

SUBMISSION ON THE GOVERNMENT OF CANADA’S PROPOSAL TO DEVELOP A CANADA WATER AGENCY

Prepared by

Maria Lucas, Ryerson Law Practice Program (LPP) Candidate, CELA
Kerrie Blaise, Northern Services Counsel, CELA
Theresa McClenaghan, Executive Director and Counsel, CELA
Anastasia M Lintner, Special Projects Counsel, Healthy Great Lakes, CELA

INTRODUCTION

The Canadian Environmental Law Association (CELA) works toward protecting public health and the environment by seeking justice for those harmed by pollution or poor decision-making and by changing policies to prevent problems in the first place. Since 1970, CELA has used legal tools, conducted public legal education, undertaken groundbreaking research, and advocated for increased environmental protection and to safeguard communities. As a specialty clinic funded by Legal Aid Ontario, our primary focus is on assisting and empowering low-income people and disadvantaged communities.

CELA provides the following general and specific comments in response to the Government of Canada’s proposal to develop a Canada Water Agency (CWA). The Minister of Environment and Climate Change Canada was tasked to work in collaboration with the Minister of Agriculture and Agri-Food, the Minister of Natural Resources, and the Special Representative for the Prairies to develop a CWA that would keep Canada’s waters “safe, clean and well-managed”.¹

Over the past several decades, CELA has been actively involved in water protection and conservation matters at the international, national, provincial, regional, and local levels. Based on this experience, CELA agrees in principle with the development of a CWA due to the severely fragmented legislative and policy framework governing water in Canada. Canada’s Constitution divides the power to legislate matters related to water among federal, provincial, territorial, and Indigenous governments.² Despite this shared jurisdiction, the lack of a federal mechanism through which to facilitate water governance means that Canadian water policy is continually governed in a reactive and crisis management mode.³

¹ Office of the Prime Minister, *Minister of Environment and Climate Change Supplementary Mandate Letter* (15 January 2021), online: <https://pm.gc.ca/en/mandate-letters/2021/01/15/minister-environment-and-climate-change-supplementary-mandate-letter>

² Paul Muldoon & Theresa McClenaghan, “A Tangled Web: Reworking Canada’s Water Laws” in Karen Bakker, ed, *Eau Canada: the Future of Canada’s Water* (Vancouver: UBC Press, 2007) 245 at 245.

³ *Ibid* at 250.

CELA believes a CWA provides an opportunity to address the fragmented jurisdictional framework governing water in Canada. The CWA can provide a means through which the four levels of Canadian government (federal, provincial, territorial, and municipal) and Indigenous governments can work collaboratively in a spirit of cooperative federalism as it applies to water.⁴ A collaborative approach can eliminate duplication, facilitate knowledge mobilization, and consolidate data on water; thereby providing for a more effective water governance system in Canada. This approach will help to ensure that Canada's waters are "safe, clean and well-managed" for all.

CELA's clients are those who have been disproportionately exposed to impacts of environmental injustices, including climate change. Climate change is exacerbating existing water quality and quantity management challenges in addition to presenting new and deeply complex water management concerns.⁵ This exacerbation of Canada's water management systems will have a further pernicious effect on Indigenous and other vulnerable communities who currently experience water insecurity.⁶

Thus, in creating a CWA, CELA recommends that the Government of Canada prioritize actions that:⁷

- 1) **Advance reconciliation with Indigenous peoples.** This commitment should be governed by the following principles:
 - a. ensure all decision-making and planning is driven by a commitment to advance Indigenous rights of self-determination;
 - b. apply a two-eyed seeing approach to water governance;
 - c. fulfill the Truth and Reconciliation Commission (TRC) Calls to Action;
 - d. adhere to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP); and
 - e. foster and maintain a spirit of cooperative federalism.

- 2) **Enable the creation of a national water monitoring program** that:
 - a) provides a knowledge creation and mobilization framework;
 - b) supports existing data collection efforts;
 - c) coordinates a central repository on water data and information;
 - d) generates future water scenarios and forecasts to contribute to climate resilience and adaptation planning; and

⁴ Phare Law Corporation, *Resetting the National Sail: A Considerations Paper on Indigenous Governance and The Canada Water Agency* (9 May 2020) at 1-2, online: https://gwf.usask.ca/documents/events/resetting-the-sail_considerations-paper-on-indigenous-governance-and-the-canada-water-agency_final-and-cvrltr.pdf

⁵ POLIS Water Sustainability Project, Centre for Global Studies, University of Victoria, et al., *Water Security for Canadians: Solutions for Canada's Emerging Water Crisis* (25 April 2019) at 6, online: https://poliswaterproject.org/files/2019/04/WaterSecurityForCanada_April-25-2019-1.pdf

⁶ *Ibid* at 6, 9.

⁷ CELA had the opportunity to review and adapt some priorities contained in the collaborative submission coordinated by Forum for Leadership on Water and Our Living Waters. The following recommendations and action items were reviewed and adapted to reflect CELA's priorities: (1) Advance reconciliation with Indigenous peoples > action items (c)-(d); (2) Enable the creation of a national water monitoring program > action items (a)-(d); and (3) Facilitate water governance at the watershed level > action items (a)-(c).

e) adheres to the precautionary principle.

3) **Facilitate water governance at the watershed level by:**

- a. developing a pan-Canadian strategy;
- b. supporting watershed-level collaborations; and
- c. supporting the protection, conservation, and restoration of freshwater ecosystems.

1) **Advance Reconciliation with Indigenous Peoples**

Water is life and is therefore sacred to Indigenous peoples.⁸ The sacred relationship that Indigenous peoples have with water is recognized in article 25 of the UNDRIP, which states “Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard”.⁹

The Government of Canada has indicated its commitment to reconciliation with Indigenous peoples through the implementation of UNDRIP and the creation of the CWA.¹⁰ The UNDRIP provides that Indigenous peoples have the right to participate in the creation of institutions that may affect their rights.¹¹ The TRC Calls to Action 45-47 call for a restructuring of legal, governance and institutional structures in Canada to permit the participation of Indigenous peoples.¹² Indigenous peoples are free to determine for themselves how they wish to participate in these structures.¹³ Given this legal and policy context, CELA submits that it is essential for the Government of Canada to meaningfully engage with Indigenous peoples in the structuring and operation of the CWA. This includes the provision of capacity funding to facilitate engagement by Indigenous bodies and communities, so that existing resources, staff and community capacity are not taxed.

⁸ Aimée Craft, “Navigating Our Ongoing Sacred Legal Relationship with Nibi (Water)” in Centre for International Governance Innovation & Wiyasiwewin Mikiwahp Native Law Centre, eds, *UNDRIP Implementation: More Reflections on the Braiding of International, Domestic and Indigenous Laws* (Waterloo: Centre for International Governance Innovation in partnership with Wiyasiwewin Mikiwahp Native Law Centre of the University of Saskatchewan College of Law, 2018) 53-61. See also: Chippewas of the Thames First Nation, Munsee-Delaware First Nation, Oneida Nation of the Thames and Canadian Environmental Law Association, *Legal and Policy Tools for Source Water Protection in Indigenous Communities* (7 January 2019), online: <https://www.cottfn.com/wp-content/uploads/2020/03/CMO-CELA-Source-Water-Protection-Toolkit-Jan-7-2019-Final.pdf>; Kerrie Blaise and Friends of the Attawapiskat River, *Webequie Supply Road Project and Marten Falls Access Road Comments on the draft Tailored Impact Statement Guidelines and draft Indigenous Engagement Plan* (28 January 2020), online: <https://cela.ca/wp-content/uploads/2020/01/Comments-from-the-Friends-of-the-Attawapiskat-River-Webequie-Supply-Road-Marten-Falls-Community-Access-1.pdf>.

⁹ United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples* (13 September 2007), art 25, online: https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf [UNDRIP].

¹⁰ Environment and Climate Change Canada, *Toward the Creation of a Canada Water Agency Discussion Paper* (17 December 2020) at 19, online: https://www.placespeak.com/uploads/6321/Canada_Water_Agency_Discussion_Paper.pdf

¹¹ UNDRIP, *supra* note 9, arts 18-19.

¹² Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (2015), arts 45-47, online: http://trc.ca/assets/pdf/Calls_to_Action_English2.pdf

¹³ Phare Law Corporation, *supra* note 4 at 6.

Historically, Indigenous peoples have been excluded from water management decisions because federal, provincial and territorial governments have denied that they have any inherent, Aboriginal or treaty-based water jurisdiction, and have refused to entertain discussions as a result.¹⁴ For example, Indigenous peoples were not originally included by the provinces and states surrounding the Great Lakes in the Annex 2001 negotiations. The Annex 2001 is a part of the Great Lakes Charter and constitutes an agreement amongst Great Lakes provinces and states that proposes to provide decision making standards regarding applications for certain diversions in the Great Lakes-St. Lawrence Basin.¹⁵ It was only very late in the process of the Annex 2001 negotiations that the Ontario government decided to inform some Indigenous communities situated in Ontario and their umbrella associations about the negotiations.¹⁶ Several Ontario Indigenous communities viewed the terms of the Annex 2001 as having significant implications for their unceded Aboriginal rights and properties.¹⁷

The CWA is an opportunity to remedy historical injustices from governments' failure to include Indigenous peoples in water management decision making. The establishment of a CWA could provide an important opportunity for the federal government to instead advance reconciliation.

CELA recommends that Canada advance reconciliation by ensuring that Indigenous peoples have a role in the development and operation of the CWA. The success of this collaboration will require a commitment to principles that include the following:

- a) *Ensure all decision-making and planning is driven by a commitment to advance Indigenous rights of self-determination.* Canada has a duty to respect the rights of Indigenous peoples as recognized by the *Royal Proclamation of 1763*, Indigenous-Crown treaties, the *Constitution Act, 1982*, and international human rights instruments such as the UNDRIP. This duty requires that substantive rights of Indigenous peoples be upheld and respected, including: expressions of self-determination; rights to harvest, culture, religion and non-discrimination in relation to lands, territories and natural resources; rights to health and physical well-being in relation to a clean and healthy environment; and the right of Indigenous peoples to set and pursue their own community priorities.¹⁸
- b) *Apply a two-eyed seeing approach to water governance.* The concept of “two-eyed seeing” refers to learning to see from one eye with the strengths of Indigenous knowledges and ways of knowing, and from the other eye with the strengths of Western knowledges and ways of knowing, and to use both these eyes together, for the benefit of all.¹⁹ Research shows that when Indigenous and Western knowledge systems are braided

¹⁴ *Ibid* at 2.

¹⁵ Muldoon & McClenaghan, *supra* note 2 at 256.

¹⁶ *Ibid* at 252, 256.

¹⁷ *Ibid* at 256.

¹⁸ United Nations Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya – Extractive industries and indigenous peoples* (1 July 2013), A/HRC/24/41: <https://undocs.org/A/HRC/24/41>.

¹⁹ Cheryl Bartlett, Murdena Marshall & Albert Marshall, “Two-Eyed Seeing and other lessons learned within a co-learning journey of bringing together indigenous and mainstream knowledges and ways of knowing” (2012) 2 J Environ Stud Sci, 331 at 335.

together in the governance and management of ecosystems, this can lead to thriving ecosystems and subsequently thriving human communities.²⁰

- c) *Fulfill the TRC's Calls to Action.* In the creation of the CWA, there should be a particular focus on Calls to Action 45-47, which emphasize repudiating concepts used to justify European sovereignty over Indigenous peoples and lands and the laws, policies, and litigation strategies that continue to rely on such concepts.
- d) *Adhere to the UNDRIP.* In the creation of the CWA, there should be a particular focus on ensuring Indigenous peoples have the right to participate in decision-making in matters which would affect their rights (Article 18) and that Indigenous peoples have granted their free, prior, and informed consent before decisions are made that affect them (Article 19).
- e) *Foster and maintain a spirit of cooperative federalism.* The Government of Canada has recognized that Indigenous self-government is part of Canada's evolving system of cooperative federalism and distinct orders of government.²¹ To foster and maintain a spirit of cooperative federalism that is inclusive of Indigenous peoples, the Government of Canada has committed to developing mechanisms and designing processes that create a space for Indigenous peoples to meaningfully participate in the effective decision-making and governance of Canada.²² CELA reiterates that the CWA is an opportunity for Canada to deliver on this commitment.

2) **Enable the Creation of a National Water Monitoring Program**

Due to Canada's fragmented approach to water governance, existing knowledge gaps are hindering the ability to effectively understand impacts of current decision-making on water. The health and security of waters in Canada cannot be ensured unless there is a strong understanding of their status, how they are being impacted, and how they could continue to change in a climate-impacted future. The CWA can play a key role in creating and mobilizing the knowledge - both Western science and Indigenous knowledge - needed to predict and respond to water problems. For example, a national water monitoring program can assist in remediating the knowledge gaps that currently hinder effective wastewater management systems and the assessment of pesticide exposure.

Wastewater management systems protect human health and the environment from contamination. Sources of contamination include a wide variety of industrial and household chemicals, pharmaceuticals and personal care products, endocrine disruptors and other

²⁰ Richard Schuster et al, "Vertebrate biodiversity on indigenous-managed lands in Australia, Brazil, and Canada equals that in protected areas" (2019) 101 *Environmental Science and Policy* 1-6; University of British Columbia, "Biodiversity highest on Indigenous-managed lands" *ScienceDaily* (31 July 2019), online: www.sciencedaily.com/releases/2019/07/190731102157.htm

²¹ Department of Justice Canada, *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples* (14 February 2018) at 9, online: <https://www.justice.gc.ca/eng/cs/sj-c/principles.pdf>.

²² *Ibid.*

chemicals.²³ The effective treatment of these sources of contamination in wastewater is hampered by knowledge gaps. Wastewater management operational data exists with the provinces, but it is not coordinated at the national level.²⁴ There is a need for access to comprehensive and current data on wastewater operations, collection systems and effluent parameters across Canada.²⁵ This information would facilitate effective wastewater management by enabling decision makers to determine, on a national level, the current state and progress toward targeted goals.²⁶ A national water monitoring program could assist in this regard.

A national water monitoring program could also assist government agencies in fulfilling their legislative mandates more effectively.²⁷ For example, the Pest Management Regulatory Agency (PMRA) is responsible for implementing the *Pest Control Products Act (PCPA)*. Under the *PCPA*, the PMRA conducts re-evaluations of registered pesticides on a 15-year cycle.²⁸ Due to inefficiencies in the re-evaluation process, the PMRA developed a new integrated approach.²⁹ Part of the new integrated approach to pesticide re-evaluation is early and ongoing identification of changes in pesticide use and exposure.³⁰ Success of this new approach will require data from a national water monitoring program.³¹ Currently, the PMRA does not conduct water monitoring and available data from other federal departments, provinces, and stakeholder associations often lack the level of detail needed for exposure assessment calculations.³²

CELA recommends that the CWA enable the creation of a national water monitoring program that:

- a) *Provides a knowledge creation and mobilization framework.* This framework can address identified data gaps, create standard protocols and guidelines for data analysis, assess existing data collection capacity, and identify the most appropriate leverage points for the CWA.
- b) *Supports existing data collection efforts.* This can be done by enhancing funding and other supports for nongovernmental organizations, academic institutions, Indigenous Nations and organizations, and community-based water monitoring programs.

²³ Canadian Water Network, *Canada's Challenges and Opportunities to Address Contaminants in Wastewater: National Expert Panel Report* (March 2018) at 21, online: <https://cwn-rce.ca/wp-content/uploads/2018/08/CWN-2018-Expert-Panel-Report-on-Contaminants-in-Wastewater.pdf>

²⁴ *Ibid* at 50.

²⁵ *Ibid* at 49.

²⁶ *Ibid*.

²⁷ Green Budget Coalition, *Recommendations for Recovery and Budget Actions in 2020-2021* (September 2020) at 92, online: <https://greenbudget.ca/wp-content/uploads/sites/4/2020/10/Green-Budget-Coalitions-final-Recommendations-for-Recovery-and-Budget-Actions-in-2020-2021-Advance-copy-September-30-2020-web-site.pdf>

²⁸ *Ibid* at 95.

²⁹ *Ibid*.

³⁰ *Ibid* at 96.

³¹ *Ibid*.

³² *Ibid*; Pest Management Regulatory Agency, *2018-2019 Annual Report* at 20, online: <https://www.canada.ca/content/dam/hc-sc/documents/services/consumer-product-safety/reports-publications/pesticides-pest-management/corporate-plans-reports/annual-report-2018-2019/dtp-annual-report-eng.pdf>

- c) *Coordinates a central repository on water data and information.* This repository can be a means of collecting, interpreting, and disseminating water information and data in an accessible format for different levels of government, the water community, and the public. The central repository could address the challenges faced by decision makers in wastewater management and by government agencies, such as the PMRA, in fulfilling their legislative mandates as they relate to water.
- d) *Generates future water scenarios and forecasts to contribute to climate resilience and adaptation planning.* This could include predicting floods and droughts, prioritizing water quality issues, predicting and mitigating the risk of harmful algae blooms, and understanding future water supply and use.
- e) *Adheres to the precautionary principle.* The precautionary principle is an evidence-based decision-making tool. Decisions informed by the precautionary principle can be adapted over time as additional information becomes available through monitoring or future developments in science. This helps to reduce uncertainty of risk.³³ The CWA, by adhering to the precautionary principle in the creation and operation of a national water monitoring program, will be better placed to address the uncertainty of risk in managing Canada's waters.

3) Facilitate Water Governance at the Watershed Level

Addressing water governance fragmentation across Canada requires a new approach that emphasizes the importance of watershed boundaries in all water decision-making. The watershed approach takes into account interconnected ecological, social, economic, and cultural values that must be balanced to ensure the wellbeing of communities and ecosystems across the watershed. Further, Canada's diverse geography means that Canada's water management framework will need to be equitable and pragmatic to serve the needs of different watersheds across the country.³⁴

Watershed-based water management, involving multiple levels of government, Indigenous and public engagement both for ecosystem and for drinking water protection, has gained prominence across Canada.³⁵ At a minimum, these initiatives should be considered best practice and inform the development of water legislation, policy, and rules.³⁶

For example, the Great Lakes and St. Lawrence Collaborative ("the Collaborative") has proposed an institutional arrangement to implement the Collaborative's 2020-2030 Action Plan, which provides for better governance and protection of the Great Lakes-St. Lawrence River watershed.

The proposed institution would be comprised of: (1) the Great Lakes St. Lawrence Collaborative Commission (supported by a Secretariat); (2) Federal Great Lakes St. Lawrence Taskforce; (3)

³³ Canadian Water Network, *supra* note 23 at 28.

³⁴ Muldoon & McClenaghan, *supra* note 2 at 258.

³⁵ *Ibid.*

³⁶ *Ibid.*

Indigenous Great Lakes St. Lawrence body; and (4) Issue-specific Implementation Teams.³⁷ These issue specific implementation teams would include: (a) Shoreline climate resiliency; (b) Nutrients and algae; (c) Beaches quality and shoreline access; and (d) Exposure to toxics.³⁸ The Collaborative identified these issues as requiring alignment and new institutional arrangements to be addressed effectively. A Great Lakes and St. Lawrence Collaborative Commission, should the proposed institution described above come to fruition, will have the authority to recommend new issues to the federal taskforce for its consideration.³⁹

The institutional arrangement proposed by the Collaborative could be integrated into the new CWA to better coordinate governance and protection of the Great Lakes-St. Lawrence River watershed.⁴⁰

CELA recommends that the CWA facilitate water governance at the watershed level by:

- a) *Developing a pan-Canadian strategy.* This strategy can promote water governance according to watershed boundaries, including strategies for realigning currently isolated water management capacities within the federal government and a roadmap for watershed-based collaboration between jurisdictions.
- b) *Supporting watershed-level collaborations.* The CWA can support watershed-level governance collaborations amongst provinces, territories, municipalities, Indigenous governments and the public.
- c) *Supporting the protection, conservation, and restoration of freshwater ecosystems.* This might include mainstreaming ecosystem services valuations into all water management decision-making processes, prioritizing and protecting environmental flows across all water management decisions, and promoting nature-based solutions to address pressing water challenges.

CONCLUSION

In summary, in creating a CWA, CELA recommends that the Government of Canada prioritize actions that:

- 1) **Advance reconciliation with Indigenous peoples.** This commitment should be governed by the following principles:
 - a. ensure all decision-making and planning is driven by a commitment to advance Indigenous rights of self-determination;

³⁷ The Great Lakes and St. Lawrence Collaborative, *Action Plan to Protect the Great Lakes and St. Lawrence 2020-2030: Implementing Innovations in Science and in Governance* (June 2020) at 19-21, online: <http://www.glfcc.org/pubs/pdfs/2020%20Great%20Lakes%20and%20St.%20Lawrence%20Collaborative-ENG-Web.pdf>

³⁸ *Ibid* at 21.

³⁹ *Ibid*.

⁴⁰ *Ibid* at 22.

- b. apply a two-eyed seeing approach to water governance;
 - c. fulfill the TRC's Calls to Action;
 - d. adhere to the UNDRIP; and
 - e. foster and maintain a spirit of cooperative federalism.
- 2) **Enable the creation of a national water monitoring program** that:
- a. provides a knowledge creation and mobilization framework;
 - b. supports existing data collection efforts;
 - c. coordinates a central repository on water data and information;
 - d. generates future water scenarios and forecasts to contribute to climate resilience and adaptation planning; and
 - e. adheres to the precautionary principle.
- 3) **Facilitate water governance at the watershed level** by:
- a. developing a pan-Canadian strategy;
 - b. supporting watershed-level collaborations; and
 - c. supporting the protection, conservation, and restoration of freshwater ecosystems.

Addressing these priorities will assist in meeting the water needs particularly of the most vulnerable of Canadian communities who tend to disproportionately bear the impacts of environmental injustices, including climate change.

CELA would be happy to meet to discuss any of our comments or recommendations.

March 1, 2021