Water Governance and Issues in the Northwest Territories and Nunavut

NEERLS Conference Paper by John Donihee, MES, LL.M

April 5, 2011
1. INTRODUCTION:¹

We are all downstream.

Ecologists’ Motto

Millions have lived without love. No one has lived without water.

Turkish Businessman 1998

Whiskey is for drinkin’; water is for fighting over.²

Mark Twain

Water is intrinsic to life. Our relationship to water is organic, personal, and spiritual. The role of water in the development of Canadian society, especially in the west and north has been fundamentally important. Historically, the exploration of Rupert’s Land and the Northwest Territory was spurred by the pursuit of the beaver, a semi-aquatic mammal with a pelt that became the standard of exchange in these remote areas.³ Today, as then, industry, transportation and municipal and social infrastructure depend on water. Northern communities cluster along rivers and on the shores of lakes or the sea. Ecosystems could not survive and life as we know it could not exist without water. Man is a major user of water. Throughout history he has had to develop rules to govern water uses, manage relationships between water users and to protect and sustain water resources and the environments that depend on them.

¹ John Donihee, BSc, MES, LLB, LLM, barrister and solicitor, member of the bars of Alberta, NWT and Nunavut. The opinions expressed in this paper are entirely my own and the responsibility for any errors or omissions is also mine.
³ As Peter C. Newman observed in commenting on the importance of the trade in beaver skins:

“Seldom has an animal exercised such a profound influence on the history of a continent. Men defied oceans and hacked their way across North America; armies and navies clashed under the polar moon; an Indian civilization was debauched – all in quest of the pug nosed rodent with lustrous fur.”

This paper will provide a brief overview of the governance framework applicable to water in the Northwest Territories and Nunavut. It also highlights some recent water resource management issues from the perspective of northern water management institutions. The paper is not intended to provide a detailed review of water law in the NWT or Nunavut but rather to describe the water management framework and highlight some current challenges confronting water resource managers in our northern territories.

2. ELEMENTS OF THE WATER GOVERNANCE FRAMEWORK:

I have limited this paper to a review of water governance in the Northwest Territories (NWT) and Nunavut. At the highest level, it is the responsibility of government(s) to provide a framework within which water management can take place. Such a governance framework must reconcile the often conflicting water needs, values and interests of various stakeholders while ensuring the sustainability of the resource and protecting the environment. The management and protection of northern water resources is a challenge for governance systems, not just a scientific and technical challenge.

In 2003 the United Nations World Water Assessment Programme called “Water for People Water for Life” said:

---

4 I have only briefly addressed the indirect but important role of fisheries and environmental legislation in the management of water resources. The focus herein is instead on direct authority and rights in relation to water itself.

5 This session is intended to address “Arctic Jurisdiction” and I have interpreted that to include only the NWT and Nunavut. Only the Yukon North Slope is truly Arctic and it is governed under the Inuvialuit Final Agreement which is addressed in the NWT context below. The water governance framework for Yukon also differs from that of the other territories because devolution has taken place there. The Government of Yukon exercises a jurisdiction over water more like that of the provinces than the other territories. Note, however, that Yukon only has “administration and control” over federal land and water resources. See s.3 Waters Act, S.Y. 2003, c.19. A comparison on Yukon water governance to that of the other territories is beyond the scope of this paper.

At the beginning of the twenty-first century, the Earth, with its diverse and abundant life forms, including over six billion humans, is facing a serious water crisis. All the signs suggest that it is getting worse and will continue to do so, unless corrective action is taken. This crisis is one of water governance, essentially caused by the ways in which we mismanage water.  

Environmental and water governance is based on the processes, rights and institutions we use to make decisions about the environment and water. Good water governance requires an understanding of the strengths and weaknesses of these institutions and processes as well as the scientific and technical information necessary to make good decisions.

The Constitutional Framework:
In Canada, both levels of government have responsibilities in relation to water. The Constitution Act, 1867 allocates property in natural resources and legislative powers in relation to these resources to the provinces. Sections 92(13) and (16) and sections 109 and 92(5) are the most important provisions in relation to provincial powers over and ownership of water. The federal power over water is based in its authority over interjurisdictional resources and on its responsibility for international waters, particularly under international treaties as well as on several specific heads of federal constitutional authority such as fisheries and navigable waters.

In disputes involving the balancing of federal and provincial interests in water, the Courts have tended to read federal interests narrowly and to restrict them to the particular federal power being invoked -- for example the federal fisheries power has been restricted to the management of fisheries rather than allowing the federal government to stray into general water management.

---

7 Supra, note 6 at page 86.
8 30 & 31 Vict., c.3 (Imp.).
9 I will deal specifically with the territories below.
Consequently, the provinces play the predominant role in the management of intraprovincial waters and because of their proprietary rights they are entitled to allocate waters for various private uses and to grant rights to water to private parties. There is no doubt that in so doing, the provinces may impinge on various federal water authorities such as the protection of fish habitat or navigable waters. These interactions must be thus addressed in the context of a water governance framework which seeks to accommodate these sometimes competing interests.

The federal government’s interest in water appears to ebb and flow. For example, in the 1970’s Canada enacted the Canada Water Act. Much of this statute is devoted to providing a structure for cooperative work with the provinces on water–related issues. In the 1980’s the federal government undertook the development of a federal water policy based on a nationwide inquiry on the role of the federal government in water management. This resulted in the “Pearse Commission” report which was widely acclaimed at the time and recognized the diversity of federal interests in water without advocating a federal “master plan” for water. Federal leadership on water management issues has waned in the past decade and there are periodic calls for an enhanced federal role in water management.

The Unique Situation in the NWT and Nunavut Territories:
The governments of the Northwest Territories (GNWT) and Nunavut (GN) have no proprietary interest in the waters in their territories. Under section 16 of the Northwest Territories Act and section 23 of the Nunavut Act, these governments may enact legislation addressing various matters included among which are property and civil rights in the territory and matters of a local and

---

14 See Saunders and Wenig for example supra, note 10 at page 136-137.
15 In this regard Nunavut and Yukon are quite similar.
17 S.C.1993, c.28.
private nature. This along with the power to establish municipal governments gives these governments the authority to enact environmental and municipal legislation and legislation in relation to public health. However, neither of these territories has any general water management legislation.\textsuperscript{18}

The federal government owns Crown lands and resources in the NWT and Nunavut and that includes water.\textsuperscript{19} This gives the federal government the authority to legislate in relation to water and it has done so through the \textit{Northwest Territories Waters Act} (NWTWA) and the \textit{Nunavut Waters and Nunavut Surface Rights Tribunal Act} (NWNSRTA).

Sections 16 and 23 of the NWT and Nunavut Acts also specify that territorial legislation is “subject to any act of Parliament”. This is a jurisdictional limit on territorial legislative authority. Once a field has been occupied by federal legislation, territorial legislation which conflicts or is inconsistent with the federal legislation is \textit{ultra vires} the Legislature. It is of no force and effect. Given that Canada has enacted the NWTWA and the NWNSRTA, there is effectively no room for territorial water legislation. Until such time as devolution takes place, water law in the NWT and Nunavut will be predominantly federal. This situation is analogous to that in the Prairie Provinces before 1930.

The only purely water related territorial legislation is the \textit{Water Resources Agreements Act}\textsuperscript{20} which is legislation necessary to authorize the territories to enter into water management agreements with other jurisdictions. Pursuant to this legislation, the GNWT and Canada are implementing the Mackenzie River Basin Agreement by negotiating water management agreements with Yukon and adjacent provinces which share the Mackenzie River Basin. In most respects,

\textsuperscript{18} Again, this distinguishes the governance framework in the NWT and Nunavut from that in Yukon which has its own \textit{Waters Act}. \textit{Supra}, note 5.


\textsuperscript{20} R.S.N.W.T. 1988, c. 17 (Supp.).
however, Indian and Northern Affairs Canada (INAC) is the water manager in the NWT and Nunavut, performing a quasi-provincial role in this respect.

**Water as Property - Managing Water Rights in North Western Canada:**

Some brief comments on water rights and property are warranted as part of this review of water governance in the territories.

Water governance systems in western Canada vary from those in the East. This is a result of climate, geography and history. In the East, there is more rain and more water. In those areas the English common law doctrine of riparian rights which was adopted as part of the English legal framework after the conquest of Quebec in 1759 worked.\textsuperscript{21} In the west, the riparian rights doctrine acted as an impediment to development. This was the result of several factors. Because riparian water use is limited to lands appurtenant to (bordering) streams or water bodies, lands without connection to the water had no water rights. The riparian doctrine also limited water use in ways that did not favour modern commercial uses. Finally in dry years there was no scale of priorities set out by the riparian use doctrine and so high value uses (like domestic use) had to compete with other uses because all riparian owners had an equal claim to the resource. This system simply didn’t work in the dry western provinces and so new water laws were developed through statutory intervention.

The eventual result was the development of a system based on Crown ownership of water where water rights were allocated on a first come first served basis. This system of priority in Canadian water law is called prior allocation.\textsuperscript{22} In more recent water legislation these rights are granted for a term and may be subject to the Crown’s interest in water conservation. If water shortages result the users who were granted rights first are the last ones to have to stop using water.


\textsuperscript{22} This should be distinguished from the American (and early British Columbia) models which were based on appropriation (use) of water. In Canada the allocation of water is made by the Crown or a Crown agent not on the basis of appropriation and beneficial use. Both systems are, however, based on a system of priority which is linked to the timing of the rights issuance.
The land laws in the western provinces and in the territories assist in the elimination of riparian rights by reserving the beds and banks of water bodies to the Crown. If private owners don’t own the beds or banks, riparian rights cannot arise. Note, however, that in more recent land claims settled in the NWT and Nunavut the grants of land made to Aboriginal beneficiaries have included the beds and banks of water bodies and thus, in addition to the special water rights by these treaties these land owners could likely claim riparian rights to protect their lands and their uses of water.

3. LEGISLATING FOR NORTHERN WATER MANAGEMENT:

The modern era of water management in the territories began with the enactment of the *Northern Inland Waters Act* (NIWA). Federal lawmakers had the benefit of experience with water management legislation in western Canada and NIWA included several significant advances which northerners tend to take for granted.

Water legislation in the western provinces tends to focus on the allocation of and management of water rights. Although the more modern statutes do make some provisions for water resource protection they are primarily directed at the issuance and management of water rights and at managing the relationships between water users. The protection of water quality is often undertaken through other statutes.

---

24 See chapter 19 in the Gwich’in and 20 in the Sahtu land claims. In Nunavut chapter 20 grants special water rights to Inuit as well. The Inuvialuit Final Agreement (IFA) does not include a section granting special rights to Inuvialuit. The IFA does not address water management and rights directly in the way that more recent land claims do.
27 See the Alberta *Water Act*, supra, note 19.
28 In Alberta, the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3 (as amended) plays a vital role in the protection of water quality.
In the territories, NIWA integrated the allocation and management of water rights and uses and provided the framework for water quality protection as well. The Act also provided for the establishment of a Northwest Territories Water Board which would act as a quasi-judicial decision maker in respect of applications for both the use of water and the deposit of waste into water. This institution represented an important departure from the decision-making framework in the provinces where such decisions are frequently made by departmental staff or officials.

The water board model was carried through to the NWTWA in 1992 and provided an important template for the co-management boards established for various purposes through the settlement of comprehensive land claims. In the Mackenzie Valley the Gwich’in, Sahtu and more recently the Tlicho agreements have further integrated the management of land and water resources through the Mackenzie Valley Resource Management Act by establishing land and water management boards which exercise authority over land use permitting, water rights allocation and water quality protection.\(^{31}\)

In Nunavut, the Nunavut Water Board (NWB) exercises very similar powers over water resources to those exercised by the land and water boards but the NWB has no authority over land management.\(^{32}\) In this way, land claim settlements have both driven legislative change in relation to the management of water resources and granted special rights to Aboriginal land owners.

It should be noted, however, that the amendments made to the NWTWA to reflect land claims settlements have not significantly changed the basic water governance model established by NIWA in the 1970’s. Crown ownership of the

\(^{29}\) This was before Nunavut was created in 1999.  
\(^{30}\) S.C. 1998, c. 25 (as amended).  
\(^{31}\) These changes are not part of the water management framework in the Inuvialuit Settlement Region where the NWTWA regime is unchanged.  
\(^{32}\) The NWTWA was in force in 1999 when the Nunavut Territory was created. The more recent NWNSRTA reflects the specific requirements of the Nunavut Land Claims Agreement without changing the institutional basis for water governance in Nunavut.
resource has not been affected\textsuperscript{33} and the prior allocation model is still in place.\textsuperscript{34} There is still a quasi-judicial board responsible for making decisions about water use and waste disposal under this statutory framework. Today, these are co-management land and water boards in the Mackenzie Valley, the NWT Water Board in the Inuvialuit Settlement Area and the Nunavut Water Board in Nunavut.

The small population and generally low levels of development in the NWT and Nunavut combined with the relative abundance of water on northern landscapes has meant that northern water managers have not had to deal with difficult allocation questions related to competition for water rights and access to the resource. I am unaware of any instance where a water right has been modified or significant compensation paid because of the effects of subsequent water uses.\textsuperscript{35} The primary focus of water licensing proceedings in the NWT has been and continues to be management and protection of water quality and abandonment and reclamation of licensed undertakings.

**Other Legislated Interests in Northern Waters:**

There are a number of other federal statutes which have a bearing on water management and for which only brief mention can be made in this paper, if only to show how complex the water governance framework is in the territories. A partial list would include the *Navigable Waters Protection Act*\textsuperscript{36}; the *Fisheries Act*\textsuperscript{37} which has provisions to protect both fish habitat and to prohibit the release of deleterious substances; the *Canadian Environmental Protection Act*\textsuperscript{38} the

\textsuperscript{33} Note that special rights to the use of water on aboriginal lands are granted through more recent land claim settlements. These rights do not, however, affect Crown ownership.

\textsuperscript{34} This prior allocation model ensures that the users with priority (first in time) are not adversely affected by subsequent users. A compensation system to address such effects is built in to s. 14 of the NWTWA.

\textsuperscript{35} Compensation claims were advanced in the NWT in association with the licensing of both the Ekati and Diavik diamond mines. The NWT Water Board denied all claims. In Yukon, there have been compensation claims paid out for example in response to the Yukon Electric water licence renewal.

\textsuperscript{36} R.S.C. 1985, c. N-22.

\textsuperscript{37} R.S.C. 1985, c. F-14.

\textsuperscript{38} S.C. 1999, c. 33.
Canada Shipping Act\textsuperscript{39}; the Species at Risk Act\textsuperscript{40}; the Canadian Environmental Assessment Act\textsuperscript{41}; and others, notable among which is the Canada Water Act. As indicated in the discussion above, however, most of this federal legislation affects water use and water quality only in the context of the subject matter being regulated (for example fish or shipping) and not in general. It would be fair to say that the roles of other federal departments are ancillary to that of INAC in terms of water management responsibilities in the NWT.

4. DEVOLUTION AND WATER MANAGEMENT:

As indicated above, INAC working with the water boards exercises a quasi-provincial role in relation to water management in the NWT and Nunavut. The territories' current role is very limited but of course they may someday be the beneficiaries of a devolution process which delegates the INAC water management responsibilities to them.

The Government of Canada is currently exploring the possibility of transferring administration and control over land and water resources to the GNWT and GN. The situations in the two territories in respect of devolution are quite different, a result of different land claim regimes, local politics and the respective capacities of the territorial governments. In the NWT, the government recently signed an agreement in principle with Canada to pursue devolution negotiations, but it remains to be seen whether a consensus favouring devolution will emerge in the NWT. In Nunavut devolution talks are not advanced.

It is worth noting, however, that the delegation of water management authorities from INAC to the territories might not even have to wait for a separate negotiated agreement at the devolution table. Section 6 of the NWTWA and section 9 of the

\begin{thebibliography}{9}
\bibitem{40} S.C. 2002, c. 29. 
\bibitem{41} S.C. 1992, c. 37 (as amended). This statute may only be relevant in the ISR because the MVRMA replaces it in the Mackenzie Valley.
\end{thebibliography}
NWNSRTA already provide for delegation of all of the essential water management powers of the Minister of INAC to a Minister of the respective territories. Devolution of water resource management responsibilities could thus take place without the need for a more general devolution agreement.  

5. **TERRITORIAL LAND CLAIMS AND NEW WATER RIGHTS:**

For over thirty years the Government of Canada has been engaged in a process of negotiation with Aboriginal peoples across the northern Territories seeking a just settlement of land claims. The primary purpose of land claims is to achieve certainty, to reinforce Canadian sovereignty in the North and to set out a framework for the co-existence of aboriginal people and Canada. To accomplish this, land claim agreements cede, release and surrender aboriginal rights, title and interests in their settlement areas in exchange for the specific rights granted in the agreements. This exchange results in certainty of title to land and resources for Canada. In return, large tracts of fee simple lands have been granted to beneficiaries, including areas with surface title only and areas where both surface and subsurface title were included (collectively called settlement lands below). These lands were selected by beneficiaries for a variety of purposes including traditional, cultural, environmental and economic uses.

Land claims also establish governance relationships between institutions created by the agreements and the governments of Canada or a territory. Most land claims also include a form of shared decision-making, usually over resource and environmental matters based on a co-management model where half of the

---

42 These provisions have been in place for years but there has never been any serious discussion of the territories taking over water resource management on this basis. Similar provisions were in place in the Yukon Waters Act but were never implemented. Yukon authority over water was devolved as part of a comprehensive devolution agreement.

43 To give some examples, Inuvialuit own 90,650 sq. km., an area larger than New Brunswick and Prince Edward Island combined. Of this 12,950 sq. km. includes mineral rights, an area twice the size of Prince Edward Island. The Inuit of Nunavut own 352,191 sq. km., an area larger than the three Maritime Provinces combined and almost as large as the area of Newfoundland and Labrador (405,212 sq. km.). Of this, Inuit own mineral rights to an area of 36,966 sq. km. which is more than 50% of the total area of New Brunswick (72,908 sq. km.).
decision-makers are selected by aboriginal parties.\footnote{Examples include water boards, surface rights tribunals, wildlife or fisheries management boards and boards responsible for environmental impact assessment.} Co-management gives land claim beneficiaries important opportunities to influence and even make decisions about resource development in their settlement areas.\footnote{For a discussion of this influence see: \textit{Breaking the Ice – From Land Claims to Tribal Sovereignty in the Arctic}, Barry Scott Zellen, Rowman & Littlefield Publishers Inc. 2008, 419 pp. at Chapter 5 p.193 to 288.}

The rights and interests granted by these agreements are protected from encroachment by federal, provincial or territorial laws as a result of their constitutional status and by a clause in each agreement which ensures that these rights prevail in a case of conflict or inconsistency with other laws.\footnote{The \textit{Nunavut Land Claims Agreement: Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada} (Ottawa: the Tungavik and the Minister of Indian Affairs and Northern Development, 1993). Hereinafter the “NLCA”. See Article 2 Part 12.} Consequently land claims have changed the makeup of the institutions which make decisions about territorial water resources and they have affected the scope and contents of water resources management legislation too. The \textit{Nunavut Waters and Nunavut Surface Rights Tribunal Act} is new legislation developed for Nunavut which incorporates and implements the water related provisions of the Nunavut Land Claims Agreement (NLCA). In the NWT the \textit{Mackenzie Valley Resource Management Act} has similar effect in relation to the Gwich’in, Sahtu and Tlicho land claim agreements.

The special rights granted to land claims beneficiaries go beyond legislative and institutional changes.\footnote{Each land claim is different and must be reviewed on its own terms.} Although the Crown has retained title to water in the territories, the settlement lands granted to Aboriginal organizations include the beds and banks of rivers lakes and water bodies thus raising the possibility that these land grants could import riparian rights as well. The NLCA and more recent agreements in the NWT (Gwich’in, Sahtu, Tlicho) go further. These agreements include a right to have waters which are on or flowing through settlement lands remain “substantially unaltered as to quality, quantity and rate of flow” when such
waters are on the settlement lands. A special compensation regime is established to protect these waters and rights.\textsuperscript{48} Water licences cannot be issued if substantial alteration will occur and compensation requirements remain unaddressed. Chapter 20 of the NLCA also gives Inuit the exclusive right to use waters found on their settlement lands. This is an economic right which may have significant value in light of ongoing mining development on Inuit Owned Lands in Nunavut.\textsuperscript{49}

Thus land claim settlements have been important drivers of legislative and institutional change while granting new compensation and economic rights in relation to water resources on settlement lands in the NWT and Nunavut.

6. **ISSUES AND CHALLENGES IN NORTHERN WATER MANAGEMENT:**

**Legislative and Policy Gaps:**

Given the current focus of the NWT’s water licensing framework on water quality, there are some important gaps in the regulatory framework. These gaps were identified in a review of the role of INAC in non-renewable resource development in the NWT conducted by the Auditor-General in 2005. The issue was explained as follows in the Auditor-General’s report:

6.1 Non-renewable resources offer enormous potential for economic development in the Northwest Territories (NWT). Yet the investment climate for this development is uncertain, in part because Indian and Northern Affairs Canada has not adequately managed its role in the process that considers development projects.

6.2 This includes not providing guidance on some of the ambiguous terms in the governing legislation or on establishing water standards permitted by legislation. It also includes not requiring boards to be

\textsuperscript{48} See chapter 19 in the Gwich’in Land Claim; chapter 20 in the Sahtu Land Claim and Chapter 20 in the NLCA for the details on these special rights.

\textsuperscript{49} Most of the current advanced mining developments in Nunavut including Agnico-Eagle’s Meadowbank and Meliadine projects, the Baffinlands and Newmont Hope Bay projects are all on Inuit Owned Lands.
accountable for managing their role in the process without impinging on the decisions they take as quasi-judicial bodies."

**Regulations for water should be established**

6.48 When the land and water boards issue water licences under the authority of the *Northwest Territories Waters Act* and the MVRMA, they require the licensees to meet certain conditions such as measures to mitigate the environmental impacts of the use of water or the deposit of waste. Applicants for licences or permits should be able to know before they submit their proposals the standards for water use and waste disposal that they must meet. In that way, they would be able to demonstrate in their project plans how they will meet those standards.

6.49 In fact, the *Northwest Territories Waters Act* provides for the Minister for Indian and Northern Affairs, working with the boards, to make regulations governing the quality of water. Similarly, the MVRMA gives the Minister the authority to provide written policy directions regarding land and water regulations.

**Recommendation.** Indian and Northern Affairs Canada, in consultation with the boards under the *Mackenzie Valley Resource Management Act*, should develop standards for water and the Minister should direct the boards to use the standards.50

The MVLWB and the NWT Water Board play a role in the federal water management system for the NWT. But this role is primarily related to adjudication in the context of licence proceedings and to the supervision of licensed activities. The Boards’ role in policy matters is limited to those which arise in the context of licensing proceedings. Finally, the boards may play almost no role in the compliance system which is primarily the responsibility of INAC. Inspectors are appointed under the NWTWA and MVRMA by the Minister and are departmental

---

50 The *Report of the Auditor General of Canada to the House of Commons, April 2005, specific to Indian and Northern Affairs Canada, Development of Non-Renewable Resources in the Northwest Territories*. Note: Work on water quality and effluent quality standards has been initiated by INAC.
officials directed by INAC’s enforcement policy. There is limited integration of the boards in the enforcement process and little involvement of the boards in broader policy making efforts.

Over the last two years the land and water boards established under the MVRMA have initiated efforts to develop guidelines and policies addressing waste management, the development of environmental quality criteria for licensing and other operational purposes. This worthwhile initiative is unfortunately not a substitute for a much needed expansion of the regulatory framework for water management in the territories.

**Fragmented Governance Framework:**
Even this short review indicates that a large number of players have a role in the management of NWT waters. Nunavut has only a single water board and is thus less fragmented from an institutional perspective. Current responsibilities for water governance in the NWT are even more fragmented than those in the provinces. The elected territorial government which is primarily accountable at the local level in NWT communities has virtually no role in water management.

In 2010 the GNWT and INAC published a collaborative NWT Water Stewardship Strategy.\(^{51}\) This strategy is a first, much needed effort to set out roles and responsibilities, define priorities and begin identification of water management actions as early as late 2010. Unfortunately, the “Action Plan” promised for Fall 2010 has not yet been released.

New arrangements negotiated at land claims tables have not eliminated the possibility of a territorial government role in managing northern waters but recent changes to the legislative framework have been driven by land claims as has the granting of special rights and interests in water to land claims organizations. It is

also true that new rights, privileges and roles granted to aboriginal parties that have settled land claims will have to be respected as the water governance framework in the territories evolves. The territorial governments are generally out of sight and out of mind in water resource management decisions.

The important public role played by the water boards belies the limitations on their involvement in the comprehensive management of water resources in both territories. The boards have a limited role in water policy development, monitoring, compliance and enforcement. The absence of regulations addressing water quality and effluent quality makes the licensing process less efficient and fails to provide certainty to developers, communities and first nations when they address water quality concerns before the boards.

There is no water policy framework for either territory to guide the boards and it is doubtful given the presently fragmented nature of the water governance system whether such a policy could be developed until land claims are negotiated and devolution decisions are made.

Development on Aboriginal Settlement Lands:
The application of water management legislation on settlement lands raises some interesting and vexing questions, particularly in Nunavut. Many of these lands were chosen by Aboriginal organizations for their economic potential. When development proceeds on settlement lands, current INAC policy requires that financial security be posted for closure and reclamation of these industrial sites.

The problem which emerges relates to the risks which must be borne by the Aboriginal land owner. The legislative framework will not permit security to be held by any party other than the Minister of INAC. The water boards take an holistic view of the security provisions in the legislation and require payment of security for the whole project including both land and water related clean up. The
legislation provides that if the operator cannot satisfy all of the security requirements (or if the operator were to become insolvent) and additional funds for the cleanup are required, then the land owner can be liable.

Consequently, both the Crown and the Aboriginal land owner want security to protect their interests and there is overlap in their demands. When both the Crown and the Aboriginal land owners demand security the total amount held often exceeds actual project liability. The licensee must bear the cost of this over protection.\footnote{This issue first emerged before the NWB in 1999 at the renewal of the Boston Project Water licence. The NWB has had to adjudicate in relation to issues arising from double bonding on at least four occasions since then. The Board’s efforts to resolve the problem using arrangements for jointly held security have been rejected by INAC. Efforts by Inuit organizations and mining company representatives to address this problem in the development of new Nunavut Water Regulations have also recently been rejected by INAC.} The mining industry in Nunavut has had unfortunate and expensive experience with this “double bonding” problem.\footnote{Since the water legislation is a law of general application it applies on settlement lands in both territories. This problem has presented more frequently in Nunavut because of the advance stage mining activities on settlement land there but it would likely have emerged in the NWT if the Mackenzie Gas project had been constructed.} The current arrangements actually act as a disincentive to mining development in an already high cost environment.\footnote{Inuit and mining organizations have brought this problem repeatedly to the attention of INAC but no legislative response has been forthcoming.}

7. CONCLUSION:

The water governance framework in the territories is still evolving as relationships between federal and territorial roles are reconsidered in light of devolution proposals. Until all land claims in the NWT are settled and until the Government of Nunavut’s capacity to manage natural resources is enhanced, major change to these relationships should not be expected. For the foreseeable future, Canada through INAC will continue in its quasi-provincial role as the primary water management agency in the territories.
Land claims and the special rights and land ownership granted through them act as hard limits which will affect and shape but will not prevent new institutional arrangements for water management. In the short term, these rights must be respected and they are having day to day effect on the regulatory and licensing system currently in place. Managing issues such as the double bonding problem will require creativity and flexibility from INAC something which in relation to this particular problem has been in short supply. Industry and Aboriginal organizations should continue their collaboration on this issue.

The gaps in the legislative framework identified by the Auditor-General remain to be addressed. It would be easier to complete that work in advance of major development. As things stand the regulatory framework in the NWT in particular has been the subject of criticism for being complex and fragmented and contributing to regulatory uncertainty. As climate change continues and Canadian government policy looks more and more to the North for reasons of sovereignty and for the economic development needed to provide futures for Northerners, water governance systems should be among the first areas to be addressed. The protection of northern ecosystems and sustainable development of Canada’s northern territories may depend on it.