

# Legal and Policy Tools for Source Water Protection in Indigenous Communities

A Tri-First Nation (Chippewas of the Thames First Nation, Munsee-Delaware First Nation, Oneida Nation of the Thames) and Canadian Environmental Law Association Initiative

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Canadian  
Environmental Law  
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With thanks to the funding support by:



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## **Acknowledgements**

We wish to pay tribute to the late George Henry, former Councillor and Elder at the Chippewas of the Thames First Nation, who was instrumental in pursuing this collaborative, Tri-Nation source water protection project. George was not only passionate about clean drinking water and protection of the Great Lakes, but in passing knowledge on to future generations, and including the community deeply in decision making. This project's outcomes, from the application of the legal tools and ongoing water testing efforts, are a testament to George's inspiration.

The Canadian Environmental Law Association (CELA), Chippewas of the Thames, Munsee-Delaware and Oneida Nation of the Thames (CMO) also graciously appreciate the support of our funder, the Law Foundation of Ontario, who has provided the financial support for this multi-year source water protection project.

With thanks to the experience, knowledge and dedication of the CMO's Chief and Council, their staff and community leaders including Kelly Riley, Emma Young, and Brandon Doxtator; researcher and Chippewas of the Thames community member Martina Albert; community researcher/ animator Kim Wheatley, Dr. Mohammad Reza Najafi and Dr. Shirin Bahrami from Western University; CELA counsel Theresa McClenaghan, Kerrie Blaise and Rizwan Khan; and, the numerous CMO community members and Councillors who participated in workshops and invested their time in the making of this toolkit, to facilitate the integration of this project within community events, traditional practices and strategic plans.

*The material presented in this report is provided for informational purposes only and is not legal advice.  
This report is current to January 2019 and pertains to the jurisdiction of Ontario, Canada.*

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# I. An Introduction to the Source Water Protection Project

## 1. Project Objectives

This collaborative project has been undertaken by the Chippewas of the Thames First Nation, the Oneida Nation of the Thames, and the Munsee-Delaware Nation (CMO) and the Canadian Environmental Law Association (CELA).

The overall aim of this project was to:

1. Identify, assess, and mitigate actual and potential threats to sources of drinking water, and
2. Develop legal and policy tools to protect and improve source waters.

The risk to human health and the natural environment from the contamination of water is a concern to all people; however, this issue is of great concern to the First Nations communities on the Thames River, whose historical use and enjoyment of the water has been diminished because of threats from industrial discharges and spills, sewage overflows, and the impact of phosphorus loading and pesticide use from neighbouring farms.

Created as part of this project, we invite you to watch a short film which introduces you to this project, the meaning of water and its importance to the CMO communities: <https://youtu.be/wInig0ou35o>



**Source:** Indigenous Water Protection: Chippewa, Munsee, Oneida and the Thames River (2018)

This toolkit is a compendium of resources for First Nation communities and individuals interested in community-based, policy and legal instruments aimed at source water protection (please see below, “3. Guidance on Using this Toolkit”).

In response to threats to source water identified and prioritized by the CMO communities, the following chapters examine a range of legal tools which can be used in First Nation communities to protect source waters and mitigate threats. Many of these legal tools are accompanied by templates, which can be used as-is, or edited to reflect a community’s interests, history and the threats unique to their source waters. As this toolkit is a living document, we encourage all readers to refer to the websites of the individual CMO communities for updates regarding the use of these legal tools by community members, Chief and Council, and administration.<sup>1</sup>

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<sup>1</sup> Please visit: *Chippewas of the Thames First Nation*, online: [www.cottfn.com](http://www.cottfn.com); *Munsee-Delaware First Nation*, online: [www.munsee.ca](http://www.munsee.ca); and *Oneida of the Thames Nation*, online: <https://oneida.on.ca>

## 2. Project Partners

### *i. Chippewas of the Thames*

The watersheds of southwestern Ontario have been the home of Anishinaabe people for millennia. Widespread archaeological evidence of the “Western Basin Late Woodland Tradition” confirms our traditional oral history teachers’ accounts of this lengthy Anishinaabe dwelling in our territory of Waawayaatanong, or “Round Lake.” This region is known as the third stopping place of the Water Drum on its sacred journey to Madeline Island, centuries before the era of colonization. We have continued to dwell here despite the disruptions stemming from conflicts with other Anishinaabe nations also dwelling near the Great Lakes, from the wars between various settler powers between 1757 and 1815, and from the imposition of Britain’s, then the United States, and Canada’s colonial rule.

Deshkan Zibiing edbendaagzijig, “those that belong to Antler River” (The Chippewas of the Thames First Nation)<sup>2</sup> comprise one of the traditional Anishinaabe nations governing the territory of Waawayaatanong, collectively known now as the Waawayaatanong Anishnaabeg Southwest Treaty Council. As a governing body, Deshkan Zibiing has lengthy experience in developing relations with other communities interested in the lands and waters of Waawayaatanong, as early French explorers recognized, and as our historic treaty-making with Britain demonstrates.

The rights that Deshkan Zibiing exercises in relation to our ancestral lands, treaty lands, reserve lands, and Addition to Reserve lands, are inherent, grounded most basically in the Creator’s gift of lands, waters, and way of life to ndodeminaanig, “our clans.” These rights are embodied in our historical and ongoing occupation of our territory, and in our practice of self-determination as a people. Our rights as a self-determining people are also recognized within, although they are certainly not created by, the formation of several treaties, the terms of constitutional documents, and international conventions, including Article three of the Jay Treaty (1794). Our historic treaty partner, Britain, recognized these rights, as seen within the joint context of the Royal Proclamation of 1763 and the Treaty of Niagara, 1764; and within the subsequent treaties formed between 1790 and 1827. Our traditional understanding of these treaties with Britain indicates that they in no way eliminate our own rightful control of, and enduring ability to benefit from, the lands and waters within our territory. Section 35(1) of Canada’s Constitution Act, 1982, also clearly recognizes these rights, as do the expressions of international customary law elaborated within the United Nations Declaration on the Rights of Indigenous Peoples (2007).

Traditional Anishinaabe territory in southwestern Ontario north of the Thames River includes the 2.78 million acres marked on the treaty maps concerning the Longwoods (1822) and Huron (1827) tracts. In addition, south of the Thames River, traditional territory also includes the lands addressed in the McKee Treaty (1790), the London Township Treaty (1796), and the Sombra Township Treaty (1796). Deshkan Zibiing is party with other Anishinaabe nations to several of these treaties but is the sole Anishinaabe party to the Longwoods Treaty.

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<sup>2</sup> Chippewas of the Thames First Nation, online: <http://www.cottfn.com/>

As recognized in these treaties, the ancestral lands of Deshkan Zibiing thus include all the lands and waters between Lake Huron to the north and Lake Erie to the south, and stretching eastward from the eastern banks of the St. Clair and Detroit rivers to the Mississaugas of New Credit 1792 treaty lands, a line running northwards from Point Bruce on the Erie shore, to Point Clark on the Huron shore. In addition, Deshkan Zibiing territory extended into what are now the American states of Michigan and Ohio. Historically, we managed portions of our territory in common with other Anishinaabe nations, and at times in partnership with the Haudenosaunee. Nevertheless, the lands bordering the northern bank of the Thames River have been solely in the stewardship and possession of Deshkan Zibiing since before the treaty era.

Upper Canada's settlement and development from the early nineteenth century certainly transformed much of this land from its pre-treaty state. Nevertheless, we who are Deshkan Zibiing edbendaagzjig continue to hold our lands, and to assert over the full extent of our treaty lands and traditional territory our historic commitment to the protection of the watersheds of the Thames River, Bear Creek (now known as the Sydenham River) and the Au Sable River, and to the Erie and Huron lakeshores. As well, our understanding from our elders, an understanding we share with many other Anishinaabe nations, is that our treaties did not "surrender" our lands, despite what Britain and Canada have presumed. As part of our ongoing commitment to these watersheds, the citizens of Deshkan Zibiing are currently engaged in aboriginal title research concerning the bed of the Thames River.

## ***ii. Munsee-Delaware Nation***

Ancestors of the Munsee-Delaware Nation<sup>3</sup> came to what was then known as Upper Canada from southeastern New York, northern New Jersey and eastern Pennsylvania at the close of the American Revolution, 1783.

The Munsee-Delawares, along with the Unami Delawares, form a larger Confederacy known as the Lenape.

The Munsees are signatories to a number of Treaties of Alliance with the British Crown during the 18<sup>th</sup> century. A Wampum Belt representing the Treaty by which the Munsees moved into Upper Canada is on display at the Museum of Natural History in New York.

The Munsee-Delaware Nation Reserve #1, has about 600 members of which about 200 live on-Reserve. The Reserve land base consists of 2,604 acres. Some Munsee homes are connected to the Chippewas of the Thames water supply and the remainder are connected to a separate Munsee supply system.

## ***ii. Oneida Nation of the Thames***

Oneida Nation of the Thames is 1 of 3 Onyata:aka ("People of the Standing Stone") communities across Turtle Island.<sup>4</sup> The Oneida people originate from present day New York along the Finger Lakes and are

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<sup>3</sup> Munsee Delaware Nation, online: <http://www.munsee.ca/>

<sup>4</sup> Oneida Nation of the Thames, online: <https://oneida.on.ca/>

one of the five original nations that make up the Haudenosaunee confederacy, which predates European colonization.

The Two Row Wampum (1613) is one of the earliest treaties signed between Indigenous and European nations. The treaty, signed by the Haudenosaunee and the Dutch, symbolizes an understanding of peace, friendship and respect and signifies the type of relationship they envisioned. Each nation had its own canoe travelling down the river of life and though they must travel it together, each of the nation's people, were to stay in their own canoe with their own language, customs and laws "for as long as the grass grows green, for as long as the wind blows and for as long as the sun shines". This is the first example of a Nation-Nation treaty of respect and non-interference.

The Nan-Fan Treaty of 1701 which was signed between Haudenosaunee people and the British, concerns their Beaver Hunting territory and guarantees the economic right, and title to that land forever. The territory of the Beaver Hunting grounds go from the Ohio river in the south, to the Illinois river in the west to present day Chicago, Lake Simcoe in the north, and 60 miles east of Lake Erie.

The Haudenosaunee also recognize the 1 dish 1 spoon philosophy. This is an agreement between Haudenosaunee and Anishinabek nations that states that all the land is on one dish and each of our communities must share this resource. This has been used many times to establish friendly relationships with other indigenous nations and is still used today to acknowledge our combined duty to the protection and sustainability of the land.

During the American Revolutionary War (1775-1783), while many Oneidas fought alongside the Continental U.S army against the British army, some chose a position of neutrality. Their alliance with the Americans did not fare well with the other Iroquois nations who were sympathetic to the Loyalists and British. Many Haudenosaunee moved north to Canada after the war settling in Ontario and Quebec.

In payment for their assistance during the war, the Treaty of Fort Stanwix in 1784 offered the Oneidas a guarantee of their claim to their traditional homelands. The treaty between the U.S. Continental Congress and the Oneida Nation promised that the Oneidas "shall be secure in the possession of the lands on which they are settled." This Guarantee was again reiterated in the 1789 Treaty of Fort Harmer

However, between these Indian treaties, the state of New York would force tribal land cessions via the 1785 Treaty at Fort Herkimer and 1788 Treaty of Fort Schuyler. Through these treaties, the Oneidas would lose most of their ancestral homelands, reducing the Oneida territory from approximately six million original acres to about 300,000 acres, and was further reduced to its smallest extent of 32 acres.

In 1822, the Oneida's purchased rights from the Menominee in the Wisconsin Territory to settle on their lands. By 1838, close to 700 Oneidas relocated to a four-million-acre tract in Wisconsin, which the U.S. federal government would soon reduce to half a million acres. Then, in 1838, the Treaty of Buffalo Creek forced the removal of all Iroquois from New York State while the Wisconsin land base was further reduced to only 65,000 acres near Green Bay. In reaction to the Treaty of Buffalo Creek, some two hundred Oneidas sold their New York land in 1839 and jointly purchased 5,200 acres in Delaware Township near the City of London, Ontario. The Oneida Nation of the Thames is unique in that their forefathers purchased this land when they settled here and it is not reserved or held in trust under the crown.

*“Under the circumstances represented of a number of Indians coming into the Province possessed of means to purchase land, the Council do not think the Government is under any obligation to interfere with their affairs any more than in the case of ordinary immigrants; and the state of civilization to which they are said to have attained makes it, in the opinion of the Council, advisable to leave them to their own discretion in the management of their property, but they should receive when they require it, the advice, counsel and protection of the Indian Department and of the Government, so as to insure the success of the Settlement as far as possible.” - Order-in-council granted August 14th, 1840*

More than a 175 years later, the People of the Oneida Nation of the Thames continue to live peacefully and co-operatively with the land and their indigenous and non-indigenous neighbours.

#### **iv. Canadian Environmental Law Association**

The Canadian Environmental Law Association<sup>5</sup> is a specialty clinic funded by Legal Aid Ontario. As a non-profit, public interest organization established in 1970, CELA is the most senior environmental law organization in Canada. CELA continues to advocate for the public interest through law reform initiatives and litigation, to further the protection of the environment and the promotion of environmental justice.

CELA has been involved in Ontario drinking water issues since its inception in 1970. CELA acted as counsel for the Walkerton Citizens during the Walkerton Inquiry, prompted by the events which unfolded in May 2000, when seven people died, and thousands of children and adults became severely ill after drinking contaminated drinking water. CELA was instrumental in the passing of the province's *Clean Water Act, 2006* which resulted from the recommendations of the Walkerton Inquiry, and also the *Safe Drinking Water Act, 2002*. CELA continues to be heavily involved in the implementation of these Acts and the safeguarding of the drinking water safety net across Ontario.<sup>6</sup>

CELA has previously worked with the Pays Plat First Nation and the Grassy Narrows First Nation to identify threats to drinking water on-reserve and to develop legal and policy mechanisms to protect drinking water sources.<sup>7</sup> As part of our access to environmental justice mandate, CELA remains committed to First Nations communities and overcoming barriers impeding source water protection.

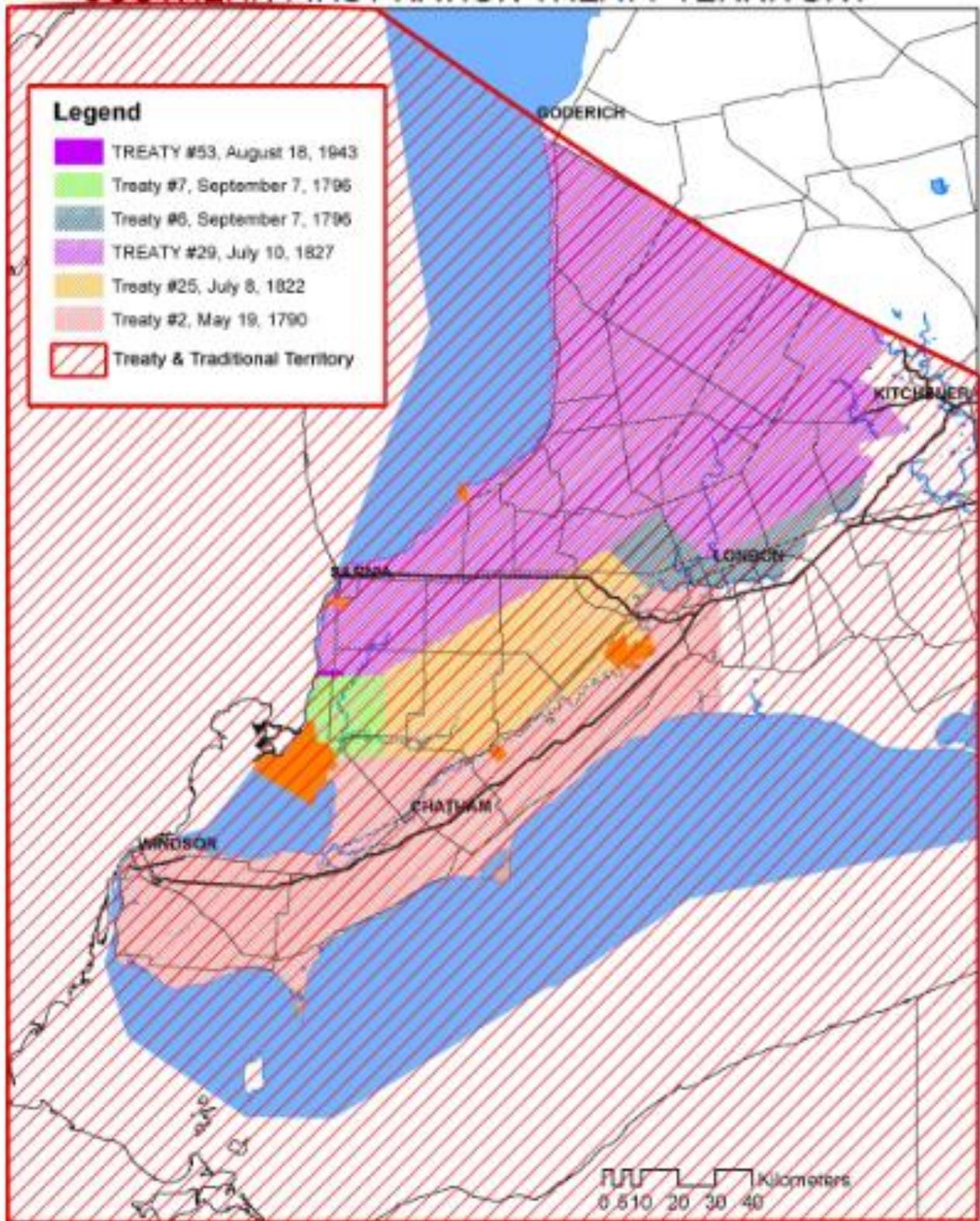
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<sup>5</sup> Canadian Environmental Law Association, online: [www.cela.ca](http://www.cela.ca)

<sup>6</sup> Theresa McClenaghan and Richard Lindgren, “Ontario’s drinking water rules are not red tape,” (21 Dec 2018), The Star, online: <https://www.thestar.com/opinion/contributors/2018/12/21/ontarios-drinking-water-rules-are-not-red-tape.html>

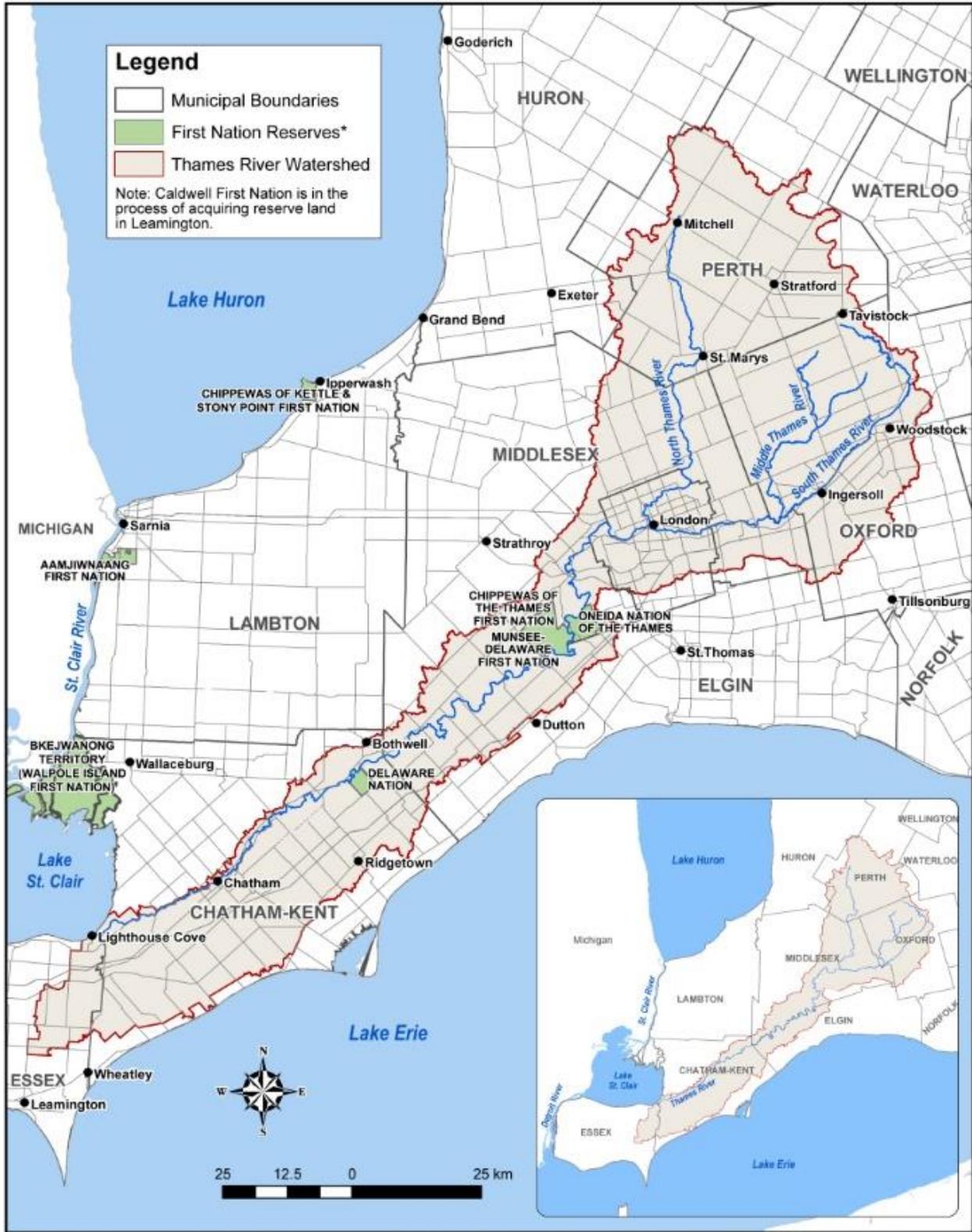
<sup>7</sup> CELA, “First Nations Source Protection Toolkits,” online: <http://www.cela.ca/first-nations-source-protection-toolkits>

Figure 1. Southwestern Ontario Treaty Map



Source: Chippewas of the Thames First Nation, "Consultation Protocol" (26 Nov 2016)

Figure 2. Map of the Thames River Watershed



Source: Thames River Revival, online: <https://www.thamesrevival.ca/>

### 3. Guidance on Using this Toolkit

This report is a compendium of resources for First Nation communities and individuals interested in community-based, policy and legal instruments aimed at source water protection. Each chapter can be applied on a stand-alone basis or used together, by Indigenous communities seeking to advance legal protections of their source waters.

Each chapter has been drafted to provide an overview of the threat(s) to source water protection it seeks to address and provides a legal tool with accompanying template. **Chapter 2** reviews the structure and five-phased approach of this project and, introduces First Nations' jurisdiction for lands and resources, generally. **Chapter 3** discusses community-based water monitoring efforts and provides the preliminary findings of this project's source water data. **Chapter 4** discusses how legal tools can be used to address threats to source water. **Chapters 5 – 9** introduce five distinct legal tools to protect source water which include by-laws, a protocol for Indigenous consultation and accommodation, public environmental rights, agricultural leases and the protection of source water under the *Clean Water Act*.

Templates accompanying each of these legal tools can be found in the **Appendices 1-7** Because of the size of some templates, hyperlinks which redirect to the material are provided. **Appendices 8 – 9** provide links to this project's workshop resources.



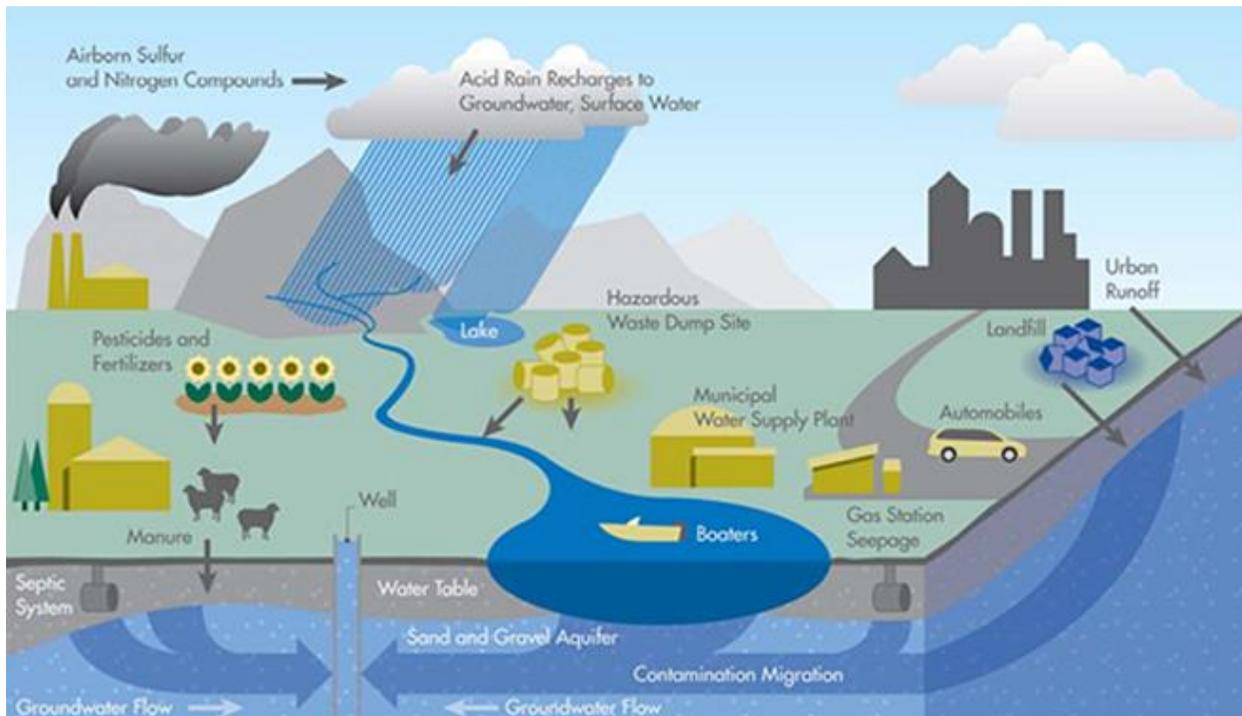
**LEFT TO RIGHT** Former COTTFN Chief Leslee White-Eye, the Late George Henry, Kim Wheatley (Workshop Facilitator), Kerrie Blaise (CELA), Elder Irene Peters, Mark Peters, Heather Gingrich

#### 4. Defining Key Terms Used throughout this Toolkit

The following key terms are used throughout this toolkit and therefore, preliminary explanations are provided below.

- **Source waters** are untreated surface or groundwaters used to supply private wells and public drinking water systems with potable water for human consumption or use.
- **Surface water** refers to water found in lakes, rivers, streams, and wetlands. Rain and melting snow replenish surface water. Surface water from the Great Lakes is the source of water that most Ontarians use for drinking water, cleaning, irrigation and industrial purposes.
- **Groundwater** is water from rain or snow that seeps below the ground and pools in cracks and spaces beneath the earth's surface, in what is called aquifers. It is a valuable resource as it makes up 2/3 of the world's fresh water supply. Over a quarter of Canadians use groundwater to meet their daily needs for drinking, cleaning and irrigation. It is especially important to protect groundwater sources for those who obtain their water from wells.

**Figure 3.** Common threats to source waters



**Source:** Pollution Probe – The Source Water Protection Primer (2004)

## II. Project Overview - Creating a Source Water Protection Project and Defining First Nations' Jurisdiction for Reserve Lands and Resources

### 1. Developing a Source Water Protection Project

Since 2017, the Chippewas of the Thames, Munsee-Delaware and Oneida of the Thames (CMO) in collaboration with the Canadian Environmental Law Association (CELA), have sought to identify, assess, and mitigate actual and potential threats to source water; and develop legal and policy tools to protect and improve the health of source waters.

This toolkit is a culmination of the experience and dedication of the CMO's Chief and Council, the dedication of their staff, including Kelly Riley and Emma Young; researcher and COTTFN community member Martina Albert; community researcher/ animator Kim Wheatley, Dr. Mohammad Reza Najafi and Dr. Shirin Bahrami from Western University, legal counsel Theresa McClenaghan, Kerrie Blaise and Rizwan Khan of CELA; and, the numerous others who participated in workshops and invested their time, allowing the integration of this project within community events, traditional practices and strategic plans.

This chapter reviews the five-phased approach which informed this project (section 2), and reviews the jurisdiction of First Nation communities to govern in relation to source water protection (section 3).

### 2. A Five-phased Approach to Community-based Source Water Protection

This two-year source water protection project was undertaken in five phases, each described in greater detail below:

**Phase 1:** Form a Source Water Protection Steering Committee

**Phase 2:** Identify the community's source water protection challenges

**Phase 3:** Consult with the communities to determine priority threats and issues

**Phase 4:** Develop legal tools to address threats to source water protection

**Phase 5:** Communicate and share project results

Each of these phases could be adapted for use in other Indigenous communities wishing to carry out a source water protection project

#### ***Phase 1: Form a Source Water Protection Steering Committee***

The Source Water Protection Steering Committee included six members – two from each of the three communities. Its role was to guide the CELA lawyers and a community-based researcher / animator in conducting adequate and culturally-appropriate consultation workshops, prioritizing the identified threats and issues, and developing legal measures that were responsive to the identified threats and

acceptable to the community. To ensure the project was community-based, and reflective of the communities' cultural, legal traditions, and priorities, the Steering Committee guided the CELA lawyers and the scope and applicability of the proposed source water protection legal tools.

### ***Phase 2: Identify the community's source water protection challenges***

In Phase 2, the CELA lawyers collaborated with the community researcher/ animator to visit the CMO communities and gather information from previous CMO efforts to identify upstream source water threats. The development of the format for the workshops in Phase 3 also commenced.

### ***Phase 3: Consult with the communities to determine priority threats and issues***

In this phase, CMO with CELA hosted a series of 6 workshop to consult with the communities at large, in addressing both on- and off-reserve sources of drinking water contamination. All workshops solicited input on prioritizing and addressing identified source water threats. While each workshop was open to the community, each was organized around a theme such as Elder engagement, women, or youth.

These workshops were purposely designed to be community-led and based in the Thames Valley watershed. Whether paddling the Thames River and embarking on a bio-blitz (see Figure 4), led by the Antler River Guardians of the Four Directions, or filming CMO community members concerns and hope for their water,<sup>8</sup> this phase was crucial to informing the legal tools and outcomes, detailed in this report (see Appendix 8 for the Source Water Protection Primer distributed to workshop attendees and Appendix 9 for a sample of material distributed at each workshop).

### ***Phase 4: Develop legal tools to address threats to source water protection***

In Phase 4, CELA used the information gathered in the previous phases to develop legal and policy tools to address the issues and protect against the threats. Based on the information received in Phase 3, the CELA lawyers and the community researcher/ animator developed by-laws, farm leases, and a consultation framework amongst other legal and policy instruments in response to identified threats to our drinking water. CMO worked closely with the CELA lawyers to ensure that the laws and policies drafted would be enforceable and reflect traditional laws and values.

### ***Phase 5: Communicate and share project results***

Following the completion of this report and the drafting of legal tools, the outcomes were shared with CMO through a youth ambassador program.

As the report has been made publicly available, with the consent of CMO following their review, it will continue to be used by CELA in its outreach forums, including public legal education sessions, and we hope, by Indigenous and non- Indigenous communities in Ontario facing similar threats to source water protection.

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<sup>8</sup> Indigenous Water Protection: Chippewa, Munsee, Oneida and the Thames River, online: <https://youtu.be/wInig0ou35o>

Figure 4. Information poster for Workshop 4

The Source Water Protection Project PRESENTS

# Canoe trip and bio-blitz

Wednesday, August 23rd, 2017. 10AM-6PM

WHERE: CHIPPEWA COMMUNITY CENTER- 326 CHIPPEWA RD  
CONTACT MARTINA ALBERT @ (519) 282 3962

GIFTCARDS DRAWN EVERY 30 MINS!!!

EVERYONE WELCOME! ALL AGES!  
FAMILIES!

YOUTH ENJOY A DAY OUTDOORS  
WHILE WE ALL HELP DETERMINE  
WAYS TO KEEP OUR WATER SAFE.

AGENDA:

 10AM-1PM SPEAKERS ON ISSUES OF SOURCE WATER IN THE CMO COMMUNITIES. YOUTH WILL BE DOING WATER GAMES AND FUN STUFF

 1:00-2:00PM FREE LUNCH

2-4PM PRIORITIZING LEGAL OUTCOMES FOR THREATS TO OUR DRINKING WATER. YOUTH WILL BE DOING TREE PLANTING AND CANOEING

 4-6PM FREE DINNER AND GIFTS FOR ATTENDEES

 The Law Foundation of Ontario  
Advancing access to justice

### 3. First Nations' Jurisdiction to Oversee Lands and Resources: The Land Management Regime

When developing a source water protection plan, it is necessary to consider the First Nations' jurisdictional basis for the oversight of their lands and resources. While the majority of First Nations in Ontario are governed by the *Indian Act*, the First Nations Land Management (FNLM) Regime, through the implementation of a Land Code, provides an alternative governance structure. This section reviews the authority of a Land Code in the development of source water protection plans.

#### *i. An Introduction to the First Nations Land Management*

For most First Nations, the *Indian Act* controls how their reserve lands and resources are managed. This includes how their reserve lands are used or developed for personal, community and economic development purposes. Under the FNLM Regime, First Nations may opt out of 34 land-related sections of the *Indian Act* and govern their reserve lands and resources through their own land code (sample Land Code provided in Appendix 7). The FNLM Regime transfers administration of land to a participating First Nation. This includes the authority to enact laws with respect to land, the environment, and most resources. First Nations in the FNLM Regime are free to develop projects on reserve land without approval from the Minister of Aboriginal Affairs and Northern Development Canada (AANDC) (now Indigenous and Northern Affairs Canada (INAC)).

In 1991, a group of First Nation Chiefs approached AANDC with a proposal to allow First Nations to opt out of the portions of the *Indian Act* dealing with land and resources. As a result, the *Framework Agreement* on First Nation Land Management was signed by the Minister of Indian Affairs and Northern Development and 13 First Nations on February 12, 1996 and one First Nation on December 1997. The First Nations Land Management was ratified in 1999 with the enactment of the *First Nations Land Management Act*. The *Framework Agreement* was an initiative by these 14 First Nations to take over the management and control of their lands and resources and only applies to the Signatory Members of the Framework Agreement. The *Framework Agreement* sets out the principal components of the land management process, but is not a treaty and does not affect treaty or other constitutional rights of the signatory First Nations.

The Agreement has since expanded to include (as of now) 81 communities across Canada.<sup>9</sup> First Nations who initially signed the *Framework Agreement* established the Lands Advisory Board and Resource Center to help implement their own land management regimes.<sup>10</sup> There are presently 140 First Nations

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<sup>9</sup> Lands Advisory Board and Resource Centre, Member Communities, <<https://labrc.com/member-communities/>> accessed December 3, 2018.

<sup>10</sup> Government of Canada; Aboriginal Affairs and Northern Development Canada, First Nations Land Management Regime (Ottawa, Aboriginal Affairs and Northern Development Canada, 2013). <<http://www.aadncaandc.gc.ca/eng/1327090675492/1327090738973>> accessed December 3, 2018.

operating under, or developing, their own land codes under the FNLM Regime. Links to sample land codes can be at the First Nations Lands Advisory Board website.<sup>11</sup>

Canada agreed to ratify the *Framework Agreement* by enacting federal legislation consistent with the *Framework Agreement*. On June 17, 1999, the *First Nations Land Management Act* (FNLMA) was enacted and given royal assent. Along with ratifying the *Framework Agreement*, the FNLMA implemented those clauses of the *Framework Agreement* that affect third parties or other federal laws, or that are considered important enough to be repeated in the legislation.<sup>12</sup> Most importantly, the FNLMA ensures that the land management provisions of the *Indian Act* do not apply to any Signatory Members of the Framework Agreement that adopt a Land Code, their members or their First Nation lands.<sup>13</sup>

## **ii. Steps to Participating in the FNLM Regime**

A signatory to the *Framework Agreement* exercises its increased autonomy in land management by creating its own Land Code, drafting a community ratification process, and entering into an Individual Transfer Agreement with Canada. The specific steps are set out in the *Framework Agreement* and include the following:<sup>14</sup>

1. **Band Council Resolution:** A First Nation may apply to join the FNLM Regime by submitting a Band Council Resolution (BCR) to INAC or to the Lands Advisory Board and Resource Centre.
2. **Assessment Questionnaire:** The First Nation must also complete an Assessment Questionnaire and send it to their INAC Regional Office to determine its readiness to enter into the FNLM Regime.
3. **Sign the *Framework Agreement*:** Upon entry to the FNLMA, First Nations must sign onto the *Framework Agreement*. During the developmental phase, a First Nation has 24 months to develop a land code and negotiate an Individual Transfer Agreement.
4. **The Land Code:** The First Nation must draft a Land Code that replaces the land management provisions of the *Indian Act*. The Land Code does not require approval from INAC and the Ministry will no longer be involved in the management of the First Nation's reserve lands. While a land code can reflect a First Nations unique cultures, traditions, and decision-making

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<sup>11</sup> Lands Advisory Board and Resource Centre, Land Codes, <<https://labrc.com/resources/land-codes/>> accessed December 3, 2018.

<sup>12</sup> Lands Advisory Board and Resource Centre, Introduction, <<https://labrc.com/c49-legislation/introduction/>> accessed December 3, 2018.

<sup>13</sup> Lands Advisory Board and Resource Centre, Effect on other Federal Legislation <<https://labrc.com/c49-legislation/effect-on-other-federal-legislation/>> accessed December 3, 2018.

<sup>14</sup> Lands Advisory Board and Resource Centre, Introduction, <<https://labrc.com/framework-agreement/introduction/>> accessed December 3, 2018; John W. Gailus and Caitlin Mason, Fundamentals of Aboriginal Law Certificate Land Management under the First Nation Land Management Act (Devlin Gailus Watson Barristers & Solicitors, 2017). <<http://www.dgwlaw.ca/wp-content/uploads/2017/03/Land-Management-under-the-First-Nation-Land-Management-Act.pdf>> accessed December 3, 2018.

processes, section 6 of the FNLMA sets out the requirements for a First Nation wishing to adopt a land code.<sup>15</sup>

5. **Individual Transfer Agreement:** An Individual Transfer Agreement is negotiated and entered into to deal with such matters as the reserve lands to be managed by the First Nation, the specifics of the transfer of the administration of land from Canada to the First Nation, and the developmental and operational funding to be provided for land management.
6. **Community Ratification Process:** In order to assume control over its lands, the Land Code and the Individual Transfer Agreement must be ratified by the First Nation. The procedure for the community ratification process is developed by the community in accordance with the *Framework Agreement*.
7. **Verification:** An independent person selected jointly by the First Nation and Canada, called a Verifier, will confirm that the community ratification process and Land Code are consistent with the *Framework Agreement*.
8. **Transfer of Land Management:** If the community ratifies the Land Code and Individual Transfer Agreement, the Minister will sign the Individual Agreement to transfer administration and control over the First Nation's land and resources to the First Nation. Control over First Nation land and resources is transferred from the *Indian Act* to the First Nation's land laws and administration. At this point, the 34 sections of *Indian Act* which deal with land, resources, and environment no longer apply to that First Nation.

### **iii. Available Funding**

Funding is available to support First Nations through the developmental phase, as well as with operational land management activities:

- Developmental funding assists with the community's approval process, development of the land code, and negotiation of the individual agreement.
- Operational funding is determined through a formula, which is set out in the individual agreement
- Most relevant to the development of a SWPP, once a Land code is implemented, it supersedes the authority of any provisions of a First Nation law or of a by-law made by its council under section 81 of the *Indian Act*.

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<sup>15</sup> *First Nations Land Management Act*, SC 1999, c 24, <<https://www.canlii.org/en/ca/laws/stat/sc-1999-c-24/latest/sc-1999-c-24.html#sec6subsec1>> accessed December 3, 2018.

# III. Gathering Source Water Data through Community-based Research and Monitoring

## 1. Community-based Research

Critical to the success of this project and the formation of long-term relationships was the partnership created with Western University, Ontario. A postdoctoral fellow at Western University, Joshua Dent, had been developing a digital community-based research hub meant to link academics with community-sourced research projects, for the purposes of realizing both academic and community research goals.<sup>16</sup>

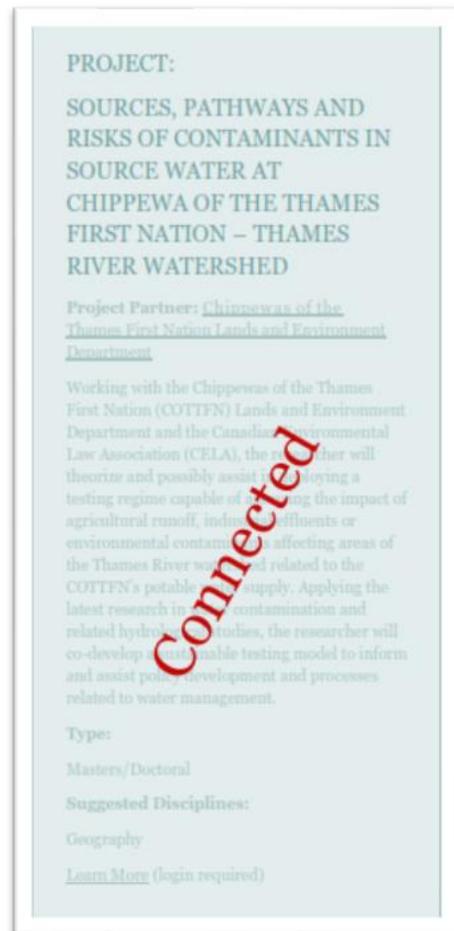
The pilot phase of this research portal project coincided with the CMO-CELA source water protection project and presented a new opportunity to seek further expertise on water quality data and testing. The following project description was provided as a featured posting to the online portal during its pilot phase:

Working with the Chippewas of the Thames First Nation (COTTFN) Lands and Environment Department and CELA, the researcher will theorize and possibly assist in deploying a testing regime capable of assessing the impact of agricultural runoff, industrial effluents or environmental contaminants affecting areas of the Thames River watershed related to COTTFN’s potable water supply. Applying the latest research in water contamination and related hydrological studies, the researcher will co-develop a sustainable testing model to inform and assist policy development and processes related to water management.

The aim of the project is to:

- (1) Develop a theoretical framework and methodology which can be used for tracking contaminants, their pathways and possible routes of exposure in the Thames River Watershed;
- (2) Apply a testing model to the hydrology at COTTFN.

Within one day of the Research Portal posting and promotion, the source water project was connected<sup>17</sup> with Dr. Mohammad Reza Najafi, an Assistant Professor in the Department of Civil and Environmental Engineering at



<sup>16</sup> See online: <https://insituated.com/research-portal>

<sup>17</sup> The Research Portal Newsletter, online: <https://insituated.com/wp-content/uploads/2017/11/Research-Portal-Newsletter-1.2.pdf>

Western University and Adjunct Faculty, Dr. Shirin Bahrami from the same department and a specialization in chemical biology.

The report which follows provides excerpts from the preliminary findings of Dr. Najafi and Dr. Bahrami of Western University. Their water quality studies will continue beyond the timeframe of this project.

## **2. Water Quality Findings**

### **A. Introduction**

#### ***i. Monitoring the Water Quality of the Thames River and Local Creeks at COTTFN (4 Month Period)***

The quality of water at the Chippewas of the Thames was graded C which indicates low aesthetic quality and a review of the scientific literature revealed an increase in the concentration of both nitrogen and phosphorus from agricultural activities (Chippewa of the Thames, 2014). Over the years, surface water quality has continued to deteriorate from excessive nutrients leading to poor aesthetic conditions.

The water parameters monitored in the study were pH, temperature, dissolved oxygen, turbidity, total dissolved solids, electrical conductivity and salinity. While total Phosphorus and total Nitrogen are currently not monitored, there are plans to include them in the monitoring process of the creeks. The water supply in Chippewas is considered as Wellhead Protection Area-F (WHPA-E) based on evaluation methodologies outlined in MOE technical rules for municipal Groundwater system that are under the Direct Influence (GUDI) of surface water. GUDI systems are commonly considered as surface water sources for water treatment and water protection (Chippewas of the Thames First Nation, 2013).

Monitoring of the creeks is necessary to detect presence of contaminants which could arise from agricultural activities at and surrounding the Chippewas of the Thames territory.

#### ***ii. Watershed Modelling***

The Soil and Water Assessment Tool (SWAT) is a useful tool for predicting water quality and quantity modeling which is commonly used in different parts of the world. The robustness of SWAT makes it useful for hydrologic and sediment modeling, water quality and quantity modeling as well as nitrogen and phosphorus modeling (White et al., 2011; Zhang, Xia, Chen, & Zhang, 2011). It has been used for long-term simulations of streams, erosion, nutrient and sediments and subsurface drain. It is regarded as a physical method, a semi distributed river basin simulator developed by USDA Agricultural Research Service (ARS) (Zanen, 2013). It is useful for quantifying the impact of land management practices on the water quantity, on sediment transport and on the water quality of large complex watersheds with varying soil, land use and management conditions and over a long period of time (Kane, Tim, & Mickelson, 2007; Yang et al., 2013). The aim of this study is to determine if the creeks are contaminated and to model the hydraulics of the streamflow using SWAT.

### **iii. Study Area Description**

The Chippewas of the Thames community is located along the west banks of the Thames River approximately 25 km southwest of London with an area of about 38 km<sup>2</sup> (Chippewas of the Thames First Nation, 2013). The Thames River is the major hydrological feature in the area because of its direct influence on the water table in the flood plains particularly in terms of water baseflow, groundwater recharge and bank storage. The water supply at Chippewa consists of a horizontal infiltration gallery within 50-100m axis of the Thames River. The Chippewa water intake comes from two connected infiltration galleries situated on the righthand side of the Thames River floodplain. It has a length of 700m with a total capacity of 573 m<sup>3</sup>/day (6.69L/s) (Johnson & Consulting, 2016). The soil cover is mostly saturated gravel layer ranging from 7m to 10m deep which is predominantly silty clay loam with a high runoff potential and low permeability. The geology of the site consists of gravely sands glaciolacustrine in nature with a thick stratum of silt clay (Chippewas of the Thames First Nation, 2013). Presently, the creeks and river are being monitored to detect possible contamination and the results of the monitoring are documented in this study.

## **B. Methodology**

### **i. Local creeks at Chippewas of the Thames**

There are 17 locations in COTTFN along the Thames River and its tributaries where benthic samples are collected annually in the spring and autumn (Straightup Environmental Consulting, 2017). For this study, seven of these locations were monitored and the remaining ten locations were not monitored due to difficulties inaccessibility. The pathways to the creeks were completely covered with shrubs and the terrain is very steep, making it difficult to reach the waterbodies.

### **ii. Water parameters**

Water samples were collected every fortnight from the local creeks and the Thames River at Chippewas of the Thames. The water samples were characterized to determine the waterbodies with the highest nitrogen or phosphorus concentration. Other water quality parameters measured included turbidity, dissolved oxygen (the most important parameter in water because it is essential for the metabolism of aerobic aquatic species in water), pH (the measure of free hydrogen ions in water), total dissolved solids (shows the concentration of dissolved matter in water indicating the ionic strength of the solution), electrical conductivity, and temperature (significantly impacts both chemical and physical interactions parameters of water affecting aquatic life). These parameters were determined in the laboratory of the Civil and Environmental Engineering Department at Western University.

## **C. Conclusion**

Based on the Canadian Council of Ministers of the Environment Water Quality Index, the waterbodies sampled are classified as 'Poor'. Results for total nitrogen and phosphorus, two critical water quality parameters, have shown quantities above government standards. The results obtained from monitoring will be utilized for modeling using SWAT.

## IV. Connecting Threats to Source Water with Legal Tools

“The health of the water reflects the health of the community”

- CMO community member, May 2017

### 1. Community-identified threats to source water

During the source water protection workshops, CMO community members reflected on changes they had observed to the Thames River watershed, shared concerns about its health in relation to their community, and suggested ways to reduce threats to source water.

CMO community members shared their observations about changes in the area, such as an overall decline in biodiversity and species abundance. From a reduction in the number of tree and songbird species, to fewer fish and deer, community members shared how alterations to the land outside of their community, from agriculture, landfill siting and urban development, had impacted the Thames River, its wetland and riparian habitats, and consequently their local environment.

Community members also provided insight into the present and legacy threats to their source waters. Table 1, below, highlights the main threats that were identified and the perceived source of these threats.

CMO community members often referred to historical events when discussing the present health of their source water. The harm to source waters resulting from leaking underground gas tanks and naphthalene, from the furnace of what was once a residential school, and a test site which was used for bombing during WWII were often discussed. These contaminated sites had also been identified in an Environmental Site Assessment COTTFN had conducted in years prior.

Present day threats caused by the communities’ proximity to the Hwy 401 transportation corridor, rail lines, landfill siting, intensive agriculture and the City of London – due to sewage discharges upstream were also repeatedly raised as threats by community members.

**Table 1.** Community-identified Threats to Source Water

Threat	Source
Animal feedlots	Waste Lagoons Land application Pasture areas
Fertilizers and pesticides	Land Application
Irrigation	Return flows to groundwater, surface water

Residential	Runoff from disturbed land
Commercial	Runoff from impervious surfaces
Industrial transportation	Runoff from disturbed land Runoff from impervious surfaces
Harvesting operations	Road construction Runoff from disturbed sites
Fire Management	Ash and sediment runoff
Storage tanks	Hazardous materials and waste
Landfill	Hazardous material
Pipelines	Hazardous materials and waste
Wastewater Treatment Plant	Improper practices
Brownfield sites (former industrial sites)	Petroleum release Hazardous materials
Fuel storage tanks	Hazardous materials, hydrocarbon releases
Cemeteries and graveyards	Chemical and pathogenic contaminants
Septic tanks	Individual homes, businesses, multi-family units
Impervious surfaces	Runoff from roads, parking lots
Surface impoundment	Sewage lagoons
Groundwater	Unused/ abandoned and contaminated wells
Unpermitted dumping	Illegal dumping of yard waste, household waste, wood waste, concrete, tires, old cars, etc.
Human wellness	Aboriginal Traditional Knowledge

## 2. Using Legal Tools to Respond to Source Water Threats

Based on the communities' identification of threats to their source water, feedback from the Steering Committee, Chief and Council, and staff in the departments of Lands and Resources and Justice, the following legal tools were drafted by CELA. These tools drafted include by-laws, a consultation and accommodation protocol, a primer on environmental rights and participating in environmental significant decision-making, a template farming lease for use on First Nation lands, and an overview of mechanisms to protect source waters available in the Ontario *Clean Water Act*.

These tools, summarized below and detailed in **Chapters 5 - 9**, were not only selected for use by CMO, but for their value to other Indigenous communities, seeking to address threats to source water protection. Accompanying each legal tool is a template which can be amended to reflect the history, traditional ecological knowledge and governance structure of the community.

### ***Legal Tool 1: By-laws as an Authority for Environmental Protection and Enforcement***

As discussed in greater detail in **Chapter 5**, environmental protection can be addressed through the enactment of environmental by-laws in relation to First Nation lands under the *Indian Act* or the *Framework Agreement on First Nation Land Management*, which allows First Nations to establish and implement land governance laws overseeing reserve lands and resources.

However, as Federal environmental legislation does not provide an effective or comprehensive management regime for these lands and there is very little meaningful regulation for dealing with environmental matters such as source water protection or the remediation of contaminated sites on First Nation lands,<sup>18</sup> a series of by-laws were drafted to respond to threats identified by the community. These by-laws relate to agricultural and nutrient management (**Appendix 1**), waste management (**Appendix 2**), septic systems (**Appendix 3**), and wetlands (**Appendix 4**).

### ***Legal Tool 2: Consultation and Accommodation Protocol to Advance Source Water Protection***

As a result of the community workshops and meetings with the CMO Steering Committee, it became apparent that due to developments outside of the community (ie. the siting of landfills or the issuance of water taking permits), threats to source water could be exacerbated. Therefore, there was an opportunity to ensure concerns about source water protection were considered and central to decision-making and discussions, between CMO, government officials and private companies.

Therefore, a detailed discussion of the role of consultation and accommodation is included in **Chapter 6**. Accompanying this discussion, is a template "Consultation and Accommodation Protocol" in **Appendix 5**, which expressly includes considerations of source water protection, the mitigation of negative effects and community involvement in water quality and environmental monitoring.

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<sup>18</sup> "Contaminated Sites on First Nation Lands", 2016 Site Remediation in B.C. Conference – B.C. Ministry of Environment. Vancouver, BC, September 2016 online: [http://www.woodwardcompany.com/wp-content/uploads/pdfs/2016-09-20-Contaminated\\_Sites\\_on\\_First\\_Nation\\_Lands-Final.pdf](http://www.woodwardcompany.com/wp-content/uploads/pdfs/2016-09-20-Contaminated_Sites_on_First_Nation_Lands-Final.pdf).

The Protocol draws on the approach taken in several publicly available consultation documents from First Nation communities in Ontario and guidance from cases, international treaties, and the earliest of First Nation-Crown authorities which recognize nation-to-nation relationships.

The Protocol aims to provide a starting point for discussion and baseline requests, which can be relied upon by a First Nation. The template is intended to facilitate First Nations' ability to uphold their rights and interests and be a resource for all First Nations involved in consultation. It is also applicable in the context of drafting terms of reference or community benefit agreements, where a First Nation may seek to retain experts or require financial resources, to ensure adequate dissemination of information, studying or monitoring of effects on traditional and ecological values.

### ***Legal Tool 3: Public Environmental Rights and Appeals Related to Source Waters***

Throughout the series of workshops hosted in the communities, it was apparent that community members wanted to be informed of decisions being made which could have repercussive effects on the health and quality of their source waters and be provided the opportunity to comment.

Therefore, **Chapter 7** details the environmental rights of all Ontario residents. These rights are recognized in the *Environmental Bill of Rights* and exist to facilitate public participation in environmentally significant decisions with the aim of protecting, conserving and restoring the integrity of the environment. **Chapter 7** also provides a how-to guide for using Ontario's online Environmental Registry, where proposals are posted for public comment.

### ***Legal Tool 4: Considering Source Water within Agricultural Leases on First Nation Reserve Lands***

During discussions with community members and the Steering Committee, concerns were raised resulting from leases allowing farming on reserve land. Of concern, was the ability of the community to oversee a farm tenants' actions and ensure methods of farming which did not degrade or impact the environment and local waters.

In response to this concern, a template lease under the *Indian Act* was drafted (see **Appendix 6**). As detailed in **Chapter 8**, as all leases include provisions that establish the rights and obligations of the landlord and tenant, provisions can dictate how the land will be used. For example, a lease of land for use as a farm may contain a clause dealing with fertilizer application.

### ***Legal Tool 5: Protecting Source Waters Under the Clean Water Act***

A final legal tool evaluated for its potential of advancing source water protection was the role of Ontario's *Clean Water Act* (CWA). Ontario mandates that Source Protection Committees (SPC) consult with First Nation communities in their source protection areas and solicit their participation in the process, either through working groups or as members of the SPC. The mechanism for source water protection, available to First Nation communities under the CWA are discussed in greater detail in **Chapter 9**.

## V. Legal Tool: By-laws as an Authority for Environmental Protection & Enforcement

Source water protection can be addressed through the enactment of environmental laws in relation to First Nation lands under the *Indian Act* or the *Framework Agreement*, which allows First Nations to establish and implement land governance overseeing reserve lands and resources.

As Federal environmental legislation does not provide an effective or comprehensive management regime for these lands and there is very little meaningful regulation to deal with environmental matters such as source water protection or the remediation of contaminated sites on First Nation lands,<sup>19</sup> a series of by-laws were drafted to respond to threats identified by the CMO communities. These by-laws relate to agricultural and nutrient management (Appendix 1), waste management (Appendix 2), septic systems (Appendix 3), and wetlands (Appendix 4).

### 1. Environmental Protection under the *Indian Act*

First Nation lands are within the exclusive jurisdiction of the federal government, which means that federal laws of general application will apply to reserve lands regardless of the applicable administrative regime unless another piece of federal legislation expressly excludes them. There are no federal laws dealing with local land matters, such as zoning, land use, and building codes because these are “property and civil rights” matters under the exclusive jurisdiction of the provinces. Parliament does exercise limited environmental regulation through federal laws of general application, such as the *Canadian Environmental Assessment Act*, the *Fisheries Act*, the *Species at Risk Act*, and the *Canadian Environmental Protection Act*. However, these laws are not specific to First Nation lands.

While the federal government is competent to enact environmental laws in relation to First Nation lands, Federal environmental legislation does not provide an effective or comprehensive management regime for these lands. There is very little meaningful regulation for dealing with environmental matters such as source water protection or the remediation of contaminated sites on First Nation lands.<sup>20</sup>

The primary legislation through which the federal government exercises its jurisdiction over First Nation lands is the *Indian Act*. While there is a land management regime under the *Indian Act*,<sup>21</sup> there are no

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<sup>19</sup> “Contaminated Sites on First Nation Lands”, 2016 Site Remediation in B.C. Conference – B.C. Ministry of Environment. Vancouver, BC, September 2016 online: [http://www.woodwardandcompany.com/wp-content/uploads/pdfs/2016-09-20-Contaminated\\_Sites\\_on\\_First\\_Nation\\_Lands-Final.pdf](http://www.woodwardandcompany.com/wp-content/uploads/pdfs/2016-09-20-Contaminated_Sites_on_First_Nation_Lands-Final.pdf).

<sup>20</sup> “Contaminated Sites on First Nation Lands”, 2016 Site Remediation in B.C. Conference – B.C. Ministry of Environment. Vancouver, BC, September 2016 online: [http://www.woodwardandcompany.com/wp-content/uploads/pdfs/2016-09-20-Contaminated\\_Sites\\_on\\_First\\_Nation\\_Lands-Final.pdf](http://www.woodwardandcompany.com/wp-content/uploads/pdfs/2016-09-20-Contaminated_Sites_on_First_Nation_Lands-Final.pdf).

<sup>21</sup> The regulations under the *Indian Act* include the *Indian Reserve Waste Disposal Regulations*, the *Indian Timber Regulations*, *Indian Timber Harvesting Regulations*, and the *Indian Mining Regulations*, which establish limited rules for environmental management during specific activities.

express provisions for the protection of the environment on First Nation lands. The environmental management that is available emerges indirectly through regulation, through the First Nation's by-law making authority, and through contract.

The *Indian Act* grants certain by-law making authority under section 81 to Band Councils for the regulation of certain activities on First Nation lands. Section 81(1) of the *Indian Act* sets out the purposes for which Band Councils may make by-laws "not inconsistent with" the *Indian Act* or any federal regulation. These powers are analogous to the powers granted to municipalities and are very limited in scope. Most notably, section 81(1) does not include environmental management matters as enumerated powers. By-laws enacted under section 81(1) include 22 subject areas that may impact development including health, law and order, zoning, prevention of nuisance, trespass, regulation of traffic, regulation of the construction and maintenance of watercourses, roads, bridges, ditches, fences and other local works, the control of noxious weeds, regulation of water supplies, and the preservation, protection and management of animals on reserve. Indian Affairs and Northern Development has suggested that by-law powers can incidentally address issues of pollution and contamination by regulating:<sup>22</sup>

- garbage disposal (subject to the Indian Reserve Waste Disposal Regulations, CRC, c 960);
- burning (grass, tires, garbage etc.);
- the use of dangerous materials; and
- management of fur-bearing animals, fish and other game on reserve (which is limited to zoning nature preservation areas and protecting areas from development).

While it is technically possible for by-laws to play a role in environmental management, they have serious limitations. This is because their enforcement powers are very weak. Offences must be prosecuted through summary conviction, and the maximum penalties are a fine of \$1000, imprisonment for a term not exceeding 30 days, or both.

The 2014 amendments to the *Indian Act* eliminated the requirement for Ministerial approval of by-laws prior to their enactment.<sup>23</sup> The amendments also allowed First Nations to now keep the proceeds from fines imposed under by-laws, rather than remitting the fines to the Minister. However, the maximum penalties were not amended are still insufficient to deter major polluters or to recover the costs of remediation.<sup>24</sup>

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<sup>22</sup> Indigenous and Northern Development Canada, *Appropriate Authorities in the Indian Act for the Enactment of By-Laws*, 2012, Online: <<https://web.archive.org/web/20121016111630/http://www.aadnc-aandc.gc.ca/eng/1100100013962/1100100013963>>.

<sup>23</sup> *Indian Act Amendment and Replacement Act*, SC 2014, c. 38.

<sup>24</sup> "Contaminated Sites on First Nation Lands", 2016 Site Remediation in B.C. Conference – B.C. Ministry of Environment. Vancouver, BC, September 2016 online: <[http://www.woodwardandcompany.com/wp-content/uploads/pdfs/2016-09-20-Contaminated\\_Sites\\_on\\_First\\_Nation\\_Lands-Final.pdf](http://www.woodwardandcompany.com/wp-content/uploads/pdfs/2016-09-20-Contaminated_Sites_on_First_Nation_Lands-Final.pdf)>.

## 2. Environmental Protection under the *First Nation Land Management Act*

Parliament has attempted to address environmental issues on First Nations' lands by, primarily, transferring administrative and management responsibility to First Nations themselves. One way this is being achieved is through the development and implementation of the *Framework Agreement* and the *First Nation Land Management Act*. The FNLMA provides First Nations with the statutory authority, not possible under the *Indian Act*, to manage and develop their lands and the recognition of rights and capacities with respect to the governance and management of their lands. Under this program, the federal government delegates responsibility for land management to First Nations who administer this authority pursuant to their own Land Code.<sup>25</sup> The FNLMA regime also recognizes all existing rights and interests in Reserve Lands at the time a land code comes into effect, including the special rights and interests that locatees have in their lands.

In order to transition from the *Indian Act* regime to the FNLMA regime, a First Nation must take a number of steps, including the adoption and ratification of a land code. Once ratified a land code becomes the basic land law of the First Nation and replaces the land management provisions of the *Indian Act*. The rights and obligations of Her Majesty pursuant to instruments granted under the *Indian Act* in respect of the Reserve Lands of the First Nation who has adopted a land code become those of the First Nation.<sup>26</sup> AANDC then ceases involvement in the management of the First Nation's lands and resources.

Land Codes provide for a comprehensive land management regime, including rules and procedures for the granting and transfer of interests in First Nation lands. While the FNLMA stipulates the subject matters that must be contained in a land code, Land Code First Nations have a broader authority to govern land use in a way that is more similar to the authority granted to municipalities. Additionally, in contrast to First Nations who are subject to the *Indian Act*, First Nations with a land code have the express ability to establish environmental regulation over their lands. The result is that Land Code First Nations have the potential to administer their lands under a more comprehensive and autonomous regime than do First Nations operating under the *Indian Act*.

## 3. Legal Precedents

This document appreciates that a First Nation may not yet be at a stage that enables the community to develop regulations under the broader authority of a Land Code. As a result, a number of samples are provided in Appendices 1 – 4 for First Nations whose lands are governed under the *Indian Act*, while others are drafted assuming greater autonomy for lands and resources under the FNLMA. The samples

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<sup>25</sup> Ibid; "Development on First Nations Lands Laws of General Application", Real Estate Development on First Nation Lands – Pacific Business & Law Institute. Vancouver, BC, September 2016. Online: [http://www.woodwardandcompany.com/wp-content/uploads/pdfs/Real\\_Estate\\_Development-Laws\\_of\\_General\\_Application-Final.pdf](http://www.woodwardandcompany.com/wp-content/uploads/pdfs/Real_Estate_Development-Laws_of_General_Application-Final.pdf)

<sup>26</sup> Section. 16(3) of the FNLMA.

provided are an attempt to address the specific SWP concerns raised by the CMO during the development of this toolkit.

Despite the seemingly limited subject matter, jurisdiction and enforcement powers under the *Indian Act* by-laws, the substantive provisions of these by-laws could still be used as precedent for a First Nation that is no longer governed under the *Indian Act*. The substantive provisions would largely remain the same, while the preamble and enforcement provisions would need to be amended to reflect the particular interests of a First Nation community.

Specific sources of concern for source waters included run-off from agricultural operations, construction waste and run-off, transportation road run-off, septic systems and wells, sewage lagoons, landfills, waste water treatment, fuel storage tanks, and brownfields. Table 2 provides a list of the precedent by laws and a brief description of their purpose.

**Table 2.** The purpose of precedent laws, By-laws, and regulations.

Laws, By-laws, and Regulations	Purpose
<a href="#">Agricultural Nutrient Management Law</a>	The purpose of this Law and its regulations is to provide for the management of materials containing nutrients used for agricultural operations in a manner that will enhance protection of the natural environment.
<a href="#">Agricultural Nutrient Sample, Analysis, and Quality Standards By-law</a>	A regulation under the Agricultural Nutrient Management Law drafted in the form of a By-law under the <i>Indian Act</i> . The purpose of this By-law is to set standards for materials containing nutrients for use in agricultural operations; including the requirements for sampling and analysis of these materials.
<a href="#">Agricultural Nutrient Land Application Rates Regulation</a>	A regulation under the Agricultural Nutrient Management Law that provides for the allowable application rates of materials with certain nutrients in specific amounts. The application rates are based on the quality of the applied nutrient materials.
<a href="#">Agricultural Nutrient Application Standards Regulation</a>	A regulation under the Agricultural Nutrient Management Law that provides for the allowable standards of materials with certain nutrients in specific amounts. The application standards include such stipulations as setbacks from wells and waterways, and seasonal prohibitions for application based on the quality of the applied nutrient materials.

<a href="#">Agricultural Nutrient Inspection and Orders Regulation</a>	A regulation under the Agricultural Nutrient Management Law that provides for the rules surrounding the inspection of agricultural operations by officers and the order that may be made to ensure compliance with the the Agricultural Nutrient Management Law and its regulations.
<a href="#">Agricultural Nutrient Application Waiting Periods</a>	A regulation under the Agricultural Nutrient Management Law that provides for the waiting periods before certain agricultural operations may be undertaken after certain nutrients have been applied to the land.
<a href="#">Nutrient Application Strategies, Plans and Approvals Regulation</a>	A regulation under the Agricultural Nutrient Management Law that requires the creation of strategies and plans for the application of materials with certain nutrients. The regulation also provides for the requirement of an approval from Council prior to the use of a plan or strategy.
<a href="#">Waste Management By-law</a>	The purpose of this By-law is to establish rules for the disposal and collection of garbage.
<a href="#">Septic Re-Inspection Program By-law</a>	The purpose of this By-law is to establish rules for inspection and assessment of a previously installed septic system.
<a href="#">Wetland Zone By-law</a>	The purpose of this By-law is to establish a wetland zone for the protection of wetlands. It prohibits the disposal waste and certain other activates from occurring within the wetland zone.

Table 3 below, provides a list of some of the threats faced by First Nation communities and legal instruments which could be implemented to counteract the harm of source water threats.

**Table 3.** Source water threats and accompanying management actions and legal instruments

Threat	Source	Possible Management Actions	Legal Instrument
Agriculture			
Animal feedlots	Waste Lagoons	Immediate actions:	

	Land application Pasture areas	Buffer and setback zones Best management practices nutrient load standards Education Water quality monitoring Longer term: Health regulations Discharge requirements	<ul style="list-style-type: none"> <li>• Agricultural Nutrient Management Law;</li> <li>• Agricultural Nutrient Application Standards Regulation</li> <li>• Agricultural Nutrient Application Waiting Periods Regulation;</li> <li>• Agricultural Nutrient Sampling and Quality Standards Regulation;</li> <li>• Agricultural Nutrient Application Strategies, Plans, and Approvals Regulation;</li> <li>• Agricultural Nutrient Inspection and Orders Regulation;</li> <li>• Outdoor Confinement Area Regulations.</li> </ul>
Fertilizers and pesticides	Land Application	Immediate actions: Buffer and setback zones Education Longer term: Health regulations Application standards	<ul style="list-style-type: none"> <li>• Agricultural Nutrient Sampling and Quality Standards Regulation;</li> <li>• Agricultural Nutrient Application Strategies, Plans, and Approvals Regulation;</li> <li>• Agricultural Nutrient Inspection and Orders Regulation;</li> <li>• Outdoor Confinement Area Regulations.</li> </ul>
Irrigation	Return flows to groundwater, surface water	Immediate actions: Best management practices Education Longer term: Agricultural management	<ul style="list-style-type: none"> <li>• Agricultural Nutrient Inspection and Orders Regulation;</li> <li>• Outdoor Confinement Area Regulations.</li> </ul>
Industry			
Landfill	Hazardous material	Immediate actions: Waste separation Landfill monitor Fencing, signage Water quality monitoring	<ul style="list-style-type: none"> <li>• Waste Management By-law</li> <li>• Wetland by-law &amp; Band Council Resolution.</li> </ul>

		<p>Education</p> <p>Longer term:</p> <p>Runoff ponds</p> <p>First Nation zoning codes</p> <p>Pollution prevention, education</p>	
Urban (commercial and residential)			
Septic tanks	Individual homes, businesses, multi-family units	<p>Immediate actions:</p> <p>Pump-out regulations</p> <p>Setbacks, construction standards</p> <p>Education</p> <p><b>Longer term:</b></p> <p>Review health regulations;</p> <p>Design standards</p> <p>Implement subdivision regulations</p> <p>Site design</p> <p>On-site wastewater regulations</p>	<ul style="list-style-type: none"> <li>• Sanitary Sewer By-law;</li> <li>• Septic Re-inspection Program Law</li> </ul>
Unpermitted dumping	Illegal dumping of yard waste, household waste, wood waste, concrete, tires, old cars, etc.	<p>Immediate actions:</p> <p>Education</p> <p>Longer Term:</p> <p>Health Regulations</p>	<ul style="list-style-type: none"> <li>• Waste Management By-law;</li> </ul>

## VI. Legal Tool: Consultation and Accommodation Protocol to Advance Source Water Protection

As a result of the community workshops and meetings with the CMO Steering Committee, it became apparent that due to developments outside of the community (ie. the siting of landfills or the issuance of water taking permits), threats to source water could be exacerbated. Therefore, there was an opportunity to ensure concerns about source water protection were considered and central to decision-making and discussions, between CMO, government officials and private companies.

Therefore, this chapter details the role of consultation and accommodation in advancing source water protection. Accompanying this discussion, is a template Consultation and Accommodation Protocol (see Appendix 5), which expressly includes considerations of source water protection, the mitigation of negative effects and community involvement in water quality and environmental monitoring.

### 1. Advancing Source Water Protection through the Duty to Consult and Accommodate

The Crown's duty to consult and accommodate is a foundational legal doctrine, applicable to Indigenous communities, their rights and interests. The duty to consult is an essential corollary to the process of reconciliation, required by s.35 of the *Constitution Act, 1982*, which seeks to rectify the power imbalance between First Nations and Canada.

The general framework for the duty to consult was first provided by the Supreme Court of Canada, in *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, following a petition by the Haida Nation seeking an order that the Minister of Forests had "breached or failed in his fiduciary duty to consult with the Haida Nation by failing to properly consult."<sup>27</sup> As concluded by the court in this seminal ruling:

The duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.<sup>28</sup>

It is clear law that the duty to consult must be satisfied *prior* to decisions being made. This also requires the Crown to address First Nations' concerns, for the reason that "consultation that excludes from the outset any form of accommodation would be meaningless."<sup>29</sup>

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<sup>27</sup> Docket No. A950625

<sup>28</sup> *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [Haida Nation]

<sup>29</sup> *Mikisew Cree First Nation v Canada (Minister of Heritage)*, 2005 SCC 69, para 54

## 2. The Scope of the Duty to Consult

The courts have recognized that the duty to consult and accommodate will vary with the circumstance. The degree of consultation required depends on the strength of the First Nations' claim and the seriousness of the potential impact on the rights asserted.<sup>30</sup>

In *Haida Nation*, the court used the concept of a spectrum to frame their analysis of the duty to consult and accommodate. Accordingly,

At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice [ . . . ]

At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case [ . . . ]

Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake (emphasis added).<sup>31</sup>

Even in instances where the duty to consult may be at the lower end of the spectrum, it can still be used to successfully overturn decisions which infringe on First Nations' interests and rights.

Since the *Haida Nation* decision in 2004, over 350 cases have relied on the duty to consult, namely in the judicial review of government permits for resource permits.<sup>32</sup> Those in which the duty to consult and accommodate was successfully used to uphold traditional and ecological values include:<sup>33</sup>

- Holmaco First Nation (2004): Province's approval of salmon fish farming licences in Bute Inlet
- Mikisew Cree (2004): Crown's approval of a winter road in Wood Buffalo National Park, AB

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<sup>30</sup> *Haida Nation*, paras 39 and 43-45

<sup>31</sup> *Haida Nation*, paras 43 – 45

<sup>32</sup> Greg McDade, "Haida Nation – The Origins of the Haida Litigation" in William A. Tilleman & Alistair Lucas, QC, eds, *Litigating Canada's Environment: Leading Canadian Environmental Cases by the Lawyers Involved* (Toronto: Thomson Reuters Canada Limited, 2017), p 123 [Litigating Canada's Environment]

<sup>33</sup> *Ibid*

- Huu-ay-aht First Nation (2005): new BC forestry strategy and approval of unsustainable volumes of logging in their territory
- Ka'a'Gee Tee First Nation (2007): oil and gas development projects in the Mackenzie Valley impacting wildlife and trapping
- Xats'ull First Nation (2008): a permit to Gibraltar Mines Lt. to discharge materials into the Fraser River
- West Moberly First Nation (2011): permits granted by BC for mining exploration harming traditional caribou-hunting territory
- Ross River Dena Council (2012): overturning the Yukon Territory's legislated procedure for allowing automatic mineral claims
- Na-Cho Nyak Don (2015): struck down the approval of a new land use agreement in the Peel Watershed on the basis of favoured development
- Fort Nelson First Nation (2015): provincial environmental assessment approval of a project to develop several sand and gravel mines
- Coastal First Nations (2016): environmental assessment certificate for Enbridge's Northern Gateway Pipeline Project to develop a heavy oil pipeline

In carrying out the duty to consult and accommodate, the Crown may delegate procedural aspects of the consultation process to the proponent, however, the duty remains the Crown's responsibility. Thus, it is up to the Crown to "provide direction on the scope of the consultation required in the circumstances;" "provide ongoing direction, oversight and supervision of the process;" and "assess the sufficiency of consultation and accommodation, where required, and make a decision."<sup>34</sup>

### 3. The Scope of Accommodation

Like consultation, the degree of accommodation depends on the strength of the claim to particular rights, and the potential harm which could be caused by the proposed activity. Where consultation is on the low end of the spectrum, accommodation may be a discussion of the issues raised and an attempt to address concerns. Conversely, if a high degree of consultation is required, accommodation may require the mitigation of harms or the negotiation of impact or community benefit agreements.

If neither consultation nor accommodation are adequate, and not responsive to the concerns of the First Nations community, a court can direct there be further consultation or, that the permit or application be revoked pending completion of adequate consultation.<sup>35</sup>

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<sup>34</sup> *Eabametoong First Nation v Minister of Northern Development and Mines*, 2018 ONSC 4316, para 21

<sup>35</sup> *Ibid*

## 4. Legal Precedent: Consultation and Accommodation Protocol

### *i. Purpose of a Consultation and Accommodation Protocol*

Fulfilling the duty to consult and accommodate has become a prerequisite for development and indeed, many “how to” books and websites dedicated to the topic are available for proponents seeking permits or resource development approvals. While the duty to consult and accommodate may be a recognized legal doctrine, there is not necessarily a reciprocal ability – often due to capacity constraints - among First Nation communities to exercise these rights to engagement. This toolkit further appreciates that not all First Nations communities are aware of their rights within consultation processes nor, equipped with resources to guide their community’s involvement and safeguarding of interests and rights.

A consultation and accommodation protocol can set out the intention, rights and interests of a First Nation community. And, as it is expected that First Nation communities participate in the consultation process, it is important to have a process by which concerns and expectations can be outlined with sufficient detail and specificity, in order to trigger their direct consideration by the Crown or proponents.

### *ii. Principles and Laws Informing this Toolkit’s “Consultation and Accommodation Protocol”*

Drawing on the approach taken in a number of publicly available consultation protocols from First Nation communities in Ontario and guidance from cases, international treaties and the earliest of First Nation-Crown documents which recognize nation-to-nation relationships, (the Royal Proclamation of 1763), enclosed in **Appendix 5** is a template Consultation and Accommodation Protocol.

The Consultation and Accommodation Protocol aims to provide a starting point for discussion and baselines asks which can be relied upon by a First Nation. The template is intended to facilitate First Nations’ ability to uphold their rights and interests and be a resource for all First Nations involved in consultation. It is also applicable in the contexts of drafting terms of reference or community benefit agreements, where First Nations may seek to retain experts or require financial resources, to ensure adequate dissemination of information, studying or monitoring of effects on traditional and ecological values.

#### United Nations Declaration on the Rights of the Indigenous People

The Protocol incorporates the principles of the *United Nations Declaration on the Rights of the Indigenous People* (UNDRIP).<sup>36</sup> UNDRIP is expressly recognized in the preamble of the Protocol and the principle of “free, prior, and informed consent” incorporated into “Section II. Principles Guiding Consultation” and “Section IV. Accommodation.”

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<sup>36</sup> “United Nations Declaration on the Rights of Indigenous Peoples,” online: [https://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf)

While UNDRIP is not binding, as a signatory, Canada should be compelled to act as if it is. The principles and standards enunciated in UNDRIP provide greater protection to Indigenous and treaty rights and should be used as an interpretation tool for section 35 constitutional rights. Incorporating UNDRIP within the text of the protocol is a means of advancing equality among Indigenous peoples, governments and private entities with whom they may be consulting.

#### Truth and Reconciliation Calls to Action

In 2015, the Truth and Reconciliation Commission released its 94 Calls to Action in order to advance the process of Canadian reconciliation.<sup>37</sup> A number of the Calls to Action are directly relevant to the Consultation and Accommodation Protocol and have been incorporated into its provisions. For instance, Call to Action No. 18 has been incorporated in “Section II – Principles Guiding Consultation.” Accordingly, it states:

We call upon the federal, provincial, territorial, and Aboriginal governments to acknowledge that the current state of Aboriginal health in Canada is a direct result of previous Canadian government policies, including residential schools, and to recognize and implement the health-care rights of Aboriginal people as identified in international law, constitutional law, and under the Treaties.

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<sup>37</sup> Truth and Reconciliation Commission of Canada, “Honouring the Truth, Reconciling the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada,” online: [http://www.trc.ca/websites/trcinstitution/File/2015/Honouring the Truth Reconciling for the Future July 23 2015.pdf](http://www.trc.ca/websites/trcinstitution/File/2015/Honouring%20the%20Truth%20Reconciling%20for%20the%20Future%20July%2023%202015.pdf)

## VII. Legal Tool: Environmental Rights

Throughout the series of workshops hosted in the communities, it was apparent that community members wanted to be informed of decision being made which could have a repercussive effect on the health and quality of their source waters and be provided the opportunity to comment.

This chapter details the environmental rights of all Ontario citizens. These rights are recognized in the *Environmental Bill of Rights* and exist to facilitate public participation in environmentally significant decisions with the aim of protecting, conserving and restoring the integrity of the environment. This chapter also provides a how-to guide on using Ontario's online Environmental Registry, where proposals are posted for public comment.

### 1. Overview of the Ontario Environmental Bill of Rights (EBR)

#### i. Purpose of the EBR

The *Environmental Bill of Rights*<sup>38</sup> (EBR) is a piece of legislation that seeks to protect, conserve and restore the integrity of the environment, to provide sustainability of the environment, and to protect the right of Ontario residents to a healthful environment.<sup>39</sup> In order to achieve these goals, the EBR provides legislative mechanisms for:

- Facilitating public participation in environmentally significant decisions by the Ontario government, such as providing comments on a proposal for a policy, Act, regulation or instrument; and submitting an Application of Investigation or Application for Review;
- Increasing the accountability of the Ontario government for its environmental decision-making;
- Increasing public access to the courts in order to protect the environment; and
- Enhancing protection for employees who take action in respect of environmental harm.<sup>40</sup>

#### ii. Application of the EBR

##### “Prescribed Ministries”

The EBR only applies to “environmentally significant” proposals by “prescribed” ministries. Prescribed ministries are those which are listed under regulation General, O. Reg. 73/94<sup>41</sup> under the EBR. Some ministries are only prescribed for certain parts of the EBR; for example, a ministry may be subject to the EBR public notice and consultation requirements and the Application for Review process, but not for the

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<sup>38</sup> Environmental Bill of Rights, 1993, S.O. 1993, c. 28 [EBR], online: <https://www.ontario.ca/laws/statute/93e28> [EBR]

<sup>39</sup> EBR, subsection 2(1)

<sup>40</sup> EBR, subsection 2(3)

<sup>41</sup> O. Reg. 73/94: GENERAL, under *Environmental Bill of Rights, 1993, S.O. 1993, c. 28*, online: <https://www.ontario.ca/laws/regulation/940073>

Application for Investigation process. The ministries to which the EBR applies may change from time to time. Currently, the ministries subject to the EBR are:

- Agriculture, Food and Rural Affairs (OMAFRA)
- Economic Development, Job Creation and Trade (MEDJCT)
- Education (EDU)
- Energy, Northern Development and Mines (MENDM)
- Environment, Conservation and Parks (MECP)
- Government and Consumer Services (MGCS)
- Health and Long-Term Care (MOHLTC)
- Indigenous Affairs (MIA)
- Infrastructure (MOI)
- Labour (MOL)
- Municipal Affairs and Housing (MMAH)
- Natural Resources and Forestry (MNRF)
- Tourism, Culture and Sport (MTCS)
- Transportation (MTO)
- Treasury Board Secretariat (TBS)

If a ministry is prescribed under the EBR, any environmentally significant policy or Act of that ministry is automatically subject to the EBR.<sup>42</sup> Proposals for environmentally significant regulations are only subject to the EBR if the enabling Act is prescribed under O. Reg 73/94.<sup>43</sup> Instruments (e.g. approvals, licenses and permits) are only subject to the EBR if they are listed in O. Reg 681/94, the Classification of Proposals for Instruments. Notice must be given for Class I, II, and III instruments.<sup>44</sup>

#### “Environmentally Significant”

It is up to the prescribed ministry to decide, on a case by case basis, whether a proposal for a policy, Act or regulation might significantly affect the environment. An effect can be either negative or positive outcome. The EBR provides some guidance to assist ministries in making this determination.<sup>45</sup>

Instruments that are determined by a ministry to have the potential to have a significant effect on the environment must be prescribed (listed) under the regulation, Classification of Proposals for Instruments, O. Reg. 681/94.<sup>46</sup>

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<sup>42</sup> EBR, subsection 15(1).

<sup>43</sup> EBR, subsection 16(1).

<sup>44</sup> EBR, subsection 22(1).

<sup>45</sup> EBR, section 14.

<sup>46</sup> *O. Reg. 681/94: Classification of Proposals for Instruments under Environmental Bill of Rights, 1993, S.O. 1993, c. 28*, online: <https://www.ontario.ca/laws/regulation/940681>

### **iii. Applying the “Statements of Environmental Values”**

The EBR also requires prescribed ministries to publicly prepare Statements of Environmental Values (SEVs) that explain how will integrate environmental values with social, economic and scientific considerations when they make environmentally significant decisions.<sup>47</sup> The Ministers of prescribed ministries have a mandatory duty under the EBR to take every reasonable step to ensure that the SEVs are considered whenever decisions that might significantly affect the environment are being made within the Ministries.<sup>48</sup>

### **iv. Tracking Proposals and Providing Comments: The Environmental Registry**

The EBR establishes the Environmental Registry, a searchable online database that provides public access to timely information about environmentally significant proposals and decisions made by the Ontario government.<sup>49</sup>

Prescribed ministries must give notice on the Environmental Registry when they propose to create new or amend existing environmentally significant policies, Acts, regulations under prescribed Acts, or prescribed instruments.<sup>50</sup> Ministries must also give an opportunity for the public to submit comments on such proposals.<sup>51</sup> When a ministry makes a decision about a proposal, it must post a notice on the Environmental Registry.

## **2. Exercising your Environmental Rights**

### **i. Public Notice & Comment Opportunities**

As explained above, the EBR gives the public the right to comment on certain proposed policies, Acts, regulations and instruments that are posted on the Environmental Registry. The “proposal notice” must provide a minimum of 30 days for the public to submit comments.<sup>52</sup>

For certain instrument proposals (i.e. Class II instruments, which have a higher potential effect on the environment) ministries are required to provide additional notice, longer comment periods and enhanced public participation.<sup>53</sup> The proposal notice summarizes the proposal and explains how to participate, the deadline by which comments must be submitted, where to send them, and where to get additional information. Submissions become part of the public record.<sup>54</sup>

There are certain exceptions to the requirement of posting a proposal. For example, proposals for policies or Acts that are predominantly financial or administrative in nature are exempt,<sup>55</sup> as are

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<sup>47</sup> EBR, section 7.

<sup>48</sup> EBR, section 11.

<sup>49</sup> Environmental Registry, online: [www.ebr.gov.on.ca](http://www.ebr.gov.on.ca)

<sup>50</sup> EBR, section 27.

<sup>51</sup> EBR, section 27.

<sup>52</sup> EBR, sections 15, 16, and 22.

<sup>53</sup> EBR, sections 22, 24, 25, and 28.

<sup>54</sup> EBR, section 27.

<sup>55</sup> EBR, section 16(2).

proposed amendments to or revocation of an instrument that in the minister's opinion will have an insignificant effect on the environment.<sup>56</sup> There is also an exception to requiring public notice and the opportunity to comment under an emergency that poses a serious risk of harm to a person, the environment, or property.<sup>57</sup> The minister can also circumvent the required notice period and opportunity to comment if in the minister's opinion, the proposal has already been considered in a process that is substantially equivalent to the public participation process under the EBR.<sup>58</sup>

When a ministry decides upon a proposal, it must post a "decision notice" on the Environmental Registry explaining the decision and describing the effect that the public's participation had, if any, on the ministry's decision. Ministries are required to consider any public comments before making a decision.<sup>59</sup> However, those who have provided comments will not receive a formal response from the Ministry.

Furthermore, a ministry is not required to make a decision on a particular proposal within a set time frame. Therefore, the Environmental Registry must be monitored for a decision notice.

## ***ii. Review outdated or ineffective environmental laws with an "Applications for Review"***

Under the EBR, any two Ontario residents can formally apply for reviews of outdated or ineffective environmental laws, regulations, policies or instruments on the grounds that they should be amended, repealed or revoked in order to protect the environment.<sup>60</sup> Similarly, any two Ontario residents can use this mechanism to apply for a review of the need for a new law, regulation or policy to protect the environment.<sup>61</sup>

Previously, applications for review were filed with the Environmental Commissioner, who in turn, forwarded a copy to the relevant ministry. Recent amendments to the EBR now require applications for review to be filed with the appropriate minister. The responsible minister must acknowledge receipt of the application for investigation within 20 days of receiving the application.<sup>62</sup> Within 60 days of receipt of the application, the relevant ministry must inform the applicants (with reasons) and the Auditor General whether the requested review will be conducted.<sup>63</sup> If the minister determines that it is in the public interest to conduct the review, the review must then be completed within a reasonable time.<sup>64</sup>

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<sup>56</sup> EBR, subsection 22(3).

<sup>57</sup> EBR, section 29.

<sup>58</sup> EBR, section 30.

<sup>59</sup> EBR, section 35.

<sup>60</sup> EBR, subsection 61(1).

<sup>61</sup> EBR, subsection 61(2).

<sup>62</sup> Bill 57, Restoring Trust, Transparency and Accountability Act, 2018, schedule 15, section 7.

<sup>63</sup> Bill 57, Restoring Trust, Transparency and Accountability Act, 2018, schedule 15, section 8.

<sup>64</sup> EBR, section 69.

### **iii. Investigate potential environmental offences with an “Application for Investigation”**

The EBR enables Ontarians to formally request an investigation of suspected environmental offences.<sup>65</sup> Previously, applications for investigation were filed with the Environmental Commissioner, who in turn, forwarded a copy to the relevant ministry. Recent amendments to the EBR now require applications for investigation to be filed with the minister responsible for the administration of the Act, regulation or instrument for an investigation by that minister of the alleged contravention. The responsible minister must acknowledge receipt of the application for investigation within 20 days of receiving the application.<sup>66</sup> If the minister decides not to investigate the matter, it must provide notice (with reasons) to the applicants and the Auditor General within 60 days of receipt of the application.<sup>67</sup>

The EBR specifies that ministries are not required to conduct an investigation where the application is frivolous or vexatious, or where the alleged contravention is not sufficiently serious or is unlikely to cause environmental harm.<sup>68</sup> If the investigation proceeds, the Ministry must generally complete it within 120 days, and advise the applicants and the Auditor General of the outcome of the investigation within 30 days of its completion.<sup>69</sup>

### **iv. Appeal a Ministers Decision to Issue a Licence, Permit and Approval**

The EBR includes an appeal mechanism that Ontarians can use to hold ministries accountable for their decisions in relation to prescribed instruments (e.g. licences, permits, and other approvals). In particular, Ontario residents can seek “leave” (i.e. permission) to appeal instrument decisions to an independent appellate body (i.e. Environmental Review Tribunal).<sup>70</sup>

The appellate body will consider two questions when deciding to grant leave: (1) whether it appears that there is good reason to believe that the decision is unreasonable, and (2) whether it appears that the decision could result in significant environmental harm.<sup>71</sup> Leave applications must be served and filed within 15 days after the date that notice of the instrument decision was posted on the Environmental Registry.<sup>72</sup> If leave is granted (in whole or in part), then a public hearing is held and the appellate body can uphold, vary or revoke the decision related to the prescribed instrument. Appealing a ministry decision on an instrument can take time, money and expertise, and you may wish to consult with a lawyer before undertaking an appeal.

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<sup>65</sup> EBR, section 74.

<sup>66</sup> Bill 57, Restoring Trust, Transparency and Accountability Act, 2018, schedule 15, section 9.

<sup>67</sup> Bill 57, Restoring Trust, Transparency and Accountability Act, 2018, schedule 15, section 10; EBR, section 78.

<sup>68</sup> EBR, section 77.

<sup>69</sup> EBR, section 80.

<sup>70</sup> EBR, section 38.

<sup>71</sup> EBR, section 41.

<sup>72</sup> EBR, section 40.

## **v. *The Right to Sue***

### Public Nuisance

The EBR allows any person to sue for damages or other personal remedies where they have suffered direct economic loss or personal injury as a result of a public nuisance causing environmental harm, without the consent of the Attorney General, or where persons have suffered the same kind or degree of loss and injury as the plaintiff.<sup>73</sup>

### Harm to a Public Resource

The EBR also creates a statutory cause of action which permits Ontarians to bring a civil action to protect “public resources”<sup>74</sup> against significant harm caused by a contravention of a prescribed Act, regulation or instrument.<sup>75</sup>

The filing of an application for investigation is generally, a precondition to triggering this cause of action to protect public resources.<sup>76</sup> This action cannot be framed as a class proceeding<sup>77</sup>, and certain defences (i.e. statutory authority, reasonable interpretation, etc.) are expressly recognized by the EBR.<sup>78</sup>

Plaintiffs utilizing this EBR-based cause of action should promptly serve a Statement of Claim upon the Attorney General of Ontario<sup>79</sup> and post an appropriate public notice on the Environmental Registry.<sup>80</sup> If the action is successful, the court may award costs, order declaratory or injunctive relief, or require the parties to negotiate a restoration plan; however, the court has no jurisdiction to award damages or other personal remedies under the EBR.<sup>81</sup> There is a two-year limitation period prescribed by the EBR in relation to this cause of action.<sup>82</sup>

## **vi. *Whistleblower Protection***

The EBR prohibits employers from taking “reprisals”<sup>83</sup> against employees on certain grounds prohibited by the EBR. In particular, employers are prohibited from taking reprisals merely because an employee, in good faith, exercised public participation rights under the EBR, applied for reviews or investigations under the EBR, or provided information or evidence to appropriate authorities or in proceedings under prescribed Acts.<sup>84</sup> Where such reprisal occurs, the employee may file a complaint with the Ontario

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<sup>73</sup> EBR, section 103.

<sup>74</sup> “Public resource” is defined as air, water, certain public lands greater than 5 hectares, and any associated plant life, animal life or ecological system: EBR, section 82.

<sup>75</sup> EBR, subsection 84(1).

<sup>76</sup> EBR, subsection 84(2).

<sup>77</sup> EBR, subsection 84(7).

<sup>78</sup> EBR, section 85.

<sup>79</sup> EBR, section 86.

<sup>80</sup> EBR, section 87.

<sup>81</sup> EBR, section 93.

<sup>82</sup> EBR, section 102.

<sup>83</sup> This term generally refers to acts such as dismissing, disciplining, penalizing, coercing, intimidating, or harassing employees: EBR, subsection 105(2).

<sup>84</sup> EBR, subsection 105(3).

Labour Relations Board, which is given various powers under the EBR (i.e. compensation, reinstatement, etc.) to remedy the situation.<sup>85</sup>

### **3. Other online resources for tracking approvals and permits**

Access Environment provides Ontarians with an online map-based tool for finding detailed information about environmental approvals and registrations in your local communities and to locate Ontario facilities on an interactive map.<sup>86</sup>

Using this map-based online tool, you can search for, Environmental Compliance Approvals (ECA), Renewable Energy Approvals (REA), and Environmental Activity and Sector Registry (EASR) registrations issued by the Ministry of the Environment and Climate Change from December 1999 onward.

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<sup>85</sup> EBR, section 110.

<sup>86</sup> Available online: <http://www.accessenvironment.ene.gov.on.ca/AEWeb/ae/GoSearch.action?search=help&lang=en>.

## VIII. Legal Tool: Considering Source Water Protection within Agricultural Leases on First Nation Reserve Lands

During discussions with community members and the Steering Committee, concerns were raised resulting from leases allowing farming on reserve land. Of concern, was the ability of the community to oversee the tenants' actions and ensure methods of farming which did not degrade or impact local waters.

In response to this concern, a template lease under the *Indian Act* was drafted (see Appendix 6). As detailed in this chapter, as all leases include provisions that establish the rights and obligations of the landlord and tenant, provisions can dictate how the land will be used. For example, a lease of land for use as a farm may contain a clause dealing with fertilizer application and as a result, safeguard source waters.

### 1. Land Transactions under the *Indian Act*

The Canadian Constitution creates a distinction between First Nation territorial lands and other lands in Canada. The legal framework underlying these lands is that:

1. Pursuant to s. 2 of the *Indian Act*, these lands are set aside by the Crown in Right of Canada for the use and benefit of a First Nation;
2. Generally, only First Nations and their members occupy and use these lands. However, a First Nation may ask the Crown to grant interests, such as leases or other rights, to non-members.

First Nation lands governed by the authority of the *Indian Act* have qualities that set them apart from other lands:

- a) All transactions involving these lands must be approved by the Minister or the Governor in Council.
- b) Pursuant to s. 29 of the *Indian Act*, these lands cannot be seized by legal process.
- c) Pursuant to s. 89 of the *Indian Act*, these lands cannot be mortgaged, pledged, or charged to a non-Indian. However, leasehold interests on reserve lands may be mortgaged.
- d) Pursuant to s. 87 of the *Indian Act*, taxation of these lands is restricted: lands cannot be taxed unless held under a lease or permit.

Pursuant to s. 28(1) of the *Indian Act*, transactions without statutory authority are void and therefore unenforceable. This means that all transactions dealing with lands governed by the authority of the *Indian Act* must be authorized under the *Indian Act*.

### 2. Leasing Land under the *Indian Act* - An Overview

Leases, in general, have certain characteristics that govern the relationship between a lessor (the landlord) and a lessee (the tenant). Every lease includes:

- a) A grant, by the lessor to the lessee, of the exclusive possession of land.
  - Here the lessor retains the underlying ownership of the land (the freehold interest), while the lessee is entitled to “exclusively occupy” the land during the term of the lease.
  - Exclusive occupation is known as the right of possession, one of the rights of ownership. Essentially, the lessor temporarily gives up, in favour of the lessee, one of the rights of ownership of their land.
  
- b) The term of the lease,
  - A fixed period during which the lessee has exclusive possession of the leased land.
  - A lease must include a definite commencement and termination date for the term.
  - A lease that lasts for an uncertain term, or in perpetuity, could amount to a grant of the ownership of the land rather than a lease. For example, a lease with a term said to last "for as long as required" is not certain, and the lease therefore, may not be valid.

All leases include provisions that establish the rights and obligations of the landlord and tenant. While many of these provisions contain standard terms, other provisions vary depending on the type of lease and how the land will be used. For example, a lease of land for use as a farm may contain a clause dealing with fertilizer application, while one leasing land for use as a shopping centre will not.

The three common types of leases based on land use are:

- a) Agricultural Leases:
  - Appropriate for the grazing of livestock and the growing of agricultural crops.
  - Note that resource extraction, such as the cutting of timber, is not dealt with through leasing, but by means of permits and licenses.
  
- b) Commercial Leases:
  - Used when the leased property is intended for commercial or industrial ventures.
  - Commercial activity would include use of the land for a shopping centre, manufacturing facility, restaurant, water park, gas station, hotel, etc.
  - The commercial lease is also appropriate for multi-unit residential projects, such as a condominium, apartment building or subdivision development.
  
- c) Residential and Cottage Leases:
  - This type of lease is designed to reflect the special requirements attached to leasing land for single family use, or for seasonal or year-round cottage recreation.

### **3. Mandatory Steps for Leases under the *Indian Act***

The federal government requires that leasing of land governed by the *Indian Act* involve certain mandatory steps. The general framework for leasing is summarized below.

The provisions which allow for the leasing of land governed by the *Indian Act* are found under Subsections 53(1)(b), 58(1)(b), 58 (1)(c), and 58(3). Reserve lands which have been validly allotted by a First Nation Council under the *Indian Act* are referred to as “locatee lands” , and are usually issued a

Certificate of Possession. Unallotted “band lands” are reserve lands which the Band Council has not allotted to a locatee. Unallotted land is also known as “common band land.”

Locatee land may be leased through several mechanisms:

- a) On the application of the locatee, land may be leased without being designated, pursuant to ss. 58(3). This is referred to as a locatee lease.
- b) Uncultivated or unused locatee land may be leased, with the consent of the Band Council, for agricultural or grazing purposes, or for any purpose that benefits the locatee pursuant to ss. 58(1)(b)). With the increasing use of ss. 28(2) permits, a lease under ss. 58(1)(b) is not commonly used for agricultural purposes.

There are several requirements to using ss. 58(1)(c) to Lease Band lands:

- a) The land to be leased must be either uncultivated or unused. At the time the lease is entered into, therefore, the land should be vacant, and not being used for farming, grazing, habitation or other purposes.
- b) The land must be leased for agricultural or grazing purposes only.
- c) The First Nation Council must consent to the lease. A Band Council Resolution (BCR) or some other form of council consent must be obtained.
- d) The lease must be for the benefit of the First Nation.
- e) If the Minister’s authority has not been delegated to the First Nation under s. 60, an agricultural or grazing lease must be approved by the officer who has delegated authority pursuant to the Delegation of Authority Instrument under the *Indian Act* and related Regulations (refer to the relevant regional delegation instrument).

#### **4. Locatee Leases**

This section explains how to lease allotted (“locatee lands”) reserve lands under ss. 58(3) of the *Indian Act*, at the request of the locatee.

Locatee lands are lands which a First Nation has validly allotted under the *Indian Act*, possession of which is generally evidenced by a Certificate of Possession (CP). The authority for the leasing of locatee land is found under:

- a) Pursuant to ss. 58(1)(b) of the *Indian Act*, uncultivated or unused land in the possession of an individual may be leased, with the consent of the Band Council, for agricultural or grazing purposes or for any purpose that is for the benefit of the person in possession. This mechanism is rarely used today.
- b) Pursuant to ss. 58(3), a locatee can apply to the Minister to lease all or part of the land in the locatee's possession without the land being designated. This type of lease is commonly called a "locatee lease", and it is the most common method used to lease allotted land.

The *Indian Act* does not specifically provide for any First Nation to provide input respecting locatee leases. However, First Nations obviously have an interest in the use and development of reserve lands.

As a consequence, the department must seek input from the Band Council, but it should be noted, an objection by the Band Council does not amount to a veto of the lease.

The Band Council must be requested to express their views as to conformity with First Nation land use policies, zoning or development plans on all locatee leases with terms of 49 years or less, including all renewal terms. The terms of a locatee lease must comply with all existing by-laws of the First Nation.

## 5. Agricultural Locatee Leases under the *Indian Act*

**Mandatory provisions:** Most leases contain many provisions dealing with every aspect of the landlord and tenant relationship. Every agreement for the leasing of land, however, must include the following elements:

- a) a lessor (landlord) and lessee (tenant). Because legal title to all reserve lands is vested in the Crown, Her Majesty the Queen in Right of Canada must be the “lessor” in every lease of reserve land, except in the case of a sub-lease. This provision applies even when the Crown has delegated control and management of lands to a particular First Nation under sections 53 or 60 of the *Indian Act*. In these cases, the delegated authority must sign the lease on behalf of the Minister, who represents the Crown. A sub-lease, by its nature, is made between the head lease lessee and a third party sub-lessee and consequently, the Crown is not a party to the sub-lease instrument;
- b) a legal description of the land or premises (eg. Registration Plan or a CLSR Plan) being leased;
- c) the rent to be paid, to whom it is paid, when it is payable and how and when it is to be reviewed;
- d) the term of the lease, stating the date the lease commences and when it terminates; and
- e) the authorized uses of the land.

**Implied Covenants:** Beyond the minimum requirements of the mandatory provisions, certain obligations, or covenants, are implied by law to form part of a lease unless the parties have chosen to expressly deal with them in the lease. If the parties do not deal with these obligations in the lease, then the covenants will bind the parties as if they had agreed to them.

For the landlord, there are three principal implied covenants:

- a) The tenant's right of quiet enjoyment of the leased premises. The tenant has the right to be protected against any interference by the landlord with the tenant's use and enjoyment of the premises for the stated purposes.
- b) The obligation not to derogate (take away usefulness) from the lease. The landlord may not use other property in any way that makes the leased premises substantially less fit for the purposes for which they were leased.
- c) The obligation to supply premises fit for habitation (applicable only to furnished premises).

For the tenant, there are four significant implied covenants:

- a) To pay rent: Failure to do so may result in forfeiture of possession by the tenant.

- b) To act in a tenant-like manner: In essence, this obligates the tenant to take the action necessary to preserve the state of the property. It does not, however, require the tenant to repair damage caused by wear and tear, or lapse of time.
- c) To allow the lessor to enter and view the state of repair of the property; and
- d) To pay all taxes required by law.

**Joint Tenants and Tenants in Common:** When a lease involves more than one tenant, a joint tenancy or a tenancy in common is created.

- a) A joint tenancy is one in which all the tenants hold an equal, undivided, interest in the whole of the lease, and in case of the death of a tenant, the remaining tenants automatically receive the deceased tenant's interest. This is referred to as “right of survivorship”. Joint tenancy is not permitted in the Province of Quebec.
- b) A tenancy in common involves two or more tenants, but each tenant may hold a different share of the lease, and there is no right of survivorship. On death, the interest of a tenant in common would pass to his or her estate, not automatically to the other tenants.

## IX. Legal Tool: Protecting Source Waters Under the *Clean Water Act*

A final legal tool evaluated for its potential of advancing source water protection was the role of Ontario's *Clean Water Act*. Ontario mandates that Source Protection Committees (SPC) consult with First Nation communities in their source protection areas and solicit their participation in the process, either through working groups or as members of the SPC. Mechanisms for source water protection, available to First Nation communities under the *CWA* are discussed in this chapter.

### 1. Background

Some First Nation communities have opted-in to the Ontario *Clean Water Act* program – an option that is entirely at the discretion of eligible First Nations. However, as the *CWA* does provide measures to protect source water, it is included in this report for consideration.

After the Walkerton *E. Coli* outbreak that caused the deaths of 7 people and more than 2300 falling ill in the summer of 2000, a judicial inquiry was launched to investigate the cause of the fatal outbreak. The inquiry culminated in a report that listed 121 recommendations for ensuring the safety of drinking water throughout the Province, including protection of the sources of water, and improvements to the treatment, distribution, testing and monitoring of drinking water. In response to the recommendations, the Province of Ontario implemented policies to develop Source Water Protection plans for sources of municipal drinking water and enacted the *Clean Water Act, 2006* and its regulations.<sup>87</sup>

### 2. Purpose and Process

The purpose of the *CWA* is to protect existing and future sources of drinking water.<sup>88</sup> To achieve this purpose, the *CWA* establishes a source protection planning process that is locally driven, science-based, and consultative in nature.<sup>89</sup> The *CWA* creates obligations for four main groups to develop and implement source protection plans: The Provincial Government, source protection authorities, source protection committees (SPC), and municipalities. The Province establishes the framework, provides guidance, approves plans, and is responsible for implementation and enforcement related to provincial instruments such as permits and approvals.

The Source Protection Authority, in most cases the conservation authority, initially helps to establish the source protection process and establishes the Source Protection Committee. The Source Protection Committee brings together the key stakeholders in each watershed and is responsible for preparing the main products in the process – the Terms of Reference, the Assessment Report, and the Source

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<sup>87</sup> Collins L, McGregor D, Allen S, Murray C, Metcalfe C., Source Water Protection Planning for Ontario First Nations Communities: Case Studies Identifying Challenges and Outcomes. *Water*. 2017; 9(7):550; <https://doi.org/10.3390/w9070550>.

<sup>88</sup> *Clean Water Act, 2006*, SO 2006, c 22, s. 1. Online: <http://canlii.ca/t/52wrb>

<sup>89</sup> Ontario's *Clean Water Act, 2006*: CELA FAQ #2. Online: [http://www.cela.ca/sites/cela.ca/files/CWA%20FAQ\\_2\\_0.pdf](http://www.cela.ca/sites/cela.ca/files/CWA%20FAQ_2_0.pdf)

Protection Plan. Municipalities are the owners of the drinking water system that draw on source water, and are the implementers, and the enforcers of local measures to limit threats to their drinking water.<sup>90</sup>

The CWA requires Communities in Ontario to develop source protection plans in order to protect their sources of drinking water. These plans identify risks to local drinking water sources and develop strategies to reduce or eliminate these risks. Because it is everyone's responsibility to protect Ontario's water resources, broad consultation throughout the development of the source protection plans is important and involves municipalities, Conservation Authorities, property owners, farmers, industry, businesses, community groups, public health officials, and First Nations.

The CWA sets out a basic framework for communities to follow in developing an approach to protecting their water supplies that works for them:

- **Identify and assess risks** to the quality and quantity of drinking water sources and decide which risks are significant and need immediate action, which need monitoring to ensure they do not become significant, or which pose a low or negligible risk.
- **Develop a source protection plan** that sets out how the risks will be addressed. Broad consultation will involve municipalities, conservation authorities, property owners, farmers, industry, businesses, community groups, public health officials, First Nations and the public in coming up with workable, effective solutions.
- **Carry out the plan** through existing land use planning and regulatory requirements or approvals, or voluntary initiatives. Activities that pose a significant risk to drinking water sources may be prohibited or may require a site-specific risk management plan. This plan will set out the measures that a property owner will take to ensure the activity is no longer a threat.
- **Stay vigilant** through ongoing monitoring and reporting to measure the effectiveness of the actions taken to protect drinking water sources and ensure they are protected in the future.

Northern municipalities, where Conservation Authorities are not present, will protect their drinking water supplies through a locally-driven, scoped planning process that focuses on specific drinking water threats in specific areas.

A Source Protection Plan is a strategic document for a SPA that outlines policies and procedures to ensure that all significant and potential threats to the sources of Municipal residential drinking water systems are managed in a way that will prevent them from becoming significant drinking water risks. Municipalities play a central role in the implementation and enforcement of the Source Protection Plan which will be monitored and revised as required by the Source Protection Committee.

In brief, the source protection process involves the Source Protection Authority, in most cases the conservation authority, establishing the Source Protection Committee. The Source Protection Committees are made up of a mix of stakeholders in the watershed. They have between 10-20 members depending on the size of the source protection region. Membership includes proportional

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<sup>90</sup> The Clean Water Act A Plain Language Guide. online: [https://www.sourcewater.ca/en/how-it-works/resources/Documents/CWA\\_PlainLanguageGuide.pdf](https://www.sourcewater.ca/en/how-it-works/resources/Documents/CWA_PlainLanguageGuide.pdf)

representation, a third each, from the municipal sector; the commercial, agriculture or industry sector; and the academic, professional, non-government organization sectors or the general public. If there are one or more First Nation communities in the source protection area/region, committees of 10, 16 or 22 members have to include one, two or three First Nation representatives, respectively.<sup>91</sup> It should be noted that even if there is more than one First Nation community in a source protection region that requires a 10 member committee, there is still only one seat available on the committee.<sup>92</sup> As noted above, the Source Protection Committee is responsible for preparing the Terms of Reference, the Assessment Report and the Source Protection Plan. The Source Protection Committee may propose amendments to the Terms of Reference in circumstances expected to be set out in regulation, in consultation with affected municipalities, and updates to the Assessment Report. The Source Protection Committee is also responsible for ensuring that stakeholders and the public in the watershed are consulted.

Where a source protection plan has taken effect in a source protection area, the CWA requires municipalities, local boards and source protection authorities to comply with any obligation imposed upon them by significant threat policies or designated Great Lakes policies set out in the source protection plan.

### **3. Enforcement**

Enforcement obligations for the CWA is given to municipalities with the authority to make by-laws for the production, treatment and storage of water. This enforcement authority may be delegated to other specific public bodies by agreement, such as boards of health and source protection authorities. The body responsible for enforcement must appoint a risk management official. Municipalities are required to cooperate with the Source Protection Committee, the Source Protection Authority, other municipalities in the source protection area, and of course the Provincial Government. This includes providing documents, records, technical or scientific studies that relate to sources of drinking water quality or quantity, and helping to obtain such information.<sup>93</sup> Municipalities ensure mandatory policies under the source protection plans (i.e., those addressing significant threats) are implemented using planning tools such as by-laws and Official Plan policies.<sup>94</sup> The Province is responsible for enforcement of the CWA in unorganized territories and with respect to activities prescribed by regulations.<sup>95</sup>

### **4. Prohibitions**

Once a source protection plan is in effect, regulations, restrictions, and prohibitions may come into force under the enforcement sections of the CWA. If an activity that is a prescribed activity under the CWA is

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<sup>91</sup> Minnes S. Ontario's *Clean Water Act* and Capacity Building: Implications for Serviced Rural Municipalities. *Water*. 2017; 9(7):538. <https://doi.org/10.3390/w9070538>

<sup>92</sup> Walters, D., Spence, N., Kuikman, K., Singh, B. (2012). Multi-Barrier Protection of Drinking Water Systems in Ontario: A Comparison of First Nation and Non-First Nation Communities. *The International Indigenous Policy Journal*, 3(3). Retrieved from: <https://ir.lib.uwo.ca/iipj/vol3/iss3/8> DOI: 10.18584/iipj.2012.3.3.8

<sup>93</sup> *Supra*, note 89.

<sup>94</sup> *Supra*, note 90.

<sup>95</sup> *Supra*, note 89.

identified as a “significant drinking water threat”<sup>96</sup> within an area within a “wellhead protection area” or “surface water intake protection zone” in the assessment report, is also designated in the source protection plan as an activity to which section 57 of the CWA should apply, a person is prohibited from engaging in that activity in that area. This prohibition does not apply to an activity if the activity was engaged in immediately before the source protection plan took effect until 180 days after the plan has taken effect or the date set out in the plan.

For existing and future activities that are prescribed activities and identified as “significant drinking water threats” within an area within a “wellhead protection area” or “surface water intake protection zone” in the assessment report and are designated by the source protection plan as activities to which section 58 should apply, no person may engage in such activities in that area unless the person engages in the activity in accordance with a risk management plan. Finally, for land uses that are prescribed land uses and identified as “significant drinking water threats” within an area within a “wellhead protection area” or “surface water intake protection zone” in the assessment report and are designated in the source protection plan as an activity to which section 59 of the CWA should apply, no person shall engage in such use of the land at any location within the area unless the risk management official issues a notice to the person.

To clarify by way of an example, where a particular activity (e.g. waste disposal) within a wellhead protection zone or surface water intake protection zone may create significant risk to source water, the CWA requires that the Source Protection Plan include policies to ensure that the activity “never becomes a significant drinking water threat,” or that the activity, if already underway, “ceases to be a significant drinking water threat.” To implement such policies, the Source Protection Plan may designate lands upon which prescribed activities are prohibited under section 58, restricted under section 59, or regulated through risk management plans under section 58.

In addition, under sections 40-42 of the CWA, municipalities that have jurisdiction in areas to which the source protection plan applies are required to amend their official plans and zoning by-laws in order to bring them into conformity with the significant threat policies contained in the source protection plan.

## **5. Status of Protection of First Nation’s Source Waters under the CWA**

Ontario mandates that Source Protection Committees consult with First Nation communities in their source protection areas and solicit their participation in the process, either through working groups or as members of the SPC. The CWA allows a First Nation’s drinking water system located within or adjacent to a source protection region to be considered as part of the SWPP process. It also allows First Nations to request the Crown designate a First Nation drinking water system for protection under the

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<sup>96</sup> “Drinking water threat” is defined under the CWA as “an activity or condition that adversely affects, or has the potential to adversely affect, the quality or quantity of any water that is or may be used as a source of drinking water, and includes an activity or condition that is prescribed by the regulations as a drinking water threat.”

CWA through a Band Council resolution, so that the watershed-based planning process can incorporate the protection of the First Nation system along with the municipal ones being addressed.

The process of including a First Nation system would be initiated, as mentioned, by a resolution of a First Nation band council. The Province would then have the authority to include, as part of the source protection plan, a drinking water system that serves a First Nation reserve, as long as the First Nation has requested the system be included in the process.<sup>31</sup> Some First Nations see this as an abrogation of inherent and Treaty rights and choose not to participate under the provincial regime, while other Nations are excluded because they are outside the geographical jurisdiction covered by the provincial framework. Furthermore, First Nations within a source protection area may not have similar expectations and views on source water protection, and needs between their own communities.<sup>97</sup>

Currently, of the 133 First Nations communities in Ontario, only 27 are within the boundaries of a watershed managed by an existing Conservation Authority and only three First Nations have opted into the Ontario source water protection framework.<sup>98</sup> Each of the three First Nations have enacted Band Council Resolutions through Chief and Council to have their water treatment plant intakes included in the provincially approved regional source protection plans through amendments to Ontario Regulation 287/07 of the CWA. These First Nations include Six Nations of the Grand River, Chippewas of Kettle and Stony Point First Nation, and Chippewas of Rama First Nation.<sup>99</sup>

It is important to note that, the CWA includes a ‘non-derogation’ clause in relation to protection provided for existing aboriginal and treaty rights under section 35 of the *Constitution Act, 1982*. The CWA provision is not intended to have any added legal effect beyond what is already enshrined in the Constitution.<sup>100</sup>

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<sup>97</sup> *Supra*, note 85.

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*

<sup>100</sup> *Supra*, note 89.

# Appendix 1

## Agricultural and Nutrient Management Laws

To view the laws, please visit the following links:

1. Agricultural Nutrient Management Law:  
<https://drive.google.com/file/d/1TYCesDgrhcDIYpps-VUAwoQbzztbsE4e/view?usp=sharing>
2. Agricultural Nutrient Sample, Analysis, and Quality Standards By-law:  
[https://drive.google.com/file/d/1FHTzHRtMM0BMrDB2\\_cRjc5V2UKrlun\\_e/view?usp=sharing](https://drive.google.com/file/d/1FHTzHRtMM0BMrDB2_cRjc5V2UKrlun_e/view?usp=sharing)
3. Agricultural Nutrient Land Application Rates Regulation:  
[https://drive.google.com/file/d/18Ugw3AJ97mUOwnwBGmzryiXcKqtd6W\\_H/view?usp=sharing](https://drive.google.com/file/d/18Ugw3AJ97mUOwnwBGmzryiXcKqtd6W_H/view?usp=sharing)
4. Agricultural Nutrient Application Standards Regulation:  
<https://drive.google.com/file/d/199UeoclpEgH2Va7VrplZO8dKv5w4Rw4d/view?usp=sharing>
5. Agricultural Nutrient Inspection and Orders Regulation:  
[https://drive.google.com/file/d/1jw7SFFmb4KDm-p1XzmZa-ksXCzh\\_K9Gu/view?usp=sharing](https://drive.google.com/file/d/1jw7SFFmb4KDm-p1XzmZa-ksXCzh_K9Gu/view?usp=sharing)
6. Agricultural Nutrient Application Waiting Periods:  
[https://drive.google.com/file/d/1vtK\\_rCyY2nPTXQoeodF29pia37byZ0nm/view?usp=sharing](https://drive.google.com/file/d/1vtK_rCyY2nPTXQoeodF29pia37byZ0nm/view?usp=sharing)
7. Nutrient Application Strategies, Plans and Approvals Regulation:  
[https://drive.google.com/file/d/1DjB2bcNMhXFJ6N9BEzpyWG3yKzo\\_O89M/view?usp=sharing](https://drive.google.com/file/d/1DjB2bcNMhXFJ6N9BEzpyWG3yKzo_O89M/view?usp=sharing)

## Appendix 2

### Waste Management By-law

To view the by-law, please visit:

<https://drive.google.com/file/d/1fD2pPmYtGUPqh0mkYnSSgW13steqjBmm/view?usp=sharing>

## Appendix 3

# Septic Re-Inspection Program By-law

To view the by-law, please visit:

[https://drive.google.com/file/d/14AbLJeSaeWo\\_c6mGgiqqYywV13pVcXOO/view?usp=sharing](https://drive.google.com/file/d/14AbLJeSaeWo_c6mGgiqqYywV13pVcXOO/view?usp=sharing)

## Appendix 4

### Wetland Zone By-law

To view the by-law, please visit:

<https://drive.google.com/file/d/1rMYgdFg2D1M0atwoh1-3bIfTjmdg9SNP/view?usp=sharing>

## Appendix 5

# Consultation & Accommodation Protocol

To view the Protocol, please visit:

<https://drive.google.com/file/d/1Kj1XJYkjwayVymSXwN7wmtRsfKE1b6tt/view?usp=sharing>

## Appendix 6

### Sample Locatee Lease under the *Indian Act*

To view the lease, please visit:

<https://drive.google.com/file/d/14yYVjZ6DPrMpJEyImqzyDi1ApluAilii/view?usp=sharing>

## Appendix 7

### Sample Land Code

To view the model Land Code, please visit:

<https://drive.google.com/file/d/10w4bzFCtDbAvdVFlvOhpU0fm7mJPONQE/view?usp=sharing>

# Appendix 8

## Source Water Protection Project Primer

### Legal and Policy Tools for Source Water Protection: A Tri-First Nation (Chippewa/Munsee/Oneida (COM) & CELA Initiative

#### An Introduction to Protecting Source Waters

Water is essential to all life. The environment and all the life it supports is impaired without clean, uncontaminated waters. The risk to human health and the natural environment from the contamination of water is a concern to all people.

The Chippewas of the Thames, the Oneida Nation of the Thames, and the Munsee Delaware Nation ("COM") are First Nations in Southwestern Ontario closely linked by history and geography. One of the primary challenges face d is ensuring a safe supply of drinking water in quantities that allow our communities to grow and thrive.

The COM First Nations and the Canadian Environmental Law Association ("CELA") are working together to:

1. Identify, assess, and mitigate actual and potential threats to sources of drinking water
2. Develop legal and policy tools to protect and improve our source waters

#### The Source Water Protection Project

With funding from the Law Foundation of Ontario, the COM communities will lead a project in collaboration with CELA's lawyers to address sources of drinking water contamination. The community researcher/ animator and CELA lawyers will consult with the communities to prioritise the threats and issues that we face.

The project which has been divided into a number of phases:

- **Phase 1** - a six-person steering committee will be selected, whose members will represent all three Nations and have complementary areas of expertise
- **Phase 2** - a community animator will be hired from the COM membership to assist in gathering local knowledge about water, its traditional uses and threats. The community animator and contract lawyer will work together to design the workshops that will constitute Phase 3, with input from the Steering Committee.
- **Phase 3** - the COM communities will be directly engaged through a series of workshops to gather local knowledge, understand threats and canvass possible solutions
- **Phase 4** - with the guidance of the steering committee, CELA will work on drafting legal instruments to respond to the priorities identified by the communities in Phase 3
- **Phase 5** - COM youth will be engaged in the dissemination of the project's results and lessons learned

Who is CELA? ([www.cela.ca](http://www.cela.ca))

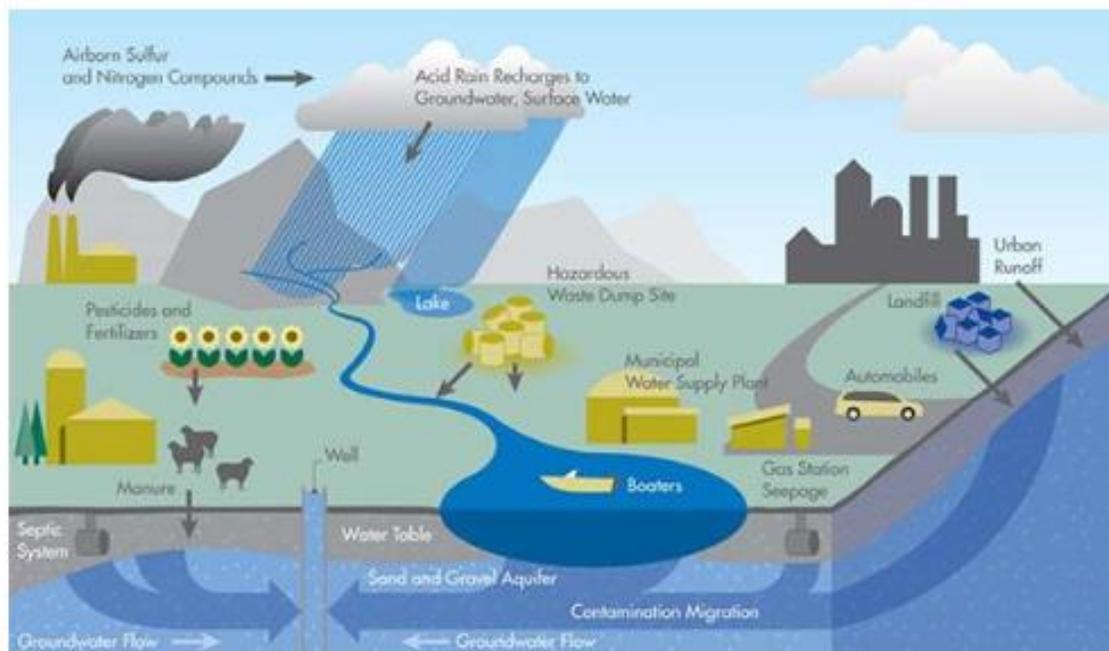
CELA is a non-profit public interest organisation that uses existing laws to protect the environment and advocate for environmental law reform. CELA is also a legal aid clinic and appears before tribunals and courts on behalf of low-income individuals, citizen groups, and not-for-profit organisations who otherwise would not be able to afford legal assistance. Throughout this project, CELA's project lawyers, Kerrie Blaise ( [kerrie@cela.ca](mailto:kerrie@cela.ca), 905-506-1512) and Rizwan Khan ( [rizwan@cela.ca](mailto:rizwan@cela.ca)) will work in collaboration with the COM First Nations.

## What is Source Water?

**Source waters** are untreated surface or groundwaters used to supply private wells and public drinking water systems with potable water for human consumption or use.

**Surface water** refers to water found in lakes, rivers, streams, and wetlands. Rain and melting snow replenish surface water. Surface water from the Great Lakes is the source of water that most Ontarians use for drinking water, cleaning, irrigation and industrial purposes.

**Groundwater** is water from rain or snow that seeps below the ground and pools in cracks and spaces beneath the earth's surface, in what is called aquifers. It is a valuable resource as it makes up 2/3 of the world's fresh water supply. Over a quarter of Canadians use groundwater to meet their daily needs for drinking, cleaning and irrigation. It is especially important to protect groundwater sources for those who obtain their water from wells.



Source: Pollution Probe – The Source Water Protection Primer 2004

## Threats to Source Waters

The COM communities face drinking water threats from every direction. Particular concerns include:

1. Chemical-heavy industrial discharges and spills,
2. Raw sewage overflow from London's sewage system,
3. Flooding,
4. Phosphorus loading from agricultural operations, and
5. Pesticide use in agricultural operations.

# Appendix 9 Community Workshop Informational Materials

## Youth Survey



**COMPLETE SURVEY= YOUR NAME IN A PRIZE DRAW!!**

**IMPROVING OUR COMMUNITY ONE STEP AT A TIME. BE A PART OF IT.**

The CMO source water protection project is looking for your help in determining threats to our drinking water and provide any traditional knowledge involving water. Leave your name and phone number on the sheet to ensure that you're entered into the prize draw beginning in August.

Name: \_\_\_\_\_ Phone number: \_\_\_\_\_

What do you think threatens the health of the water and the Thames River Watershed?

- waste dumping Y/N
- pesticide use Y/N
- runoff from farms Y/N
- industrial sites Y/N
- septic/sewage systems Y/N
- Other:

What concerns you about the health of the Thames watershed, have you noticed any changes in its quality or health? Please let us know where, what and when.

Do you have any traditional knowledge involving water or how to combat the threats to the water?



Canadian  
Environmental Law  
Association  
EQUITY. JUSTICE. HEALTH.

Please circle to answer the following questions:

Do you fish from the Thames? YES/ NO

Do you drink treated water from the community? (i.e not well water) YES/ NO

Do you live within a kilometer's distance of a farm/ crop field? YES/ NO

Do you have a well on your property? YES/ NO      Is it in use? YES/ NO

Are you aware of the rules and regulations that go with maintaining a well? YES/ NO

Do you have a septic system? YES/ NO

Does your property have an underground storage tank, for oil and gas (even if you do not use it)?  
YES/NO

Comment box - to explain the concerns you have involving the water (anything not included in this questionnaire).

**When survey is completed, place into the "COMPLETED SURVEYS" folder. Thank-you!**

This information is being gathered so our communities (Chippewa, Oneida and Munsee) can identify threats to our drinking water and find solutions to the water's health. Your name will not be shared and we'll only contact you if you win a prize.

# Source Water Protection Pamphlet (page 1)

**"Water is the world's first and foremost medicine"**  
- Proverb

**What will this project do for our community?**

This project will create legal options/ tools to be able to combat the threats to our drinking water, whether they be on or off reserve. It will also provide a framework for communities who are struggling with the same issues and how they can be mended.

**For this project to truly benefit the community, community members must be involved and active throughout this process**

The staff involved with this project would like to thank the community for efforts so far in the project and for continued participation. Thank-you for caring, sharing, and putting forth your contribution!

Photography: Kevin Sauter, Terry Oshroff, Jason Conroy, Matt Bennett, Allison Reynolds, Andrew Pickett, Sam Salzman & Angela Williams

**SOURCE WATER PROTECTION**  
CHIPPEWA, MONSEE-DELEWARE, ONEIDA

## Source Water Protection Pamphlet (page 2)



### What is the Source Water Protection Project?

The Source Water Protection Project is a tri-nation (Chippewa, Munsee-Delaware, Oneida) initiative to gather community knowledge and engage community members while working together with CELA lawyers to set rules that protect OUR water.

This project was granted funding by the Law Foundation of Ontario and has hired CELA (Canadian Environmental Law Association) lawyers to assist in the creation of legal tools to protect our communities drinking water. There are a series of workshops taking place in all three communities, throughout the months of August, September, and November of 2017, which are very engaging, fun, and beneficial to our reserves. We will be able to prioritize the threats to our waters and legal actions involving the threats. After all of these workshops take place, the legal process will begin and continue early into 2018.

Every community member is welcome to these community engagements, all ages. There will be home to home delivery of invitations or local postings.

The outcome of this project will be very positive but it depends greatly on community involvement and engagement. These workshops are run with a very passionate intent, community knowledge, and fun-filled activities.

If you have any questions regarding the project: Please contact  
 Martina Albert (Community Animator/ Researcher) at (519) 282-5962 or treehugger1@hotmail.com  
 or Kelly Riley (Lands and Environment Director) at (519) 289-2662 ex. 209

### What can I do to help?

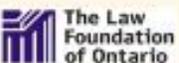
If you're looking to be a part of this wonderful initiative, there's lots to do. You can:

- Attend workshop(s). Pay attention to local posting and home mail.
- Fill out a questionnaire. Contact Martina Albert.
- Volunteer. Contact Martina Albert.
- Provide traditional knowledge about water. Contact Martina Albert.
- Tell your family and friends about this project.









With thanks to:

