, however, certain distinctions in *Yahey* that may affect such a claim. For example, *Yahey* concerned treaty rights, not aboriginal rights, and the case revolved around a uniquely prevalent and visible degree of industrial development occurring in the Blueberry River First Nation's territory. In places where these factors do not exist, and where the cause of impacts may be more diffuse or difficult to identify, it will likely be more difficult to establish that a right has been infringed because of cumulative effects.

B. LEGAL PERSONHOOD

This section explores an example of legal personhood as a potential tool for whole-river-protection.⁶⁹ Legal personhood relies, in part, on colonial laws to bestow a river with the rights of an entity with legal standing. There are a variety of global examples to draw from, including the Ganges and Yamuna Rivers in India, and the Rio Atrato in Columbia.⁷⁰ The Whanganui River - Te Awa Tupua in Aotearoa New Zealand was the first river to be granted legal personhood in colonial law.

⁶⁸ Note that in *Yahey*, the Province chose not to justify the infringement.

⁶⁹ We also note that one could pursue enshrining constitutional rights of nature in the Canadian Constitution; however, in the current Canadian political climate this is unlikely. For example, the Vilcabamba River case in Ecuador saw constitutional rights of nature upheld to protect the river: Natalia Greene, "The First Successful Case of the Rights of Nature Implementation in Ecuador" (21 May 2011), online: *Global Alliance for the Rights of Nature* <<https://www.garn.org/first-ron-case-ecuador/>>.

⁷⁰ Michael Safi, "Ganges and Yamuna Rivers Granted Same Legal Rights as Human Beings" *The Guardian* (21 March 2017), online: <<https://www.theguardian.com/world/2017/mar/21/ganges-and-yamuna-rivers-granted-same-legal-rights-as-human-beings>>; Susan Nerberg, "I am Mutehekau Shipu: a River's Journey to Personhood in Eastern Quebec" *Canadian Geographic* (8 April 2022), online: <<https://canadiangeographic.ca/articles/i-am-mutehekau-shipu-a-rivers-journey-to-personhood-in-eastern-quebec/>>; Laura Villa, "The Importance of the Atrato River in Colombia Gaining Legal Rights" (5 May 2017), online: *Earth Law Centre* <<https://www.earthlawcenter.org/blog-entries/2017/5/the-importance-of-the-atrato-river-in-colombia-gaining-legal-rights>>.

AOTEAROA NEW ZEALAND'S WHANGANUI RIVER (TE AWA TUPUA)

Overview

In 2017, the *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (“*Te Awa Tupua Act*”)⁷¹ became the first piece of legislation globally to grant a river legal personhood.⁷² This means that the Te Awa Tupua has “the rights, duties, powers and liabilities of an entity with legal standing.”⁷³ The Māori had sought to establish legal personhood to protect the River and to better reflect the Māori people’s traditional view of the River as an ancestor and “more-than-human acto[r]” in Māori and colonial legal traditions.⁷⁴

It is unclear how effective this legal status has been in protecting or improving the Te Awa Tupua’s ecosystem health. Some academics claim that legal personhood is not effective at whole-river protection unless it (1) grants the local Indigenous community the ability to govern and manage the river, and (2) vests private ownership of the river, which includes the riverbed and the water, to the river as a legal person while others view colonial legal personality of the river as connecting colonial and Indigenous legal orders and acknowledge Māori law for knowing, caring about and using the river.⁷⁵

Background

Long before European arrival, Te Awa Tupua was an integral part of many iwi’s (Māori tribes) existence.⁷⁶ The Whanganui iwi have had a connection with the Te Awa Tupua for “at least 880 years, 700 years before European settlers arrived” and had fought for over 160 years to gain legal protection of Te Awa Tupua.⁷⁷

In 2017, the *Te Awa Tupua Act* “gave effect to a [2014] deed of settlement” made between the Crown and local Māori community.⁷⁸ The Act declared that the Te Awa Tupua River possessed legal personhood, although it did not grant the Whanganui iwi ownership of the River.⁷⁹ This

⁷¹ *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ), 2017/07 [*Te Awa Tupua Act*].

⁷² Toni Collins & Shea Esterling, “Fluid Personality: Indigenous Rights and the *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* in Aotearoa New Zealand” (2019) 20:1 *Mel J Int Law* 197 at 197 [Collins].

⁷³ *Ibid* at 199.

⁷⁴ Meg Parsons, Karen Fisher & Roa Petra Crease, *Decolonising Blue Spaces in the Anthropocene: Freshwater Management in Aotearoa New Zealand* (Switzerland: Palgrave Macmillan, 2021) at 257.

⁷⁵ See Collins, *supra* note 72; Jacinta Ruru, “Indigenous Ancestors: Recognizing Legal Personality of Nature as a Reconciliation Strategy for Connective Sustainable Governance” in Atapattu, Sumudu A., Sara L. Seck, and Carmen G. Gonzalez (eds.) *The Cambridge Handbook of Environmental Justice and Sustainable Development* (Cambridge: Cambridge University Press, 2021) at 183-195.

⁷⁶ *Ibid* at 199.

⁷⁷ *Ibid*.

⁷⁸ Cristy Clark et al, “Can You Hear the Rivers Sing? Legal Personhood, Ontology, and the Nitty-Gritty of Governance” (2017) 45 *Ecology LQ* at 800 [Clark].

⁷⁹ *Ibid*; see *Te Awa Tupua Act*, *supra* note 74 at s 14(1); see also Collins, *supra* note 72 at 199.

means, theoretically, Te Awa Tupua can be a plaintiff and sue other legal persons that harm it.⁸⁰ The *Te Awa Tupua Act* establishes both the Te Awa Tupua River's personhood and the Office of Te Pou Tupua, which represents the River.⁸¹

Governance

An integral aspect of the *Te Awa Tupua Act* is that it created the Office of Te Pou Tupua as the River's "human face."⁸² The *Act* also establishes "a hierarchy of consultative bodies" and a fund to support the legal framework.⁸³ The Office of Te Pou Tupua is a well-funded two-person committee; one member represents the local iwi, and the other represents the Crown.⁸⁴ Similar to a board of directors acting as the interface between the intangible corporation and the legal system, the Te Pou Tupua bears responsibility for ensuring the Te Awa Tupua River is protected under the *Act*. Protection could include the Te Pou Tupua suing the New Zealand government or third parties for violating the Te Awa Tupua's rights.

Application to the Fraser River

Although the *Te Awa Tupua Act* vests legal personhood in the River, it "does not offer significant change to the Whanganui iwi's ability to govern and manage the River [and] most significantly it does not afford the Whanganui iwi ownership of the River."⁸⁵ Existing private property rights and water rights remain in place.⁸⁶ However, the Te Pou Tupua is a funded dedicated body that acts on behalf of the River as a whole, and can take legal and other steps to protect the River.

C. LEGISLATIVE TOOLS

This section looks at colonial legislative tool that could be used to advance whole-river-protection. Water Sustainability Plans in BC are one the strongest and most immediate mechanisms that could, upon adoption through provincial regulation, provide legal protection.

⁸⁰ Clark, *supra* note 78 at 800.

⁸¹ *Ibid.*

⁸² *Ibid*; see *Te Awa Tupua Act*, *supra* note 71 at s 18.

⁸³ Clark, *supra* note 78 at 800.

⁸⁴ *Ibid* at 257.

⁸⁵ Collins, *supra* note 72 at 201.

⁸⁶ *Ibid* at 202; *Te Awa Tupua Act* *supra* note 71 at s 16..

BC WATER SUSTAINABILITY PLANS: XWULQW’S ELU CASE STUDY

Overview

Water in its natural state is not owned in Canada; however, in BC the presumption is that under the *Constitution Act, 1867* the Province of BC has the authority to establish a legal framework for managing water.⁸⁷ In BC, the *Water Sustainability Act* is the principal law for managing the diversion and use of water resources and enables the development of water sustainability plans (WSPs) that can bind a range of statutory decision makers, establish agreements about dealing with conflicts about water, and address water quality and quantity issues.⁸⁸

WSPs offer a new framework for water management and potentially, “parallel governance”⁸⁹ by Indigenous Nations alongside state decision-makers. They may also be able to provide statutory protection for water health and Indigenous water uses.⁹⁰ As such, a WSP may be an effective first step under the current legal regime for establishing whole-of-river protection within the Fraser River Basin. The recently announced Xwulqw’selu Water Sustainability Plan (“WSP”) is the first example of its kind under the *Water Sustainability Act*.

Background

The process for developing the Xwulqw’selu WSP was initiated in 2020, when the Chief of Cowichan Tribes and the provincial Minister of Forests, Lands, Natural Resource Operations and Rural Development signed an interim letter of agreement (“ILOA”).⁹¹ The ILOA is a government-to-government agreement that commits the partners to seek consensus recommendations regarding Koksilah Watershed planning,⁹² including “scoping of a long-term agreement for ongoing collaborative management.”⁹³ In response to recommendations by Cowichan Tribes and provincial decision-makers a Ministerial Order was issued in 2022 designating the Xwulqw’selu – Koksilah

⁸⁷ See Curran & Brandes, *supra* note 2 at 35.

⁸⁸ *Water Sustainability Act*, *supra* note 1 at 22 64-88; see also Government of British Columbia, “Water Sustainability Act,” online: <www2.gov.bc.ca/gov/content/environment/air-land-water/water/laws-rules/water-sustainability-act>; Deborah Curran & Oliver M. Brandes, “Water Sustainability Plans: Potential, Options and Essential Content” (2019) POLIS Project on Ecological Governance & Environmental Law Centre, University of Victoria online: <<https://poliswaterproject.org/files/2019/10/POLIS-WSP2019-6e1-web.pdf>>.

⁸⁹ Curran & Brandes, *supra* note 2 at 7.

⁹⁰ *Ibid.*

⁹¹ Government of British Columbia, News Release, “Partnership Supports Management of Koksilah Watershed” (7 February 2020), online: <news.gov.bc.ca/releases/2020FLNR0015-000248>.

⁹² See Cowichan Tribes and Government of British Columbia (Minister of Forests, Lands, Natural Resource Operations and Rural Development), “Government to Government Interim Letter of Agreement” (7 February 2020), online (pdf): <<https://cowichanwatershedboard.ca/wp-content/uploads/2020/02/2020-02-07-Cowichan-Tribes--BC-Interim-Letter-of-Agreement--Koksilah.pdf>> [ILOA].

⁹³ *Ibid.*

Watershed and water sustainability planning area.⁹⁴ This is a milestone step that allows for the development of a WSP, which is anticipated in 2023.⁹⁵

Governance

WSPs are a statutory tool that draw their authority from the *Water Sustainability Act*. They are meant to assist in preventing or addressing conflicts between water users, risks to water quality, risks to aquatic ecosystem health, and restoration measures in relation to a damaged aquatic ecosystem.⁹⁶ They can be initiated by the Minister or by request.⁹⁷

While the *Water Sustainability Act* sets out certain mandatory content for a WSP, the actual recommendations contained in a WSP are not prescribed, meaning there is flexibility in the recommendations that can be developed.⁹⁸ Proposed WSP's can be voluntary, or they can be legally binding, depending on the recommendations they contain. If a WSP contains a recommendation that a regulation or order be made in colonial law, the Minister may forward the proposed WSP to the Provincial Cabinet, which may accept all or part of the proposed WSP and adopt parts by regulation. Those parts will have the force of law and can bind statutory decision makers, reduce volumes permitted under water licences, and restrict the use of land or resources.⁹⁹ When WSPs are used as part of government-to-government relationships between Nations and the Province, formal adoption and implementation by both parties would enable the WSP in multiple legal orders.¹⁰⁰

WSPs can have “significant impacts on the way water is managed or governed locally.”¹⁰¹ As provincial tools, “WSPs cannot adequately account for Indigenous law and aboriginal rights.”¹⁰² Nevertheless, they can create institutional and legal space for “parallel governance,”¹⁰³ and “create opportunities for cooperation, reconciliation, and operation of legal systems to build trust, new institutions, and effective outcomes.”¹⁰⁴

[I]t is important that affected Indigenous nations have a government-to- government relationship with the Province of B.C. that reflects a parallel governance and reconciliation

⁹⁴ Government of British Columbia, Order, *Ministerial Order*, M8 (13 January 2022), online: www.bclaws.gov.bc.ca/civix/document/id/mo/mo/m0008_2022.

⁹⁵ Koksilah Watershed Water Sustainability Plan Scoping Initiative, “Scoping a Water Sustainability Plan,” online: *Koksilah Water* <<https://www.koksilahwater.ca/wspscoping>>.

⁹⁶ *Water Sustainability Act*, *supra* note 1 at s 65(1)(a).

⁹⁷ *Ibid* at s 65.

⁹⁸ *Ibid* s 73(1)(d).

⁹⁹ *Ibid* s 75, 76, 78, 79; see also Curran & Brandes, *supra* note 2 at 6.

¹⁰⁰ Curran & Brandes, *supra* note 2 at 14.

¹⁰¹ Curran & Brandes, *supra* note 2 at 7.

¹⁰² *Ibid*.

¹⁰³ *Ibid*.

¹⁰⁴ *Ibid*.

*process that either enables the effective development of WSPs as expressions of shared authority or operates alongside a WSP and safeguards Indigenous laws and rights.*¹⁰⁵

Indigenous rights and title can be recognized through specific incorporation into the WSP itself.¹⁰⁶ For example, by “allocating a certain amount of water for specific Indigenous uses through a licence or reserve or by establishing a watershed-specific environmental flow regime that ensures adequate flows for fish and riparian health.”¹⁰⁷ Indigenous communities can be directly involved in WSP implementation through many approaches, such as:

- “Establish environmental flow standards that adequately protect fish and recommend that the Province of BC adopt that standard in law”; and
- “Identify critical environmental flow thresholds at a sufficient level for fish in their own watercourses, and establish monitoring commitments for these watercourses.”¹⁰⁸

Application to the Fraser River

Water sustainability plans are a comprehensive planning mechanism that can address the many impacts on water health. Their implementation, if agreements expressed in them are enacted by regulation, can affect upland activities and remedy past statutory decisions that enable pollution, land disturbance and management approaches. They do not, on their face, establish new governance arrangements but can reflect an agreement between Indigenous and non-Indigenous governments for shared decision making. Given the disparate impacts on the Fraser River a WSP could address the conflicts between the environment and water use and involve the many Indigenous Governing Organizations.

D. COLLABORATIVE GOVERNANCE AGREEMENTS

This section outlines various collaborative or shared decision-making governance agreements that provide insights into how a whole-river-protection regime could be created. The new BC First Nations Water Table demonstrates a multi-Nation policy-oriented structure. Two region-wide government-to-government approaches provide examples of decision-making frameworks. The Great Bear Rainforest Agreements establish standards for ecosystem protection that translate into forestry practices, and the Haida Gwaii Management Council is a joint Haida-Province of BC body that oversees statutory decisions for forestry, parks and heritage protection. The final two

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid* at 15.

examples are at the municipal scale. One is a Memorandum of Understanding between the W̱SÁNEĆ Leadership Council and a local municipality and the other is the creation of the Cowichan Watershed Board. These collaborative agreements may provide ideas for Fraser River protections and/or models for how a whole-river-protection regime could work.

BC-FIRST NATIONS WATER TABLE

Overview

In March 2023, the Province announced a \$100 million Watershed Security Fund and the co-development of a new watershed security strategy with First Nations¹⁰⁹ The announcement formalizes the role of the BC- First Nations Water Table (the “Water Table”) in the co-development of the Watershed Security Strategy and in co-managing the Watershed Security Fund.¹¹⁰

The Water Table sets a new standard for collaboration in relation to watershed health as it is a multi-nation and province-wide mechanism through which the Province of BC has agreed to make watershed-related commitments and address issues. It could provide an avenue for dealing with concerns in relation to the Fraser River, or alternatively, a decision-making model which could be adapted specifically for the Fraser Basin.

Background

The Water Table commenced in June 2022 to provide a “collaborative and enduring” structure for watershed management in BC.¹¹¹ The table is comprised of representatives from various provincial ministries and the First Nations Water Caucus,¹¹² which is made up of fifteen First Nations delegates, representing watersheds across the Province.¹¹³ A key priority for the Water Table has been the development of a province-wide Watershed Security Strategy.¹¹⁴ An Intentions Paper¹¹⁵ for the proposed Watershed Security Strategy was released in March 2023, coinciding with the aforementioned funding announcement. BC is currently seeking feedback on the proposed Watershed Security Strategy, the final version of which is expected to be released in 2023-24.¹¹⁶

¹⁰⁹ Government of British Columbia, News Release, “Watershed Strategy Co-Developed with First Nations, \$100 million Invested” (6 March 2023), online: <news.gov.bc.ca/28317>.

¹¹⁰ *Ibid.*

¹¹¹ Government of British Columbia, “Watershed Security Strategy and Fund Intentions Paper” (March 2023) at 5, online (pdf): <engage.gov.bc.ca/app/uploads/sites/722/2023/03/WSSF-Intentions-Paper-March2023.pdf> [Intentions Paper].

¹¹² *Ibid.*

¹¹³ First Nations Fisheries Council of British Columbia, “Expressions of Interest for a New BC First Nations Water Caucus,” online: <www.fnfisheriescouncil.ca/event/expressions-of-interest-for-new-bc-first-nations-water-caucus/>.

¹¹⁴ *Ibid.*; see also Intentions Paper, *supra* note 111 at ii.

¹¹⁵ Intentions Paper, *supra* note 111.

¹¹⁶ *Ibid.* at i.

Governance

The Water Table is a representative collaborative structure that supports the development of “consensus-based, co-developed recommendations to First Nations’ and Provincial decision-makers about watershed matters of mutual interest.”¹¹⁷ Importantly, the policy intentions in the Intentions Paper articulate a desire to ensure that consent-based decision-making, and Indigenous priorities for watershed management are incorporated into governance structures and related policies:¹¹⁸

1. Enable new approaches to watershed governance through inclusion, capacity building and collaboration.
2. Pursue legislative change, policy development and alignment of laws and policy to be consistent with the UN Declaration.
3. Build a strong foundation of watershed science and knowledge that is accessible for use by Indigenous Peoples, local governments and communities.
4. Apply holistic approaches to watershed management and ecosystem protection.
5. Balance water supply and demand (quality and quantity) at the watershed scale to address the needs of people, the environment and the economy.

Application to the Fraser River

If fully implemented, these policy intentions could substantially advance Fraser River protections. Broadly, the Watershed Security Strategy may have significant governance implications, not the least of which is establishing the Water Table as a collaborative body that can address regional and provincial issues. The Water Table is, however, not representative of most Indigenous Nations nor is there a defined mechanism through which regional priorities interact between the Water Table and individual Nations. It is the first ongoing forum within which the Province of BC and representatives of Indigenous organizations can work on common issues related to water.

THE GREAT BEAR RAINFOREST AGREEMENTS

Overview

The Great Bear Rainforest (“GBR”) Agreements are an example of a successful government-to-government approach to shared decision-making that also protects a globally significant biodiverse region on BC’s central coast. Importantly, these agreements provide a model for establishing quantitative ecosystem-based standards, which form the foundation of ecosystem-based management (“EBM”) in the GBR. For the GBR, the foundational objective was originally to

¹¹⁷ Chief Lydia Hwitsum and Assistant Deputy Minister James Mack, in Intentions Paper *supra* note 111 at ii.

¹¹⁸ Intentions Paper, *supra* note 111 at iii-iv; see, for example, Strategic theme 1(2) at 9, Strategic theme 2(1) at 10-11 and Strategic theme 5(3) at 17.

secure 70% of “representative ecosystem types in old growth” forests.¹¹⁹ This overarching metric drove and constrained decision making of the various parties to the agreements and transformed forestry operations in the region.¹²⁰ A similar metric could be established for defining what constitutes as the policy target for the wellbeing of the Fraser River.

Background

The GBR Agreements constitute a range of agreements and legal instruments established between a coalition of First Nations and the Province of BC. These agreements have been heralded as “one of the most robust examples of agreements that move towards reconciliation” in a manner that promotes ecosystem protection and economic development for local communities.¹²¹ The coalition of First Nations – involved predominantly under the umbrella organization Coastal First Nations - include the Wuikinuxv, Heiltsuk, Nuxalk, Kitasoo/Xai’xais, Gitga’at, Haisla, and Metalkatla First Nation.¹²²

The process by which the GBR Agreements developed was two tiered. Environmental organizations and forestry companies agreed on ecosystem-based parameters that they provided to First Nations and Province of BC as the authoritative decision makers in the region.¹²³ The First Nations and BC then considered these stakeholder recommendations during government-to-government negotiations, which resulted in the various GBR Agreements.¹²⁴

The foundational objective of the GBR agreements was originally to protect 70% of ecologically representative old growth forests. Initially, the parties “consented to a transitional old-growth standard of fifty per cent in 2009, monitored the impact of that standard, and agreed to increase old-growth protection to seventy per cent in 2016” as an updated “benchmark for ecological integrity.”¹²⁵

To achieve these conservation standards, the BC government “relied on the ‘zoning’ of Crown land through land use designations, offering varying degrees of ecological protection.”¹²⁶ These land use designations that required provincial law reform included:

1. Conservancies, a new type of protected areas designation under the *Parks Act* and *Protected Areas of BC Act*, whose purpose include the exercise of Indigenous rights;
2. Biodiversity mining and tourism areas (“BMTAs”); and

¹¹⁹ Curran & Brandes, *supra* note 2 at 841.

¹²⁰ *Ibid.* For more information and detail on aspects of the GBR that go beyond ecosystem-based standards, see Deborah Curran, “Legalizing the Great Bear Rainforest Agreements: Colonial Adaptations to Reconciliation and Conservation” (2017) 21:41 McGill L J 814 – 860.

¹²¹ *Ibid* at 859.

¹²² *Ibid* at 815–16.

¹²³ *Ibid* at 817.

¹²⁴ *Ibid.*

¹²⁵ *Ibid* at 843, 844.

¹²⁶ *Ibid* at 836.

3. EBM operating areas that established ecosystem and cultural values that required protection throughout areas in which forestry would occur.

Governance

While “[t]here is already a dizzying array of written agreements relating to the commitments known as the GBR agreements, and decision making is occurring across the landscape and bureaucracies at all levels,”¹²⁷ nevertheless, there are four general decision-making processes or agreements that are implicated in conservation in the GBR:

1. *Land and Resource Protocol Agreement (“LRPA”)*,¹²⁸
2. *Reconciliation Protocol* that establishes specific processes and timelines for consultation on proposed activities within the region;¹²⁹
3. *GBR Land Use Order* under the *Land Act* that establishes land use objectives for the protection of ecosystem and cultural values that bind activities under the *Forest and Range Practices Act*;¹³⁰
4. First Nation-specific collaborative management agreements for conservancies.¹³¹

In addition, the *Great Bear Rainforest (Forest Management) Act* established the annual allowable cut for the region for a ten-year period and enacted the transfer and retirement of forestry tenures.¹³²

The GBR Agreements are criticized for two main reasons: (1) for putting too much reliance on industry’s professionals to ensure compliance of conservation objectives,¹³³ and (2) that BC’s decision-making authority makes this entire process merely an enhanced consultation.¹³⁴ However, the foundational objective of securing 70% of representative old growth is still able to drive or constrain “the decisions made by qualified professionals at the stand level.”¹³⁵ Further, while the BC government retains ultimate decision-making authority, the GBR Agreements have created a “transparent and accountable” process that is improving the conservation and ecological wellbeing of the GBR in a way “that benefit[s] the First Nations on whose territories the decisions [are] being made.”¹³⁶

¹²⁷ *Ibid* at 849.

¹²⁸ *Ibid*.

¹²⁹ *Ibid*.

¹³⁰ *Ibid*.

¹³¹ *Ibid*.

¹³² SBC 2016 c 16.

¹³³ *Ibid* at 841.

¹³⁴ *Ibid* at 852.

¹³⁵ *Ibid* at 841.

¹³⁶ *Ibid* at 852.

Application to the Fraser River

Indigenous governing organizations in the Fraser River watershed could adopt specific EBM standards to drive governance changes in the watershed. Key components would be to establish a standard that will constitute a benchmark of ecological integrity, similar to 70% old growth protection for GBR, and enter into government-to-government agreements with the Province of BC that will create land use zoning and decision-making models for ensuring the implementation and adaptation of conservation along the Fraser River. An ecosystem standard for the Fraser River could be 70% (or some number determined by First Nations, Industry, scientists etc.) of protection of representative ecosystems up and down the River, a flow volume at specific places in each Indigenous territory, and an total pollutant load. This conservation could be achieved through various types of land use zoning, as in GBR, that include complete protection, protected areas permitting First Nations flexibility in how they have authority over their territory, and Indigenous-BC-industry agreements that account for cumulative impacts and establish defined water quality parameters.

JOINT STATUTORY DECISION MAKING: THE HAIDA GWAII MANAGEMENT COUNCIL

Overview

The Haida Gwaii Management Council (“HGMC”) is a unique joint decision-making body composed of two appointees from the Council of Haida Nation (“CHN”), two appointees from the BC Government and one chair that is appointed by agreement of both parties and obtains its authority from a government-to-government agreements, Haida law and provincial law.¹³⁷ HGMC is unique because:

1. The HGMC is created pursuant to both Haida law and BC law, and as such the members must act within their legislated authority under both legal orders;
2. The members make decisions independently of their respective parties; and
3. The BC government does not have veto power over the HGMC’s decision.

As such, the HGMC represents a novel government to government decision making body, which could be used as a model for a similar “Fraser River Management Council” between First Nations and the BC government. Although it is important to note that a Fraser River Management Council would undoubtedly involve many First Nations governments, whereas the HGMC is only a bilateral agreement between one First Nation and the Province of BC.

¹³⁷ See *Haida Gwaii Reconciliation Act*, SBC 2010, c 17 [HGRA].

Background

The HGMC is a product of the Haida Nation and Province of BC's efforts to create a productive, respectful relationship to land and natural resource management on Haida Gwaii. In 2003, Haida and BC initiated a "community-based, strategic level land use planning process."¹³⁸ In 2007, the parties signed a Strategic Land Use Agreement ("SLUA") and began looking seriously at how to protect areas of importance and establish an ecosystem-based management ("EBM") forest management regime on Haida Gwaii.¹³⁹ In 2010, the parties created the HGMC under the Haida and provincial state legal orders pursuant to the *Kunst'aa Guu-Kunst'aayah Reconciliation Protocol*.¹⁴⁰

The HGMC is legally authorized to implement an EBM regime on Haida Gwaii, specifically through the implementation of the Haida Gwaii Land Use Objective Orders ("LUOO") and by determining the total annual allowable cut ("AAC") for logging industry on the island.¹⁴¹ The BC Chief forester must respect the HGMC's annual allowable cut determination and allocate accordingly to private license holders wishing to log.¹⁴²

Governance

Two notable governance functions of the HGMC that implement the EBM regime on Haida Gwaii are its determination of annual allowable cut for the Haida Gwaii Management Area,¹⁴³ and its ability to amend the LUOO. The Haida Gwaii LUOO establishes legal requirements that mandate licence holders and industry to implement ecosystem-based management on Haida Gwaii in such a way as to support "Haida cultural values, [...] ecosystem integrity and provide environmental benefits by maintain [biodiversity]."¹⁴⁴

Application to the Fraser River

HGMC's shared decision making and ecosystem standards is instructive as a model for Fraser River protection. The Province of BC and the Indigenous governing organizations could establish a joint decision-making council which could have the legal authority under both Indigenous and BC law to implement a whole-of-river approach to statutory decision making. However, if this approach were to be similar to HGMC, it would likely require such a management council to identify the governance decisions that would have the greatest impact on the river sustainability and

¹³⁸ See Haida Gwaii Management Council, "Haida Gwaii Land Use Objectives Order, Consolidated Version" at 1, online (pdf): <www.haidagwaiimanagementcouncil.ca/wp-content/uploads/2019/03/HGLUOO-Consolidated-Order-2017-Final-Signed.pdf> [LUOO].

¹³⁹ *Ibid.*

¹⁴⁰ Council of the Haida Nation and Province of British Columbia, "Kunst'aa Guu-Kunst'aayah Reconciliation Protocol" (2009), online (pdf): <www.haidanation.ca/wp-content/uploads/2017/03/Kunstaa-guu_Kunstaayah_Agreement.pdf>.

¹⁴¹ See *Forest Act*, RSBC 1996, c 157 at s 8(10) [*Forest Act*] and *HGRA*, *supra* note 137 at s 5.

¹⁴² *Forest Act*, *supra* note 141 at s 8(11).

¹⁴³ The Haida Gwaii Management Area encompasses all harvestable timber on the island.

¹⁴⁴ See LUOO, *supra* note 138 at "Background."

wellbeing, such as flow volumes and total pollution (or water quality) and landscape fragmentation. In addition, the HGMC is a bilateral arrangement between two legal orders. There may be challenges with achieving consensus in a Fraser River context that involves many Indigenous governing organizations.

MUNICIPAL AGREEMENTS #1: ÁTOL,NEUEL MEMORANDUM OF UNDERSTANDING

Overview

Several local governments have adopted reconciliation strategies in recent years, signalling a willingness to work collaboratively with Indigenous communities towards shared objectives.¹⁴⁵ This is a potentially important opportunity for Indigenous communities in the Fraser River because local governments exercise considerable power in relation to private land use and watershed management.

In 2021 the WSÁNEĆ Leadership Council (“WLC”) and the District of Saanich signed the ÁTOL,NEUEL Memorandum of Understanding (“MOU”). The signing represented the culmination of several years of work between the organizations and initiated by the WLC. The MOU is an example of a government-to-government agreement that sets a framework for Indigenous-led discussions and collaborative planning processes carried out with a goal of continuous improvement. In a Fraser River context, adoption of an MOU with a willing local government could provide a template that, over time, could be adopted by other Nations and local government partners throughout the Fraser Basin.

Background

Local governments, which include regional districts and municipalities, exercise powers delegated by the Province of BC through the *Local Government Act* and *Community Charter*.¹⁴⁶ These colonial statutes provide local governments with powers primarily over private land that can significantly impact watershed health, including the power to determine location, types and density of

¹⁴⁵ Recent examples include City of Vancouver, “City of Vancouver UNDRIP Strategy” *City of Vancouver* (25 October 2022), online (pdf): <<https://council.vancouver.ca/20221025/documents/p1.pdf>>; Comox Valley Regional District, “Statement of Reconciliation with Indigenous Peoples,” online: <www.comoxvalleyrd.ca/reconciliation>; Capital Regional District, “Capital Regional District Statement of Reconciliation,” online: <<https://www.crd.bc.ca/about/what-is-crd/statement-of-reconciliation>>.

¹⁴⁶ See *Local Government Act*, RSBC 2015, c 1 [LGA]; *Community Charter*, SBC 2003, c 26 [Community Charter].

development;¹⁴⁷ the management of stormwater, drainage and sewers;¹⁴⁸ protection of the natural environment and foreshore protections;¹⁴⁹ wastewater and effluent management.¹⁵⁰

Unlike provincial and federal government, local governments are not required to adhere to the constitutional duty to consult.¹⁵¹ Local governments have minimal statutory requirements to consult with First Nations. For example, when developing or amending official community plans, which will dictate the nature of development in a given area for up to 20 years, local governments must only “consider” whether consultation with First Nations is required.¹⁵² However, lack of strict consultation requirements means that there are opportunities for Indigenous Nations and local governments to develop their own frameworks for collaborative planning and decision making. Courts have allowed local governments considerable discretion to determine the scope and depth of the consultation they undertake.¹⁵³

Governance

The ÁTOL,NEUEL MOU is notable for its recognition of W̱SÁNEĆ laws, and its commitment to continuous improvement of relationships through ongoing collaboration. The MOU is explicitly grounded in W̱SÁNEĆ laws and legal principles, and recognizes W̱SÁNEĆ self-governing authority.¹⁵⁴ Both the WLC and the District of Saanich recognize the MOU as a living document and a “starting point that reflects generations of continuing work.”¹⁵⁵ The parties acknowledge that implementation of the MOU will require the development of protocol agreements, committees and working groups, and regular Council-to-Council meetings, in order to be effectively implemented.¹⁵⁶

Application to the Fraser River

Local government powers are limited to their geographic boundaries.¹⁵⁷ These boundaries are typically limited to urban areas, but regional district jurisdiction may incorporate large rural areas and can include entire watersheds. However, the cumulative impacts of urban development and their related impervious surfaces have a notable impact within the Fraser Basin.

¹⁴⁷ LGA, *supra* note 146 at parts 13,14; see specifically ss 471, 479.

¹⁴⁸ *Ibid*, Part 9 Division 3.

¹⁴⁹ *Community Charter*, *supra* note 146 at s 8(3)(a).

¹⁵⁰ LGA, *supra* note 146 at Part 9, Division 3.

¹⁵¹ See *Neskonlith Indian Band v. Salmon Arm (City)*, 2012 BCCA 379 [Neskonlith].

¹⁵² LGA, *supra* note 146 at s 475(2)(b)(iv).

¹⁵³ See eg *Gardner v. Williams Lake (City)*, 2006 BCCA 307 at para 27.

¹⁵⁴ W̱SÁNEĆ Leadership Council and District of Saanich, “Memorandum of Understanding” (3 December 2021), at ss 1(A), 1(D), 2, online (pdf): <www.saanich.ca/assets/News~and~Events/Documents/ÁTOL,NEUEL%20MOU.pdf>.

¹⁵⁵ W̱SÁNEĆ Leadership Council and District of Saanich, News Release, “W̱SÁNEĆ Leadership Council and District of Saanich Sign ÁTOL,NEUEL MOU” (3 December 2021), online (pdf): <<https://www.saanich.ca/EN/main/news-events/news-archives/2021/w-s-ne-leadership-council-and-district-of-saanich-sign-tol-neuel-mou.html>>.

¹⁵⁶ *Ibid*.

¹⁵⁷ As defined by Letters Patent; see LGA, *supra* note 149 at ss 3(1), 12(1), 13(1), 41(1), 41(2).

From a whole-of-river perspective, local government jurisdiction is highly fragmented. However, this fragmentation lends itself to an incremental approach, in which collaborative decision-making models may be adopted one-by-one, gradually and over time. More broadly, benefits of these localized models include the ability to adapt to (and be reflective of) local circumstances, a relatively low implementation cost, efficient implementation, and the ability to adopt continuous improvement as implementation proceeds from one jurisdiction to the next. Over time, a series of MOUs or collaborative processes could establish a network that facilitates greater awareness of Indigenous rights in relation to the Fraser River, incorporate Indigenous perspectives in local planning processes, and communicate between Indigenous rights-holders and stakeholders throughout the Fraser River watershed.

Additionally, the Province of BC's enactment of DRIPA is likely to accelerate the development and adoption of local government reconciliation strategies. This may mean there is substantial opportunity to partner with local governments to leverage municipal powers in watershed protection.

MUNICIPAL AGREEMENTS #2: COWICHAN WATERSHED BOARD

Overview

The Cowichan Watershed Board ("CWB") is a partnership between Cowichan Tribes and the Cowichan Valley Regional District¹⁵⁸ that facilitates cooperative engagement between the parties to advance the health of the Cowichan and Koksilah watersheds.¹⁵⁹ The CWB's mandate is to "provide leadership for sustainable water management to protect and enhance ecosystem health in local watersheds, guided by the Cowichan teaching Muks'uw'slilhukw'tul (we are all inter-connected)." ¹⁶⁰

In a Fraser River context, the CWB provides an example of a flexible and collaborative decision-making structure that centres Indigenous perspectives and rights to water management. The structure can exist outside of a strict statutory framework while still leveraging the statutory powers afforded to its members.

Background

Cowichan Tribes and the Regional District developed the CWB, in part, to facilitate effective water management in the Cowichan-Koksilah watershed. Historically, water management in the region

¹⁵⁸ Cowichan Watershed Board "The Cowichan Watershed Board," online: <cowichanwatershedboard.ca/the-cowichan-watershed-board-2/>.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

was hindered by the complexity of legislative authorities¹⁶¹ and the number of rights- and interest-holders involved, which included First Nations, local governments, agencies, and the federal and provincial governments.¹⁶² The CWB's governance manual recognizes that "[l]egal authority for water lies in many Crown statutes and Indigenous water laws"¹⁶³ and, as a result, leadership and coordinated decision making amongst the many organizations responsible for watershed management is "central to the [CWB]'s purpose and structure."¹⁶⁴ The work of the CWB is supported by the Cowichan Watershed Society, a non-profit Society that provides financial and administrative support for the CWB. Approximately half of CWB members also serve on the Society's Board.¹⁶⁵

Governance Opportunities

The CWB is co-chaired by the Chief or a Councillor from Cowichan Tribes, and a Director from the Cowichan Valley Regional District ("CVRD"), who is selected jointly by Cowichan Tribes and the CVRD.¹⁶⁶ The fourteen member Board includes representatives from Cowichan Tribes and local governments, Federal and Provincial government nominees, as well as members-at-large with watershed experience.¹⁶⁷ The Board uses "general consensus" decision making,¹⁶⁸ and requires the co-Chairs and Board members to make their best effort to achieve full consensus at all times.¹⁶⁹ If full consensus is not reached, the co-Chairs will defer the matter for further discussion, with efforts made in the interim to "discuss, review and revise [motions] [...] to reach a solution that all members can support."¹⁷⁰

The CWB does not hold any statutory decision-making powers but has benefitted from the statutory powers afforded to local governments. For example, the CVRD is a key contributor to the CWB's core operating budget.¹⁷¹ CVRD funding for the CWB (and other watershed related activities) is raised pursuant to sections 332 and 338 of the *Local Government Act*, which provides broad powers to operate any service that the regional district board considers necessary or

¹⁶¹ Cowichan Watershed Board, "Governance Manual Version 3" (23 September 2018) at s 1(2), online (pdf): cowichanwatershedboard.ca/wp-content/uploads/2019/08/CWB-Gov-Manual-Version3-Sept-24-2018.pdf [Governance Manual].

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ Cowichan Watershed Board, "Cowichan Watershed Society," online: cowichanwatershedboard.ca/cowichan-watershed-society/.

¹⁶⁶ Governance Manual, *supra* note 161 at s 3(2).

¹⁶⁷ *Ibid* at s 3(1)(1).

¹⁶⁸ *Ibid* at s 3(3)(3).

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ See Cowichan Watershed Board, "2021 Business Plan Update," online (pdf): cowichanwatershedboard.ca/wp-content/uploads/2021/10/CWB_Business_Plan_2021_final-2021.pdf Appendix A: Five Year Budget – Core Annual Revenue at 18 [CWB Budget].

desirable.¹⁷² A significant portion of project funding is also provided by the Provincial government,¹⁷³ and goes towards data collection, addressing flood risks, and drought mitigation.

Outside of statutory powers, there are many options for local watershed entities like the CWB to contribute to watershed governance.¹⁷⁴ Examples include:

- “Developing an ecosystem-based management approach to science in the watershed;
- Generating ongoing, credible scientific data;
- Providing recommendations and advice to all levels of government on planning, law and application-driven decisions based on the ecosystem-based framework and scientific data;
- Undertaking cumulative impacts assessments of key areas over time or as significant applications come forward;
- Being consulted specifically by the province on water licensing decisions for both groundwater and surface water;
- Being consulted specifically by the local governments on the water implications of land use decisions;
- Developing municipal policy and bylaw language based on [locally] generated science; and
- Developing metrics to undertake long-term evaluation of watershed health and reporting on progress on those metrics [...]”¹⁷⁵

The CWB notes that “[activities] that help shift decision-making [towards a model] based on ecological boundaries and functions, rather than political or jurisdictional boundaries, is part of watershed governance.”¹⁷⁶ In this sense, the CWB has provided a vehicle by which the jurisdictional complexity governing watershed decision-making can be overcome in a way that also centres Indigenous perspectives and rights.

Application to the Fraser River

The CWB is an effective model of non-statutory collaboration that moves toward and achieves its objectives through partnerships. This model of establishing goals, targets and actions outside of any state government process allows the people of the watershed to identify and address issues that are important to them and to seek partnerships to obtain results rather than being constrained by jurisdictional boundaries. However, and as shown in other models described above, the watershed context for the CWB is complex but also much simpler than the Fraser River because there is only one Indigenous community co-governing the CWB and the watershed is much smaller.

¹⁷² LGA, *supra* note 146 at s 332; the board must first adopt an establishing bylaw for the service in accordance with section 338.

¹⁷³ CWB Budget, *supra* note 171.

¹⁷⁴ Cowichan Watershed Board, “Pathways and Partnerships: A Framework For Collaboration and Reconciliation in the Cowichan Watershed” (September 2018) at 20, online (pdf): <cowichanwatershedboard.ca/wp-content/uploads/2019/08/CWB_PathwaysAndPartnerships_Final_web.pdf>.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

E. TRANSBOUNDARY AGREEMENTS

This section dives into three examples of transboundary agreements which can be modelled for whole-river-protection. The International Joint Commission between Canada and the US addresses the international nature of some watershed level protections. The Mackenzie River Basin Transboundary Water Master Agreement illustrates how multijurisdictional coordination between six Canadian governments could be used to protect the entire Fraser River Basin. Various bilateral agreements were created under this Master Agreement to streamline desired outcomes for the Mackenzie River basin between provinces/territories. We discuss one of these Bilateral Agreements as an example for how this transboundary management could work.

INTERNATIONAL JOINT COMMISSION (ICJ)

Overview

The International Joint Commission (“ICJ”) was created by Canada and the US under the Boundary Waters Treaty (“BWT”) out of a realisation that each country was impacting the others’ lake and river systems that ran along their border.¹⁷⁷ The ICJ has two primary responsibilities: “approving projects that affect water levels and flows across the boundary and investigating transboundary issues and recommending solutions.”¹⁷⁸

The IJC provides a framework for a nation-nation governance system that can address systemic, watershed-level issues while also ensuring that smaller-scale, regional problems are not ignored. This framework could provide a useful model for whole-of-river protection.

Background

Since its creation, the IJC has expanded beyond its original purpose of cross-boundary navigation and flow management. Today, it also includes large-scale, ecosystem-wide projects such as the International Watersheds Initiative (IWI). The IWI was created in 1998 and supports an “integrated ecosystem approach” to addressing issues with cross-boundary watersheds.¹⁷⁹ Under the IWI, representatives from both nations work with and create boards, committees, and advisory groups that are focused on ecosystems “as a whole,” balancing the interests of the “local communities, flora, and fauna.”¹⁸⁰ The IJC creates and funds these boards, which then conducts research into

¹⁷⁷ International Joint Commission, “Role of the ICJ,” online: <<https://ijc.org/en/who/role>>.

¹⁷⁸ *Ibid.*

¹⁷⁹ International Joint Commission, “International Watersheds Initiative - History,” online: <<https://ijc.org/en/what/iwi/history>>.

¹⁸⁰ International Joint Commission, “International Watersheds Initiative - Principles,” online: <<https://ijc.org/en/what/iwi/principles>> [IJC Principles].

challenges presented to the watershed and provide a forum for discussion and solution-building to address these challenges.¹⁸¹

Governance

The basic governance structure for the IJC is to treat the two governments as equal parties with the same rights and obligations to one another.¹⁸² The IJC was created by the BWT, and requires six commissioners, three from Canada and three from the US.¹⁸³ Neither government can cause disruptions to the “natural level or flow” of the boundary waters without approval of the IJC.¹⁸⁴ Any questions or disputes can be addressed by the IJC once Canada and the US submit a request for a particular issue.¹⁸⁵ The IJC then provides a non-binding decision and/or recommendation to both governments.¹⁸⁶

The IJC also provides both nations with recompense for harms caused by the other nation. Article II of the BWT states that any diversion or interference with a boundary water that harms the other nation will provide the injured nation with the same rights and legal remedies “as if such injury took place in the country” where the interference occurred.¹⁸⁷

The IJC also delegates some of its authority to region-specific Boards. These Boards have a more diverse membership and allow localized interests and stakeholders to be heard.¹⁸⁸ Members of the Boards can include Indigenous leaders, local government officials, non-governmental organizations, and industry members. The Boards also provide opportunities for public engagement by hosting public meetings, forums, workshops, etc.¹⁸⁹

Application to the Fraser River

The BWT and the ICJ emphasize strong nation-to-nation principles that may be applied to Fraser River protection. In particular, the ICJ provides a forum for the parties to express their concerns and produce watershed-level solutions to preserve the interests of both parties. The ICJ and BWT also provide legal protection for harms sustained by either nation in a way that respects their laws.

¹⁸¹ International Joint Commission, “International Watersheds Initiative - Practices,” online: <<https://ijc.org/en/what/iwi/practices>>.

¹⁸² *The Boundary Waters Treaty of 1909* at Art VIII, online (pdf): <www.ijc.org/sites/default/files/2018-07/Boundary%20Water-ENGFR.pdf> [Boundary Waters Treaty].

¹⁸³ *Ibid* at Art VII.

¹⁸⁴ International Joint Commission, “Guidance in Seeking Approval for Uses, Obstructions, or Diversions of Waters Under the Boundary Waters Treaty of 1909” (March 2012) at 5, online (pdf): <www.ijc.org/sites/default/files/2018-07/Guidance-in-Seeking-Approval-for-Uses.pdf>.

¹⁸⁵ Boundary Waters Treaty, *supra* note 182 at Art IX.

¹⁸⁶ *Ibid* at Arts IX-X.

¹⁸⁷ *Ibid* at art II.

¹⁸⁸ IJC Principles, *supra* note 180.

¹⁸⁹ *Ibid*.

Finally, it can act as a quasi-judicial body to resolve disputes and investigate watershed-related problems.

THE MACKENZIE RIVER BASIN TRANSBOUNDARY WATER MASTER AGREEMENT

Overview

The Mackenzie River Basin Transboundary Water Master Agreement (“MRBT”) commits six governments in Canada to coordinate resource and water management for the MacKenzie River Basin. This multijurisdictional coordination could be useful comparison for protecting the entire Fraser River Basin.

Background

The MRBT was signed in 1997 between the governments of Canada, BC, Alberta, Saskatchewan, the Northwest Territories, and the Yukon.¹⁹⁰ The Mackenzie River Basin spans over all these provinces and territories, covering approximately 1.8 million square kilometres, and its watercourses are vital to the way of life of the people who live there.¹⁹¹

The purpose of the agreement is to “establish common principles for the cooperative management” of the Mackenzie Basin.¹⁹² To this end, the provinces, territories, and Canada committed to managing water resources in the basin in a way that maintains ecological integrity and provides “early and effective consultation” on activities.¹⁹³ Furthermore, it facilitates the establishment of Bilateral Water Management Agreements between each of the neighbouring jurisdictions in the Basin.¹⁹⁴ These agreements are addressed in the next section.

Governance

Governance and administration of the MRBT is largely conducted through the Mackenzie River Basin Board. The Board consists of 13 members, eight of which are appointed by the parties (one for each province and three for Canada). The remaining five members represent “Aboriginal organizations” from each of the five provinces.¹⁹⁵ Members use the Board to communicate concerns regarding the MRBT, as well as exchange information, coordinate activities, and resolve

¹⁹⁰ Mackenzie River Basin Board, “About the River Basin,” online: <www.mrbb.ca/about-us>.

¹⁹¹ *Ibid*.

¹⁹² Mackenzie River Basin Board, “Mackenzie River Basin Transboundary Water Master Agreement” (1997) at Part A, online (pdf): <www.mrbb.ca/uploads/media/5d2e0d070f2cd/mackenzie-master-agreement-english.pdf?v1>.

¹⁹³ *Ibid* at Part C.

¹⁹⁴ *Ibid* at Part A.

¹⁹⁵ *Ibid* at Part D1.

disputes.¹⁹⁶ While the Board has no legal right to regulate resource use in any of the provinces, it can influence regulatory decisions by appearing as a “friend of the tribunal” during hearings, provide factual materials for decision makers, and participate in regulatory processes such as impact assessments.¹⁹⁷ Decisions and undertakings made by the board require a super-majority of two-thirds of the Board members.¹⁹⁸

Application to the Fraser River

The MRBT is a somewhat effective model for whole-of-river governance. The MRBT provides a forum for cooperation and debate among its members. Membership is functionally equal, however the requirement of a two-thirds majority means that alliances and compromises are required to pass resolutions.¹⁹⁹ Furthermore, the MRBT’s agreement is strictly confined to water, and does not address whole-of-ecosystem issues related to land, air, and wildlife,²⁰⁰ limiting its functionality.

BILATERAL AGREEMENTS: BC-NWT

Overview

The Mackenzie River Basin Transboundary Water Master Agreement forms the basis for “bilateral” province-to-province agreements. The objective of the bilateral agreements is to increase cooperation and management of the shared water resources to sustain the “ecological integrity” of the Basin. To meet this goal, the agreements established criteria and “desired outcomes” for “water consumption, flows, quality, ground water management, and aquatic ecosystem health commitments.”²⁰¹ Furthermore, parties are expected to provide “early and effective consultation” on developments that might affect the ecological integrity of the other jurisdiction.²⁰² Currently, four bilateral agreements have been completed, including BC-Yukon, BC-NWT, Alberta-NWT, and Yukon-NWT. The BC-NWT Agreement was completed in October 2015 and will be the focus of this section.²⁰³

¹⁹⁶ *Ibid* at Part D2, Part E.

¹⁹⁷ Mackenzie River Basin Board, “Role of the Mackenzie River Basin Board” online (pdf): <www.mrbbs.ca/uploads/media/5c1a962a3a2fd/role-of-the-mrbbs-fact-sheet-2015.pdf?v1>.

¹⁹⁸ Michelle Morris & Rob C de Loe, “Cooperative and Adaptive Transboundary Water Governance in Canada’s Mackenzie River Basin: Status and Prospects” (2016) 21:1 *Ecology & Society* 26.

¹⁹⁹ *Ibid*.

²⁰⁰ Mackenzie River Basin Board, “Frequently Asked Questions,” online: <www.mrbbs.ca/about-us/frequently-asked-questions>.

²⁰¹ *Ibid*.

²⁰² Mackenzie River Basin Board, “British Columbia – Northwest Territories Bilateral Water Management Agreement” (2015) at ss 1(2)–1(3), online (pdf): <www.mrbbs.ca/uploads/media/5c1aa176e530f/nwt-bc-transboundary-water-management-agreement-oct-15-2015.pdf?v1>.

²⁰³ Mackenzie River Basin Board, “Bilateral Water Management Agreements,” online: <www.mrbbs.ca/bilateral-water-management-agreements>.

Governance

Governance is facilitated through the BC-NWT Bilateral Management Committee (“BMC”). Decisions are made by consensus among the BMC members. The BMC includes one government member and one Indigenous representative from each province, the actions of which are guided through a Terms of Reference.²⁰⁴ The BMC takes a risk-informed management approach by classifying the level of risk to major waterbodies based on use for drinking water, use for traditional practices, the sensitivity of the ecosystem, and the level of development.²⁰⁵ It also engages in long-term monitoring of water quantity/quality, ecosystem species and biological processes, and groundwater.²⁰⁶

Application to the Fraser River

The Bilateral Agreement between BC and the NWT provides a framework for a targeted, risk-based approach to ecosystem management. The agreement stresses long-term management of the watershed and focuses on monitoring the surrounding ecosystem in addition to transboundary water levels and flow. Furthermore, the governance structure is based on consensus building and mutual agreement. Overall, the governance of the BC-NWT bilateral agreement is more comprehensive and cooperative than its parent agreement, The Mackenzie River Basin Transboundary Water Master Agreement.

²⁰⁴ British Columbia and Northwest Territories, “Working Together to Manage our Shared Waters” (2019) at 10, online (pdf): <www.ecc.gov.nt.ca/sites/ecc/files/resources/bc-nwt_shared_waters_annual_report_2019-2021.pdf>.

²⁰⁵ *Ibid* at 11.

²⁰⁶ *Ibid* at 13–17.

PART III. INTERNATIONAL EXAMPLES OF WHOLE RIVER PROTECTION

Part III introduces three examples from different parts of the world – the European Union and Argentina – that demonstrate different approaches to whole-of-river protection. The first two examples of the International Commission for the Protection of the Danube and the European Union’s Water Framework Directive take a watershed approach to international (i.e., multi country) river management. The final example of the Matanza Riachuelo River Basin Authority is a unique court-ordered governance arrangement for the River.

THE DANUBE RIVER AND THE INTERNATIONAL COMMISSION FOR THE PROTECTION OF THE DANUBE

Overview

The Danube is an international river basin that has an international convention, a river basin organization, and an international river basin management plan under the European Union (EU) Water Framework Directive (WFD) attached to it.²⁰⁷ The Danube is an example of a highly urbanized river that runs through many different countries and capital cities, and the International Commission for the Protection of the Danube (“ICPDR”) provides an example of multi-jurisdictional water governance between both EU and non-EU countries.²⁰⁸ The organization, notably, does not try to control or regulate all aspects of the River, but engages in regional agreements to ensure cooperation with its component states.

Background

The Danube River Basin is the largest river basin in Europe,²⁰⁹ comprising more than 10% of the continent.²¹⁰ The River itself flows through 19 countries²¹¹ and connects 80 million people.²¹²

²⁰⁷ International Commission for the Protection of the Danube River, “The Danube River Basin: Facts and Figures” at 20, online: <www.icpdr.org/main/resources/danube-basin-facts-figures>.

²⁰⁸ *Ibid.*

²⁰⁹ See Blandine Boeuf & Oliver Fritsch, “Studying the implementation of the Water Framework Directive in Europe: a Meta-Analysis of 89 Journal Articles” (2016) 21:2 Ecology & Society 19 at 19 [Boeuf & Fritsch].

²¹⁰ International Commission for the Protection of the Danube River, “Danube Basin,” online: <www.icpdr.org/main/danube-basin>.

²¹¹ *Ibid.*

²¹² Ivan Zavatsky, “A Role Model for Water Governance in a Shared Basin: The Example of the Danube” (2020), online: East-West Center <www.eastwestcenter.org/publications/role-model-water-governance-in-shared-basin-the-example-the-danube> [Zavatsky].

However, only 24.7% of the water bodies that comprise the Danube River basin have good ecological status.²¹³

The Danube River Protection Convention is the legal document that establishes the ICPDR. The Basin also has an international river basin management plan under the EU WFD.²¹⁴ The ICPDR “is the largest transnational river management body in Europe.”²¹⁵ The ICPDR’s mandate includes making recommendations about water quality improvements and standards for emissions, developing mechanisms for flood and accident control, and ensuring that these priorities are then reflected in national legislation and policies.²¹⁶ This is achieved through investigative monitoring of the Danube every six years²¹⁷ and the sharing of data through the Danube Information System and Danube Geographical Information System.²¹⁸

Governance

The ICPDR is the governing body for the Danube River Basin and is comprised of delegations from the contracting parties to the Convention.²¹⁹ Every contracting party has one Head of Delegation representing the country. Consensus is sought in all decision making.²²⁰ The ICPDR budget comes from contributions from contracting parties.²²¹ Much of the work of the ICPDR is done by Expert Groups, seven of which are permanent and one ad hoc, which meet two or three times a year.²²² These groups are compiled from country representatives and are coordinated by a technical expert from the ICPDR Permanent Secretariat.²²³

²¹³ International Commission for the Protection of the Danube River, “About Us” online: www.icpdr.org/main/icpdr/about-u.

²¹⁴ *Ibid.*

²¹⁵ Zavadsky, *supra* note 212.

²¹⁶ *Ibid.*

²¹⁷ European Union, “Transboundary Cooperation Fact Sheets” (2012) at 15, online (pdf): ec.europa.eu/environment/archives/water/implrep2007/pdf/Governance-Transboundary%20Fact%20Sheets.pdf [European Union].

²¹⁸ *Ibid* at 16.

²¹⁹ Zavadsky, *supra* note 212.

²²⁰ Official Journal of the European Communities, “Convention on Cooperation for the Protection and Sustainable Use of the Danube River (Danube River Protection Convention)” at Art 22(4), online: *EUR-Lex* <https://eur-lex.europa.eu/resource.html?uri=cellar:1deb7f5f-66de-4bd4-8461-856facf364b5.0008.02/DOC_1&format=PDF> [Danube Convention].

²²¹ International Commission for the Protection of the Danube River, “Observers”, online: <icpdr.org>.

²²² Currently: 1. Flood Management 2. Information Management and Geographical Information Systems 3. Monitoring and Assessment 4. Pressures and Measures 5. Public Participation 6. River Basin Management 7. Ad-hoc Strategic Expert Group. (See International Commission for the Protection of the Danube River, “Expert Groups,” online: <www.icpdr.org/main/icpdr/expert-groups>.)

²²³ European Union, *supra* note 217 at 10, 11.

Application to the Fraser River

The ICPDR is an international state-based governance body that addresses issues for the Danube River. It is relevant to the Fraser River as a large river basin system with many governments and impacts involved. Its foundation in a treaty – or government-to-government agreement – that includes many parties is a helpful starting point for obtaining consent to shared governance of a watershed. From the treaty and governance arrangement can develop priorities and activities that require implementation by all signatories.

THE EUROPEAN UNION WATER FRAMEWORK DIRECTIVE

Overview

The WFD is Europe's main law for water protection.²²⁴ It is a regional tool that applies to the member states of the EU and incentivizes integrated water management.²²⁵ This integrated approach has set off a “cascade” of varied experiences of integrated water management in Europe.²²⁶ The “paradigm shift” from governance of an administrative or political area to governance of river basin districts in particular highlights the need for “flexible programming and planning tools capable of being modeled according to the individual regional hydrographic or trans-boundary realities, and the corresponding geo-political and socio-economic contexts.”²²⁷

A notable guiding principle of the WFD is its approach to policy integration. Member-states must integrate policy both within the water sector and in adjacent fields – for instance, in flood control, forestry, and with respect to climate change.²²⁸ All members engage through the Common Implementation Strategy, which publishes non-legally binding implementation guidelines.²²⁹

Background

In 2000, the European Council and Parliament adopted the “milestone” Directive 2000/60/EC, also known as the WFD.²³⁰ It is the first framework to establish a general set of rules for integrated river basin management across a large swathe of Europe. It applies to all EU member states and is legally binding. The purpose of the WFD is to prevent the deterioration of European water bodies,

²²⁴ European Commission, “Water Framework Directive” online: <environment.ec.europa.eu/topics/water/water-framework-directive_en> [Water Directive].

²²⁵ Maria Laura Scaduto, *River Contracts and Integrated Water Management in Europe* (Springer: Palermo, 2016), Foreword by Jean-Paul Bravard at xi [Scaduto].

²²⁶ *Ibid.*

²²⁷ *Ibid* at 19.

²²⁸ Boeuf & Fritsch, *supra* note 209 at 20.

²²⁹ European Commission, “Common Implementation Strategy for the Water Framework Directive (2000/60/EC)” (2003) at 7, online (pdf): <[circabc.europa.eu/sd/a/4de11d70-5ce1-48f7-994d-65017a862218/Guidance%20No%2011%20-%20Planning%20Process%20\(WG%202.9\).pdf](https://circabc.europa.eu/sd/a/4de11d70-5ce1-48f7-994d-65017a862218/Guidance%20No%2011%20-%20Planning%20Process%20(WG%202.9).pdf)>.

²³⁰ Scaduto, *supra* note 225 at 17.

enhance the status of aquatic and riparian ecosystems, and promote sustainable water use.²³¹ The practicable goal of the WFD was to achieve “good water status” for all EU waters by 2015.²³² This deadline has been extended to 2027, and there is growing concern that many countries are still a long way from achieving this goal.²³³

Governance

The design of the WFD is distinctive. It introduced water planning at a watershed scale, rather than country or regional level, by requiring that member states manage water at the river basin district (“RBD”) level.²³⁴ This is a response to the mismatch between hydrographic and political-administrative units.²³⁵

Member-states had to adopt national laws transcribing the WFD within three years of its entry into force.²³⁶ Member states had to establish RBDs, designate or create management authorities, establish monitoring networks, and adopt River Basin Management Plans within six years.²³⁷ This sequence of management activities then had to be re-initiated every following six years.²³⁸

Article 4 of the WFD requires Member States to protect and restore water bodies to reach good chemical and ecological status and prevent deterioration.²³⁹ This is referred to as a “non-deterioration obligation.”²⁴⁰ The member states are required to establish a programme of measures to achieve the objectives established in Article 4.²⁴¹

Application to the Fraser River

The WFD is instructive for its law reform for water from political to watershed or river basin boundaries, and its establishment of the overarching standard of “good water status” for all waters. It mandates river basin governance and collective action to achieve “good water status,” which provides a relevant example for future governance of the Fraser River. The WFD operates in a different context from the Fraser River as multiple state governments develop different river

²³¹ Water Directive, *supra* note 224 at Art 1.

²³² European Commission, “Water Framework Directive,” online:

<https://environment.ec.europa.eu/topics/water/water-framework-directive_en#law>; Boeuf & Fritsch, *supra* note 209 at 20.

²³³ Laurence Carvalho et al, “Protecting and Restoring Europe's Waters: An Analysis of the Future Development Needs of the Water Framework Directive” (2019) 658 *Science of Total Env* 1228 at 1229.

²³⁴ Boeuf & Fritsch, *supra* note 209 at 20.

²³⁵ Scaduto, *supra* note 225 at 19.

²³⁶ Boeuf & Fritsch, *supra* note 209 at 20.

²³⁷ Water Directive, *supra* note 224 at Art 5.

²³⁸ Boeuf & Fritsch, *supra* note 209 at 20.

²³⁹ Water Directive, *supra* note 224 at Art 4.

²⁴⁰ Tobia Schäfer, “Protection for Free Flowing Rivers” *The Nature Conservancy* (1 December 2019), online:

<www.nature.org/en-us/about-us/where-we-work/europe/stories-in-europe/protection-for-free-flowing-rivers/>.

²⁴¹ Water Directive, *supra* note 224 at Art 11.

basin approaches underneath the WFD. The intent with the Fraser River is to develop an effective protection mechanism within Indigenous and BC/Canadian law.

THE MATANZA RIACHUELO RIVER BASIN AND THE CREATION OF THE MATANZA RIACHUELO BASIN AUTHORITY

Overview

The Matanza Riachuelo River is the most polluted river in Argentina, and it runs through one of the major metropolitan areas of the country, Buenos Aires.²⁴² The main sources of pollution are sewage and industrial waste, and the polluted water has devastated the health of communities living adjacent to the Matanza Riachuelo.²⁴³ Members of these impacted communities launched a lawsuit in 2004, which was the impetus for the creation of a river cleanup plan and a new governance entity, the Matanza Riachuelo River Basin Authority (ACUMAR).

There were many challenges with the implementation of the cleanup plan, namely stemming from institutional and political difficulties.²⁴⁴ Many of the issues arose from the court making perceived political and bureaucratic decisions – some scholars have stated that perhaps this judicial intervention would be more successful if the court simply set the agenda and amplified the issues.²⁴⁵ Despite these inherent challenges, the formation of ACUMAR could provide an example of a whole-river cleanup and protection regime that may provide insights into a Fraser river model.

Background

In 2004, a group of affected members of the public from Avellaneda launched a court case against the national and provincial governments, the City of Buenos Aires, and 44 companies.²⁴⁶ They demanded their constitutional right to a healthy environment be honoured and they requested various protections and reclamations actions for the Matanza Riachuelo River Basin. The creation of a river cleanup plan and a new governance entity flowed from this litigation.²⁴⁷ On July 8, 2008, the Supreme Court of Justice of the Nation in Argentina issued their landmark decision, which set out who was responsible for carrying out the reclamation work and protection for the River Basin.²⁴⁸

²⁴² Lucas G Christel & Ricardo A Gutierrez, “Making Rights Come Alive: Environmental Rights and Modes of Participation in Argentina” (September 2017), *The Journal of Environment & Development*, Vol 26:3 at 335 [Christel & Gutierrez].

²⁴³ *Ibid* at 335.

²⁴⁴ *Ibid* at 338.

²⁴⁵ *Ibid* at 338.

²⁴⁶ Acumar, “Institutional,” online: <<https://www.acumar.gob.ar/institucional/>> [Acumar, Institutional].

²⁴⁷ Christel & Gutierrez, *supra* note 245 at 324.

²⁴⁸ Acumar, “Cause Mendoza,” online: <<https://www.acumar.gob.ar/causa-mendoza/>> [Acumar, Cause Mendoza].

The Matanza Riachuelo River Basin Authority was created pursuant to Law 26168/06 in 2006. The province and City of Buenos Aires later ratified this law.²⁴⁹ The 2008 court decision ordered ACUMAR to create the clean-up plan.²⁵⁰ Monitoring responsibilities for the cleanup plan were allocated in the 2008 court decision to three bodies, one of which was the newly created *Cuerpo Colegiado* comprised of all the *amicus curiae* organizations involved in the litigation, largely environmental NGOs.²⁵¹

Governance

ACUMAR is comprised of a board of four national government representatives, two from the province of and two from the City of Buenos Aires.²⁵² In 2009, ACUMAR designed their Comprehensive Environmental Sanitation Plan (Sanitation Plan) which has three objectives:

1. “Improvement of the quality of life of the population of the Basin.
2. Recomposition of the environment in all its components (water, air and soil).
3. Prevention of damages with a sufficient and reasonable degree of prediction.”²⁵³

ACUMAR is “autonomous, self-sufficient, interjurisdictional...and tripartite” – it spans 14 municipalities and 9 communes and works with all three levels of state government (Nation, Province, and City).²⁵⁴

The Sanitation Plan guides ACUMAR and was updated in 2010 and 2016 following work with “specialists [and] the consensus between affected jurisdictions,” while accounting for the inherent complexity and interjurisdictional nature of the River Basin.²⁵⁵

Application to the Fraser River

As a court-ordered protection arrangement, while not directly applicable to the Fraser River, ACUMAR does attempt to coordinate federal, provincial, and local action that affects water quality. It is interesting to note the creation of an independent body – the *Cuerpo Colegiado* – to monitor the implementation of a clean-up plan.

²⁴⁹ Christel & Gutierrez, *supra* note 242 at 336.

²⁵⁰ Acumar, Institutional, *supra* note 246.

²⁵¹ Christel & Gutierrez, *supra* note 242 at 337.

²⁵² Christel & Gutierrez, *supra* note 242 at 336–337.

²⁵³ Acumar, Cause Mendoza, *supra* note 248.

²⁵⁴ Acumar, Institutional, *supra* note 246.

²⁵⁵ Acumar, Institutional, *supra* note 246.

PART IV. CONCLUSION

This Legal Scan has introduced a wide range of possible legal protection approaches that point towards a whole-of-river approach. None of them are ideal for the circumstances found in the Fraser River that involves multiple Indigenous and state legal orders over a large watershed. Within provincial law, water sustainability plans offer the best existing legal tool that could supports shared decision making and protection at a watershed scale. More tailored approaches that fit the Indigenous legal orders and ecological circumstances at a regional scale are seen in the Great Bear Rainforest and Haida Gwaii Management Council examples.

Many of the river or watershed protection models in this Legal Scan contain some aspect of interest. For example, the International Commission for the Protection of the Danube is established by treaty between many nations, which is relevant for the Fraser River where Indigenous Nations could create a new Fraser River Treaty establishing protection objectives and shared decision-making structures as a step in engaging with colonial governments. Such a treaty could acknowledge the legal status of the River. An independent organization of interested Indigenous Nations and partners could advance protection measures similar to the approach taken by the Cowichan Watershed Board.

In the practice of Indigenous Nations and the Province of BC, government-to-government agreements for the Fraser River – that are transboundary agreements between Indigenous governing organizations - could set out commitments and actions for restoration, protection and collective decision-making. Any new instrument or agreement can adopt and ecosystem-based and cumulative effects framework.

There are many possibilities for advancing whole-of-river protection for the Fraser River. However, with no clear legal approach that could bind colonial governments advancement of several approaches may lead to more comprehensive action.

APPENDIX: SELECT ARTICLES FROM THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Appendix A sets out some of the articles from UNDRIP that are relevant for watershed and water conservation.

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. States shall provide effective mechanisms for prevention of, and redress for:
 - (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
 - (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

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 before adopting and implementing legislative or administrative measures that may affect them.

Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
[...]

Article 23

Indigenous Peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, Indigenous Peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes

affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.
[...]

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 28

Indigenous Peoples have the right to redress, by means that can include restitution or, when that is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.
[...]

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 36

Indigenous Peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations, and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

Article 39

Indigenous Peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.