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INDIGENOUS LAWS IN THE CONTEXT OF CONSERVATION

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Indigenous Protected and Conserved Areas (IPCAs) are defined by the Indigenous Circle of Experts (ICE) as "lands and waters where Indigenous governments have the primary role in protecting and conserving ecosystems through Indigenous laws, governance and knowledge systems."[1]

The recent recognition of IPCAs as an effective form of conservation in Canada provides new opportunities. There is a growing consensus that Indigenous peoples' millennia-long experiences of governing their lands and waters is more effective than that of the conservation-based practices established by Canadian government bodies. As a recent United Nations report states, "Nature managed by indigenous peoples and local communities is under increasing pressure. Nature is generally declining less rapidly in indigenous peoples' land than in other lands, but is nevertheless declining, as is the knowledge of how to manage it."[2] IPCAs provide Canadian governments with opportunities to learn from Indigenous peoples about how to improve and better direct conservation efforts, while also providing Indigenous nations with spaces to practise and pass on their knowledge and laws to future generations.

This report examines SGaan Kinghlas- Bowie Seamount Marine Protected Area in Haida Gwaii and Thaidene Nëné in Łutsël K'é Dene First Nation territory. We critically examine how Indigenous laws are being applied in each context. We consider the opportunities and challenges from both a theoretical and practical perspective, and we provide recommendations on how recognition of Indigenous jurisdictions and authorities for the establishment and operation of IPCAs can advance effective conservation and provide a pathway for reconciliation.

We conclude that IPCAs that integrate Crown and Indigenous jurisdictions provide a promising new direction for conservation action. The Indigenous legal traditions that form part of the shared jurisdictional framework for the establishment, operation and management of SGaan Kinghlas and Thaidene Nëné are distinct to the Haida and Dene, but the case studies suggest that IPCAs can be effectively advanced in different and distinct Indigenous contexts.

Canada has a long history of working across national, provincial/territorial and regional differences between public governments. Many of Canada's most important institutions require ongoing collaboration between different levels of government. IPCAs offer a pathway to recognize and affirm Indigenous laws and governance, and to develop new institutions for reconciling Crown and Indigenous laws and decision-making in the establishment of new protected areas.

IPCAs offer clear and compelling benefits for both Indigenous and Crown governments that go well beyond effective conservation. IPCAs fundamentally change the relationship from one of "consultation" or "participation" under previous structures to one of mutual recognition and

[1] Indigenous Circle of Experts, *We Rise Together: Achieving Pathway to Canada Target 1*, Indigenous Circle of Experts' Report and Recommendations, Catalogue No R62-548/2018E-PDF (Ottawa: Government of Canada, 2018) online (pdf): <static1.squarespace.com/static/57e007452e69cf9a7af0a033/t/5ab94aca6d2a7338ecb1d05e/1522092766605/PA234-ICE_Report_2018_Mar_22_web.pdf> [ICE Report].

[2] Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, *The Global Assessment Report on Biodiversity and Ecosystem Services: Summary for Policymakers*, by S. Diaz, et al (Bonn, Germany: IPBES Secretariate, 2019) at 14, online (pdf): <ipbes.net/sites/default/files/inline/files/ipbes_global_assessment_report_summary_for_policymakers.pdf>.

respect for governance obligations. As our case studies demonstrate, the integration of Indigenous law and shared decision-making substantially reduces conflicts, and fosters relationships that advance mutual growth, learning, and more effective decision-making in the face of present and future challenges.

IPCAs are Grounded in Indigenous Law

Indigenous nations have been governing their territories using their own distinct legal traditions since time immemorial, well before the arrival of European settlers and European legal systems.[3] Understanding IPCAs – as distinct from other forms of Indigenous participation in protected area establishment and management which are based solely on Crown law – requires an understanding of how Indigenous law continues to operate in Canada today.

The source of Indigenous jurisdictions and authority over lands and resources arises from the fact that Indigenous nations pre-existed Canada, and existed as distinct peoples on their own lands and using their own laws, and continue to exist as nations today. Accordingly, when we speak of "inherent jurisdiction", we are referencing an Indigenous nation's own laws and sources of authority. The term "Indigenous law" refers to Indigenous peoples' own law while the term "Aboriginal law" refers to Canadian law as it applies to Indigenous peoples.

It is also important to note that the inherent jurisdictions and legal orders of Indigenous nations are distinct from "Aboriginal or treaty rights" which may be formally recognized under Canadian law in accordance with section 35 of the *Constitution Act,* under Crown legislation (such as the *Indian Act*) or through delegations of authority from other governments.

As Anishinaabe legal scholar Professor John Borrows explains,

> [the] underpinnings of Indigenous law are entwined with the social, political, biological, economic and spiritual circumstances of each group. They are based on many sources including sacred teachings, naturalistic observations, positivistic proclamations, deliberative practices and local and national customs.[4]

Indigenous law can be accessed from a range of sources, including Elders and community knowledge keepers, published stories, oral histories and narratives, songs, ceremonies, language, dreams, the land, art, pots, petroglyphs, scrolls, and published anthropological and historical research.[5] Unlike most Crown laws, Indigenous laws were not written down. In today's context, some Indigenous nations are choosing to write down some of their laws to share them more easily with others.

Given the diversity of Indigenous nations across the territory now known as Canada, there are multiple distinctive Indigenous legal orders. Different Indigenous nations have different legal

[3] John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002); Val Napoleon, "Thinking About Indigenous Legal Orders" (June 2007), online (pdf): *National Centre for First Nations Governance* <fngovernance.org/ncfng_research/val_napoleon.pdf>.
[4] John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 10.
[5] *Ibid.*

traditions, just as different countries do. Some Indigenous legal orders may be similar, sharing common legal concepts and traditions, while others are unique.

Our purpose here is not to exhaustively consider the many forms and ways in which Indigenous legal orders operate, but to focus on how Indigenous legal orders can operate in the context of IPCAs. Specifically, we are focused on identifying examples of how certain Indigenous nations are asserting and exercising inherent jurisdiction through the establishment and operation of IPCAs within their territory.

In the IPCA context, while recognizing that different Indigenous legal traditions are distinct and place-based, there are some shared attributes or traits amongst Indigenous legal traditions that differ from Crown laws governing the establishment and management of protected and conserved areas. In each of the case studies considered, we note that Indigenous laws relating to IPCAs are focused on *fulfilling responsibilities*, rather than *exercising ri*ghts.

Some central legal concepts that inform Indigenous laws about IPCAs include the understanding that everything is connected, that humans have responsibilities to care for their territories, each other and the other beings that sustain them, and a recognition of the rights and agency of non-human beings. For example, one of the six Haida legal principles set out in the SGaan Kinghlas-Bowie Seamount Marine Protected Area management plan described below is *Gin 'waadluwaan gud ahl k waagiidang (interconnectedness)*: We respect each other and all living things. We take only what we need, we give thanks, and we acknowledge those who behave accordingly.[6]

Concurrent Indigenous and Crown Jurisdictions and Authorities for Conservation

Our analysis of how Indigenous law operates in relation to protected areas generally and IPCAs specifically starts from the premise that Indigenous laws are grounded in distinct legal orders that operate concurrently with the common law and civil law in Canada.[7]

This is not a novel concept. The recognition of Indigenous nations and Indigenous laws was fundamental not only to the formation of the first pre-Confederation treaties, but was a necessary fact for enabling European settlements and trading relationships to be established in what is now Canada.[8] Canada has always been a multi-juridical society, as reflected not only in the pre-Confederation era, but in the very design of the federation. An obvious example is the fact that English and French languages and legal traditions have been integrated into Canada's legal and political orders.

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[6] Haida Nation & Fisheries and Oceans Canada, *SGaan Kinghlas-Bowie Seamount Gin Siigee TI'a Damaan Kinggangs Gin K'aalaagangs Marine Protected Area Management Plan,* Fs23-619/2019E-PDF (Council of the Haida Nation and Minister of Fisheries and Oceans Canada, 2019) at 11, online (pdf): <haidamarineplanning.com/wp-content/uploads/2019/07/CHN_DFO_SK-BS_Plan_EN_WEB.pdf> [Haida Nation, *SGaan Kinghlas-Bowie Seamount*].

[7] Borrows, *Canada's Indigenous Constitution*, *supra* note 4 at 10.

[8] Brian Slattery, "Understanding Aboriginal Rights" (1987) 66:4 Can Bar Rev 727.

However, over the past 150 years, the dominant direction of Crown governments and the Canadian courts was to deny or exclude Indigenous law. Crown governments deliberately ignored and oppressed Indigenous laws in an attempt to replace them with colonial law. Concepts such as the Doctrine of Discovery and *terra nullius* were used by the Crown to justify European sovereignty over Indigenous peoples and lands.[9] Territorial displacement, language loss, residential schools, and the banning of important institutions of Indigenous law and governance (for example, the potlatch ban) all caused serious damage to Indigenous legal orders.

The consequences and impacts of these policies continue to this day. As Cree/Gitksan legal scholar Professor Val Napoleon cautions we "cannot assume that there are fully functioning Indigenous laws around us that will spring to life by mere recognition. Instead, what is required is rebuilding..."[10]

However, a shift is underway. Crown governments are increasingly recognizing Indigenous laws and governance systems as a result of broader Indigenous resurgence and self-determination movements. In the words of former Supreme Court Chief Justice Beverly McLachlin in *R. v. Van der Peet*:

> The history of the interface of Europeans and the common law with aboriginal peoples is a long one. As might be expected of such a long history, the principles by which the interface has been governed have not always been consistently applied. Yet *running through this history, from its earliest beginnings to the present time is a golden thread: the recognition by the common law of the ancestral laws and customs [of] the aboriginal peoples who occupied the land prior to European settlement.* [emphasis added][11]

The case for why Crown governments need to recognize pre-existing Indigenous laws has been made clear. The Truth and Reconciliation Commission (TRC) calls on Crown governments to "[r]econcile Aboriginal and Crown constitutional and legal orders to ensure that Aboriginal peoples are full partners in Confederation, including the *recognition and integration of Indigenous laws and legal traditions in negotiation and implementation processes involving Treaties, land claims, and other constructive agreements.*"[12]

The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) recognizes the right of Indigenous peoples to determine how their territories and resources are used to "enable

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[9] Truth and Reconciliation Commission of Canada, *Calls to Action* (Manitoba: 2012) Action 45(I): calls on the Government of Canada to "repudiate concepts used to justify European sovereignty over Indigenous lands and peoples such as the Doctrine of Discovery and *terra nullius*."

[10] Val Napoleon, "Revitalizing Indigenous Law and Changing the Lawscape of Canada" brochure, online: *Accessing Justice and Reconciliation Project* <indigenousbar.ca/indigenouslaw/project-documents/>. For some examples of how Indigenous nations are revitalizing their laws, see: the Indigenous Law Research Unit (ILRU) at the University of Victoria, the new Joint Indigenous Law Degree at UVic, and "RELAW: Revitalizing Indigenous Law for Land, Air and Water" (accessed 23 March 2020) online: *West Coast Environmental Law* <wcel.org/our-work/relaw-revitalizing-indigenous-law-land-air-and-water>.

[11] *R. v. Vanderpeet*, [1996] 2 S.C.R. 507 at para 263.

[12] Truth and Reconciliation Commission of Canada, *supra* note 9, Action 45(iv).

Indigenous Peoples to maintain and strengthen their institutions, cultures and traditions, and to promote development in accordance with their aspirations and needs."[13]

These concepts are endorsed in the Supreme Court of Canada's *Tsilqhot'in* decision, recognizing that Aboriginal title includes both ownership and jurisdiction by the Indigenous nation over the titled lands:

> Aboriginal title confers on the group that holds it the *exclusive right to decide how the land is used and the right to benefit from those uses* (emphasis added).[14]…
> Aboriginal title confers ownership rights similar to those associated with fee simple, including: the *right to decide how the land will be used*; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the *right to pro-actively use and manage the land* (emphasis added).[15]

Many of these understandings are now reflected in the Government of Canada's 2018 *Respecting the Government of Canada's Relationship with Indigenous Peoples* policy, also known as the "10 Principles." Principle 4 of the 10 Principles states: "Recognition of the inherent jurisdiction and legal orders of Indigenous nations is therefore the starting point of discussions aimed at interactions between federal, provincial, territorial, and Indigenous jurisdictions and laws."[16]

IPCAs as an Opportunity for Recognition and Reconciliation

IPCAs provide a unique opportunity for the recognition of Indigenous jurisdictions and legal orders as the basis for advancing the shared goals of environmental protection and stewardship by both Crown and Indigenous authorities in Canada. This is evident in Canada's domestic response to implementing its international commitments under the Aichi Targets. Target 1 committed Canada to protecting 17% of terrestrial lands and waters and 10% of marine waters by 2020. This created a new incentive for collaborations between all levels of governments in Canada.[17]

The response, as reflected in the jointly developed *Pathway to Canada Target 1* process, has been to "create cross-jurisdictional relationships between and amongst Indigenous peoples, civil society organizations and all levels of government."[18] For these reasons, the *Pathway* process has expressly adopted IPCAs as a key conservation strategy.

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[13] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 53, UN Doc A/61/53 (2007).
[14] *Tsilhqot'in Nation v British Columbia* 2014 SCC 44, at para 88.
[15] *Ibid* at para 73.
[16] Government of Canada, *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*, Catalogue No. J2-476/2018E-PDF (Ottawa: Department of Justice, 2018) online (pdf): <justice.gc.ca/eng/csj-sjc/principles.pdf>.
[17] David Suzuki Foundation, "'Let Us Teach You' Exploring Empowerment for Indigenous Protected and Conserved Areas in B.C." (Vancouver: 2018) at 7, online (pdf): <davidsuzuki.org/wp-content/uploads/2018/11/let-us-teach-you-exploring-empowerment-for-indigenous-protected-and-conserved-areas-in-b-c.pdf>.
[18] *Ibid.*

In addition to significantly contributing to expanding the total area of protected lands and waters in Canada, it is now well understood that IPCAs can improve Indigenous livelihood, increase Indigenous governance and management capacities, and improve species populations and habitat protection.[19] IPCAs have transformative potential for both Indigenous and non-Indigenous people on the territory:

> Indigenous law has governed the territory now known as Canada for millennia, and Indigenous legal traditions contain a wealth of accumulated knowledge about effective strategies for environmental governance. This knowledge has implications for both Indigenous and non-Indigenous people on the territory. For example, John Borrows asserts that Indigenous laws and legal traditions speak to both the present and future needs of all Canadians, providing a stronger legal foundation for Canadian law generally[20] but also for environmental governance more specifically.[21]

Regardless of form, all IPCAs represent an important evolution in the traditional Euro-Canadian conceptions of parks and protected areas as places "protected from people", rather than being "protected for people."[22]

This is an important shift, as the conservation movement in Canada has historically viewed parks and other protected areas as opportunities to create "pristine" areas removed from human influence[23], or to turn them into "playgrounds" for outdoor recreation and other pursuits[24], rather than understanding those areas as critical parts of Indigenous cultural landscapes.

Until recently, Crown legislation and authority was used coercively to force Indigenous peoples off of their lands, and undermine their traditional stewardship and governance roles over those places.[25] In contrast, IPCAs are explicitly committed to the conservation of ecological and cultural values that are important to Indigenous peoples. IPCAs can also promote respect for Indigenous knowledge systems; respect protocols and ceremony; support the revitalization of Indigenous languages; seed conservation economies where possible; conserve cultural keystone species and protect food security; and adopt integrated, holistic approaches to governance and planning.[26]

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[19] *Ibid.*
[20] Borrows, *Canada's Indigenous Constitution*, *supra* note 4.
[21] Borrows, *Recovering Canada*, *supra* note 3 at 52-54; Jessica Clogg, et al, "Indigenous Legal Traditions and the Future of Environmental Governance in Canada" (2016) 29 J Envtl L & Prac 227.
[22] Roderick Frazier Nash, *Wilderness and The American Mind* (New Haven, CT: Yale University Press, 2014).
[23] William Cronon, "The Trouble with Wilderness: Or, Getting Back to the Wrong Nature" (1996) 1:1 Environmental History 7.
[24] Bruce W. Hodgins & Kerry A. Cannon, "The Aboriginal Presence in Ontario parks and Other Protected Places" in Bruce W. Hodgins & John S. Marsh, ed, *Changing Parks: The History, Future and Cultural Context of Parks and Heritage Landscapes* (Toronto: Dundurn 1998) 50.
[25] John Sandlos, *Hunters at the margin: Native people and wildlife conservation in the Northwest Territories* (Vancouver: UBC Press, 2007); John Sandlos, "Not Wanted in the Boundary: The Expulsion of the Keeseekoowenin Ojibway Band from Riding Mountain National Park" (2008) 89:2 Canadian Historical Review 189.
[26] ICE Report, *supra* note 1 at 6 and 38-42.

In the following sections, we will consider how IPCAs differ from other types of protected areas, including those which engage Indigenous people as "partners" through a consultative model, rather than as decision-makers. IPCAs can be established exclusively by Indigenous governments under Indigenous laws, but they can also be collaboratively established using both Crown and Indigenous legal foundations. Our case studies are focused on the collaborative forms of IPCAs, as they provide the best examples of how Crown and Indigenous jurisdictions can co-exist in an IPCA.

FORMS OF IPCAS

Although IPCAs differ in terms of governance and management objectives, they generally have three things in common. IPCAs are:

- Indigenous-led,
- represent a long-term commitment to conservation, and
- elevate Indigenous rights and responsibilities.[27]

Moreover, IPCAs are typically designated in areas where Indigenous peoples have strong spiritual or cultural connections, and where Indigenous laws, language, and culture are central.[28]

To successfully maintain Nation-to-Nation and Crown-to-Inuit relationships, and to recognize the underlying authority of Crown and Indigenous nations, IPCA governance arrangements must find ways to bring together Indigenous and Crown governance and legal systems.

This requires recognizing that each jurisdiction (federal, provincial/territorial and Indigenous governments) brings their unique authorities to the table when considering a new conservation designation. This has long been understood as an opportunity for collaboration between Crown governments – what is unique for IPCAs is that Indigenous governments and Indigenous laws are expressly "at the table."

For our purposes, we can locate the different types of IPCAs on a "jurisdictional spectrum". This spectrum is reflective of several significant characteristics that distinguish the relevant features of the different types of IPCAs considered as case studies in this report: 1) the degree to which Indigenous and Crown jurisdictions and authorities are expressly recognized, 2) how Indigenous and Crown laws define and structure the goals, purposes and objectives of the IPCA; and 3) how Indigenous and Crown laws are operationalized in management decisions and actions.

[27] *Ibid* at 5 and 36.
[28] Tanya C. Tran, et al, "A Review of Successes, Challenges, and Lessons from Indigenous Protected and Conserved Areas" (2020) 241 Biological Conservation 1.

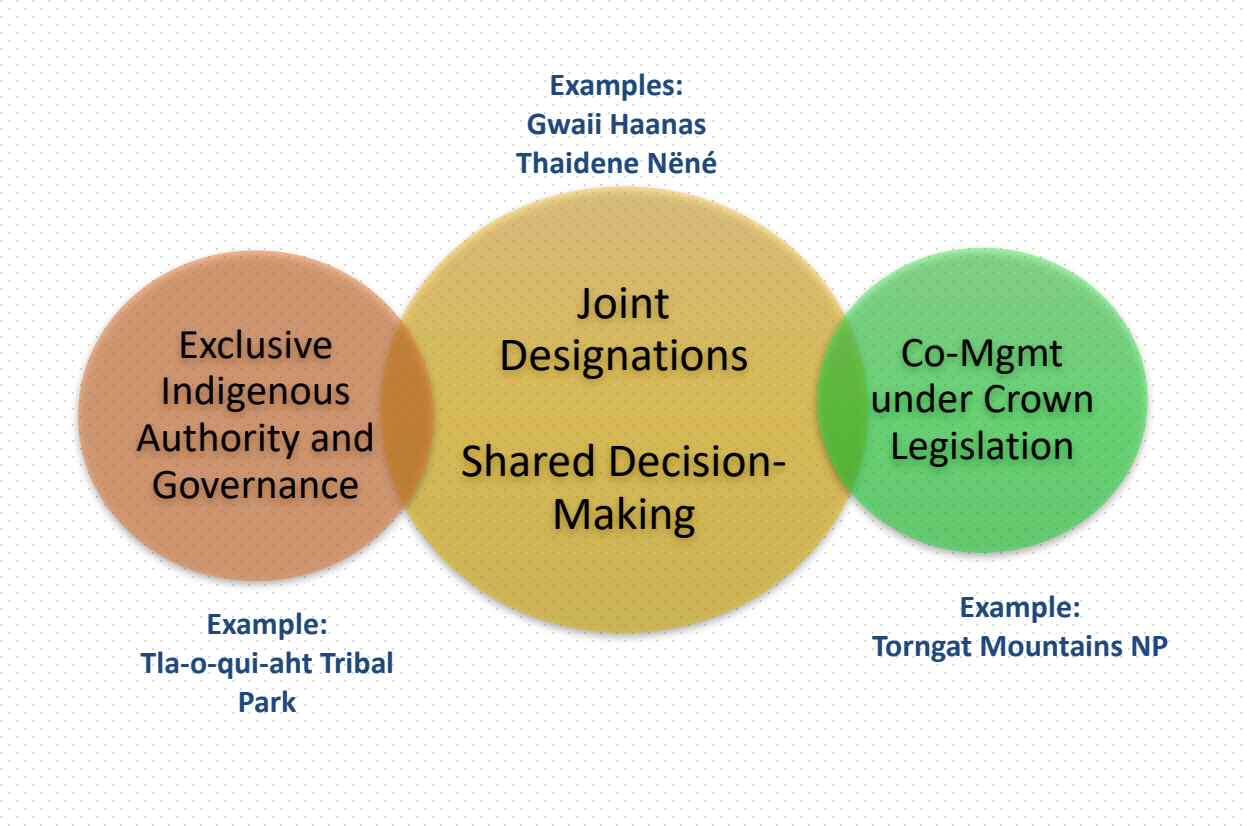

Figure 1: Jurisdictional Spectrum of IPCA Types

RECOGNITION OF JURISDICTION AND AUTHORITY

Tribal Parks

At one end of this spectrum, we use the term "Tribal Parks" to refer to IPCAs established entirely by Indigenous governments under their inherent jurisdiction and in accordance with Indigenous laws.[29] This form of IPCA can emerge in contexts where Indigenous authorities assert their inherent rights and jurisdiction over traditional unceded territories without formal recognition by Crown governments, as well as in contexts where Indigenous authority is recognized by Canadian law.

A well-known example is the Dasiqox Tribal Park, designated by the Tsilhqot'in National Government to protect 300,000 hectares of land near Williams Lake, BC.[30] Also referred to in Tsilhqot'in as Nexwagwezʔan "It is there for us," the area was established to ensure ecological protection, cultural revitalization, and sustainable livelihoods.[31]

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[29] The term "Tribal Park" is not defined; every Tribal Park will have a distinct purpose and goal depending on the goals of the Indigenous nations involved.
[30] Tsilqhot'in National Government, "Dasiqox Tribal Park" (accessed 4 May 2021), online: *Dasiqox Tribal Park Initiative* <dasiqox.org/>.
[31] Tsilqhot'in National Government, "Our Story" (accessed 21 March 2020), online: *Dasiqox Tribal Park Initiative* <dasiqox.org/about-us/our-story/>.

Although Dasiqox Tribal Park is not currently recognized by any Crown government, it is widely recognized by the conservation community as an IPCA. In the absence of Crown recognition, Indigenous nations can use a combination of other tools to ensure their IPCAs are protected and work towards other goals, including educating the public and industry, seeking relief from the court, negotiation with companies, and direct action.

Similarly, Gots'ôkàtì and Hoòdoòdzo, two sites in the Tlicho settlement area of the Northwest Territories, are also recognized as Tribal Parks. In contrast to Dasiqox Tribal Park, both of these sites are fully recognized and protected pursuant to Tlicho jurisdictions recognized by the Crown under the 2005 *Tlicho Land Claim Agreement.*[32] Tlicho jurisdictions include the power to enact laws in relation to the use, management, administration and protection of Tlicho lands and their resources. Using these authorities, the Tlicho Government designated these areas as *wehexlaxodıale* ("fully protected") under the Tlicho land use plan, which is binding on all governments and users of Tlicho lands.[33]

Co-Managed Protected Areas

At the other end of the spectrum, we define 'Co-Managed Protected Areas" as a form of protected area that is formally established under federal, provincial or territorial ("Crown") legislation and management authority.

There is some debate about whether co-management regimes implemented under exclusively federal or provincial/territorial legislation are in fact IPCAs. In our assessment, there are aspects of the co-management regime which are consistent with how IPCAs were defined by the ICE Report. To be an IPCA, a protected area must be Indigenous-led, represent a long-term commitment to conservation, and elevate Indigenous rights and responsibilities.

Co-management protected areas are established exclusively under Crown legislation. However, where the Indigenous party *consented* to the designation, and where Crown authorities are formally subject to a co-management regime in which the Indigenous party significantly shapes how Crown decisions are made, such areas may constitute an IPCA. Co-management protected areas are often established under the terms of modern treaties or similar arrangements in which the Indigenous party is recognized not only as having priority rights to access and use the area, but to meaningfully participate in management decisions.

In the co-management protected areas context, the decisions by park managers are subject to extensive formal consultation and dispute resolution arrangements. A recent example of a co-managed protected area that may be considered to be an IPCA is Torngat Mountains National Park/ Tongait KakKasuangita SilakKijapvinga in Labrador. Torngat Mountains was first established as a National Park Reserve in 2005 pursuant to the *Labrador Inuit Land Claim Agreement,* and became a National Park pursuant to the *Nunavik Inuit Land Claims Agreement.*[34]

[32] *Tlicho Land Claim and Self Government Act,* SC 2005 c 1.
[33] Tlicho Land Use Plan (2013), p. 37
[34] *Land Claims Agreement Between the Inuit of Labrador and Her Majesty the Queen in right of Newfoundland and Labrador and Canada* (January 2005), online (pdf): *Government of Newfoundland*

Torngat National Park operates pursuant to the provisions of the Nunatsiavut and Nunavik land claim agreements, which guarantee Inuit rights of access and use, as well as contractual *Parks Impact and Benefit Agreements* that requires Parks Canada, as the Crown agency responsible for management and operations, to engage in consultation with Inuit on all matters.[35] While Canada retains legal jurisdiction and authority over the park, such authorities are subject to treaty rights and contractual agreements that ensure that Inuit have a significant role in all aspects of park operations, as well as providing priority hiring, contracting opportunities, and other benefits to Inuit communities. The success of this approach is reflected in the fact that the majority of Park staff, including senior officials, are Inuit.

Jointly Designated IPCAs

In the middle of the jurisdictional spectrum, we situate "Jointly Designated IPCAs" as protected areas established pursuant to both Indigenous and Crown jurisdiction. Indigenous and Crown laws and authorities are both formally recognized and exercised in the establishment, management and operation of the protected area. Both of our case studies focus on this type of IPCA, as they provide examples showing that Crown and Indigenous jurisdictions can operate concurrently, which is one of the central questions that we are examining in this paper.

The Haida were leaders advancing this approach in the early 1990s – well before the term "IPCA" was developed. Both Gwaii Haanas and Duu Guusd were initially unilaterally declared to be Haida Heritage Sites by the Council of the Haida Nation. In both cases, following conflict and periods of negotiation, they were also formally recognized and designated by Crown governments. Gwaii Haanas was first designated as a Haida Heritage Site in the late 1980s, and then jointly designated with Canada as a National Park Reserve and Haida Heritage Site in 1993 and as a National Marine Conservation Area Reserve in 2010.[36] As described in the case study below, in the marine context, SGaan Kinghlas-Bowie Seamount MPA was first designated as Xaas siigee tl'a damaan tl'a king giigangs (a Haida Marine Protected Area) by the Council of the Haida Nation (CHN) in 1997[37] and in 2008 designated as a marine protected area under the federal *Oceans Act*.[38]

The *Gwaii Haanas Agreement* is in many ways *the* model for how a Jointly Designated IPCA is established. The *Gwaii Haanas Agreement* expressly acknowledges the unceded, inherent and unextinguished rights and title of the Haida as well as the Crown's views of its own sovereignty

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<gov.nl.ca/exec/iias/files/January212005AgreementComplete.pdf> [*Labrador Inuit Land Claims Agreement*]*; Labrador Inuit Land Claims Agreement: Annual Report 2013-2014*, Catalogue No. R1-28-PDF (Minister of Aboriginal Affairs and Northern Development, 2016), online: <rcaanc-cirnac.gc.ca/eng/1504191997659/1542905265353>.

[35] Government of Canada, "Labrador Inuit Claims Agreement Annual Report – 1 April 2007 to 31 March 2008" (22 February 2012), online: <rcaanc-cirnac.gc.ca/eng/1328024238442/1542907020411>.

[36] Carol Linnit, "Canada Commits Historic 1.3B to create new Protected Areas," *The Narwhal* (28 February 2018), online: <thenarwhal.ca/canada-commits-historic-1-3-billion-create-new-protected-areas/>.

[37] Haida Nation, *SGaan Kinghlas-Bowie Seamount*, *supra* note 6 at 6.

[38] *Ibid* at 5.

and authority. The Agreement recognizes the divergent viewpoints of the Haida Nation and the Government of Canada with respect to the sovereignty, title and ownership to the Gwaii Haanas area and references both the Haida and Canadian constitution. These two seemly irreconcilable views are expressed in the preambles of the agreement, which then goes on to provide for the exercise of Indigenous rights and management jurisdictions under Haida law, while simultaneously engaging the authorities of the Minister under the *Canada National Parks Act*. The two designations – the Haida Heritage Park and the National Park Reserve—are jointly managed and stewarded towards advancing the shared objectives of conservation and stewardship.[39] In the case of *Duu Guusd*, it was jointly designated in 2008, and the park's first jointly development management plan was approved in 2011.[40]

Similarly, Thaidene Nëné is a Jointly Established IPCA that protects the lands and waters of the East Arm of Great Slave Lake in the Northwest Territories. The area was identified as a potential national park in the late 1960s by the federal government, but was opposed by the Łutsël K'é Dene First Nation, who did not support the idea of a national park on their traditional territory that would exclude them from using the area for traditional purposes. In 2000, after significant evolutions in the dynamics of the relationship between Indigenous peoples and the federal government, and under the threat of expanded mineral and hydro development in the area, Chief Felix Lockhart of Łutsël K'é Dene First Nation declared the area to be protected under Łutsël K'é authority, and approached the Canadian government to renew discussions about jointly establishing Thaidene Nëné as a national park.[41] In 2019, establishment agreements between the Government of the Northwest Territories (GNWT), Parks Canada, and Łutsël K'é Dene First Nation were concluded to designate Thaidene Nëné as a jointly established IPCA, federal National Park Reserve and as a Territorial Park under territorial legislation.[42]

GOVERNANCE MODELS

Another significant feature distinguishing IPCAs is their governance model. Whereas jurisdiction and authority described above are the power to make laws or otherwise control an area, governance models describe how operational and management decisions are made.

While IPCAs vary considerably in their governance models, they can be generally classified under three broad categories: 1) Indigenous governance, 2) shared decision-making, or 3) co-management/consultation.

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[39] *Gwaii Haanas Agreement (Government of Canada and the Council of the Haida Nation)*, (30 January 1993), s 1, online (pdf): *Haida Nation* <haidanation.ca/wp-content/uploads/2017/03/GwaiiHaanasAgreement.pdf>.
[40] Haida Nation & British Columbia Parks, *Duu Guusd Management Plan* (Council of the Haida Nation and BC Parks Planning & Management Branch, July 2011), at 6, online (pdf): <haidanation.ca/wp-content/uploads/2017/03/duu-guusd-july292011-mp.pdf>.
[41] Parks Canada, Thaidene Nëné National Park Reserve, (2011) online: https://www.pc.gc.ca/en/pn-np/nt/thaidene-nene
[42] "Thaidene Nëné: Land of the Ancestors" (accessed 4 May 2021), online: *Thaidene Nëné* <landoftheancestors.ca>.

Indigenous Governance

For IPCAs operating under an Indigenous governance model, the Indigenous government will be the sole decision-maker and manager of lands (e.g., Treaty lands, reserves, Aboriginal title lands, etc.) in accordance with Indigenous laws. Examples of this governance model include Dasiqox Tribal Park and Wehexlaxodiale.

Shared Decision-Making

Many IPCAs have governance models that require shared-decision making between the Indigenous government and a Crown government partner. The specific mechanisms are usually set out in a contractual establishment agreement between the Indigenous and Crown governments which expressly recognizes the jurisdictions and authorities of each partner. Significantly, they also mandate each partner to seek consensus with the other governments on policies, activities and developments in the IPCA. The partners are typically assisted in this work by a jointly appointed management board, which provides advice and recommendations to the Parties on any matters that might affect the planning, management, operation, monitoring and evaluation of the IPCA.[43]

For example, in Gwaii Haanas Haida Heritage Site, National Park Reserve, and National Marine Conservation Area Reserve, the Haida Nation and the Crown each appoint an equal number of members to an Archipelago Management Board ("AMB") (three from the Haida Nation, two from Parks Canada, and one from Department of Fisheries and Oceans). The Archipelago Management Board considers and seeks consensus on all matters related to park management, including the management of Haida traditional use activities, spiritual and cultural sites, visitor use, permitting commercial operations, undertaking annual maintenance work, and hiring and staffing decisions. Any disputes that arise concerning a matter result in decisions relating to that matter being placed in abeyance until consensus is reached, either between the members of the Board, officials of the Parties, or if necessary, the governments themselves.[44]

Consensus between the Parties is the most critical consideration in this model. For shared decision-making to be meaningful, it must go well beyond "consultation" to incorporating and internalizing the often-divergent laws, knowledge, values and perspectives of both the Crown and the Indigenous governments. Properly drafted, the provisions of an establishment agreement should be sufficiently robust to make reaching consensus more than a "better alternative"—consensus should be the only realistic alternative, enabling Indigenous decision-makers to have equal authority and weight in management planning and decisions. Procedural requirements can facilitate the consensus building process. Specifying these requirements in detail, with substantive restrictions on when decisions can be rejected, time limits, and making reasons mandatory, can help ensure transparency throughout the process and create a presumption that decisions of the board will be adopted. Where this can be achieved, the resulting management

[43] IPCA management boards are empowered to make recommendations to representatives from both Parties (i.e., Crown Minister and chosen Indigenous leaders) who make the final decision. Another model of decision-making occurs where the management board is delegated authority by both Parties to make the final decision.
[44] *Gwaii Haanas Agreement*, *supra* note 39, ss 4-5.

plans will reflect a nation-to-nation, government-to-government relationship built on mutual respect for each Party's jurisdictions, knowledge and authorities.[45]

Joint decision-making processes are not without their challenges. As a general and well-established principle of Canadian law, a Minister or other designated official exercising discretion under legislation is accountable to Parliament, and is not permitted to "fetter" or restrict their discretion by transferring decision making authority to another person. The courts in Canada have affirmed that the general prohibition on the fettering of discretion applies in the context of shared decision-making. In the *Moresby Explorer* cases decided by the Federal Court of Canada, it was held that the Minister could not fetter discretion exercised under the *Canada National Parks Act* under the Gwaii Haanas Agreement.[46] However, the court also upheld the Agreement, finding that the Agreement preserved the exercise of discretion by the Minister.

This is a critical point. From a legal perspective, each decision-maker (the Minister or the Indigenous government) maintains their own authorities to act in accordance with their own jurisdictions. But each decision-maker has agreed to exercise that discretion in accordance with the establishment agreement, which requires seeking consensus. This is set out in the general provisions of the Gwaii Hannas and Thaidene Nëné agreement:

> Nothing in this Agreement limits the lawful jurisdiction, authority or obligations of either Party, except to the extent of the requirement that all reasonable efforts must have been made to reach consensus through [the dispute resolution processes in each Agreement].

While establishment agreements are expressly not treaties, they are animated by many of the same principles, and are situated in the context of reconciliation under section 35 of the *Constitution Act*, 1982. In the Thaidene Nëné Agreement, this is expressed as follows:

> This Agreement will be interpreted and applied in a manner consistent with the recognition and affirmation of existing aboriginal and treaty rights in section 35 of the Constitution Act, 1982.

Further, even where the specific decision-making structures are working effectively between the Minister and the Indigenous government in the context of an establishment agreement for the IPCA, there may be other decision-makers exercising their own jurisdictions without due consideration for the processes applicable to the IPCA. One specific example of this challenge that arose in the governance of Gwaii Haanas relates to different understandings of the role of the AMB in fisheries management. In 2013 and 2014, the Canadian Minister of Fisheries and Oceans decided to open commercial herring fisheries in Gwaii Haanas against the AMB recommendation to keep the fishery closed. A dispute arose over the interpretation of the AMB's

[45] See, for example, the Haida Nation & Parks Canada, *Gwaii Haanas Gina 'Waadlu<u>x</u>an KilG<u>u</u>lG<u>a</u> Land-Sea-People Management Plan*, R64-464/2018E-PDF (Council of the Haida Nation and Chief Executive Officer of Parks Canada, 2018), online: <pc.gc.ca/en/pn-np/bc/gwaiihaanas/info/consultations>.
[46] *Moresby Explorers Ltd. v. Canada (Attorney General)*, [2001] 4 FC 591.

role in fisheries management, as defined by the Gwaii Haanas Agreements[47] that resulted in several costly court cases.[48]

To try to address issues of this type, structures have been adopted in Thaidene Nëné, where Canada, the Government of the Northwest Territories and the Łutsël K'é Dene First Nations are engaged in formalized shared decision-making over operational matters, while taking advice from a larger group of Indigenous governments on more strategic or regional management planning issues through a regional management board that operates on an advisory basis. However, the challenge of parties involved in a shared-decision making engaging other decision-makers who are not parties to the agreement exercising their own authorities independently of the IPCA remains an aspect of this type of governance.

Co-Management/Consultation

Under a co-management/consultation governance model, the Crown authority (such as Parks Canada) retains final decision-making, while Indigenous governments exercise what is fundamentally an advisory role through co-operative management boards, but do not have final decision-making authorities.

Torngat Mountains National Parks is an example of an IPCA operating under such a governance model. In Torngat Mountains National Park, Parks Canada creates the management plan, with feedback from the Co-management Board (CMB), of which majority members are appointed from the Nunatsiavut Government and the Makivik Corporation.[49] While the Minister of the Environment must consider the CMB's advice in reviewing the management plan, it is ultimately the Minister who makes the final decision.[50] In practice, the Minister is unlikely to reject a co-management board's advice, but the co-management model expressly contemplates and permits that possibility.

In a co-management/consultation governance structure, the scope for the exercise of Indigenous law is often formally defined through a modern treaty. In Torngat Mountains for example, both Canada and Nunatsiavut Government have jurisdiction and authorities that apply to the exercise of Inuit rights under the *Labrador Inuit Land Claim Agreement* (LILCA).[51] However, in the case of a conflict between an Inuit law and a federal law of general application, the federal law is deemed to prevail.[52]

[47] Russ Jones, Catherine Rigg & Evelyn Pinkerton, "Strategies for Assertion of Conservation and Local Management Rights: A Haida Gwaii Herring Story" (2017) 80 Marine Policy 154.
[48] *Haida Nation v. Canada (Fisheries and Oceans),* 2015 FC 290.
[49] Parks Canada, "Torngat Mountains National Park" (20 May 2020), online: *Government of Canada* <pc.gc.ca/en/pn-np/nl/torngats/info/index>.
[50] "Co-Management: Working Together" (accessed 4 May 2021), online: *Nunatsiavut Government* <nunatsiavut.com/department/co-management/>.
[51] *Labrador Inuit Land Claims Agreement, supra* note 34.
[52] *Ibid,* s 9.2.9.

MANAGEMENT AND OPERATIONS

A third distinguishing feature of IPCAs is how they operate "on the ground." Where authority is the power to make laws, and a governance model defines how management and decision-making takes place, the management and operational aspects of an IPCA are perhaps the most visible elements which distinguish IPCAs from other forms of protected areas. To be considered as an IPCA, Indigenous knowledge and values must structure the way in which the protected area operates. However, there is considerable variability in the degree to which Indigenous laws structure management and operations "on the ground, " as reflected in both the "hard rules" or fixed requirements for the IPCA that are set out in legislation and/or an establishing agreement, as well as in more flexible and adaptive policies and administrative decision-making by parks officials.

CASE STUDIES

SGaan Kinghlas- Bowie Seamount Marine Protected Area

Introduction

Since the 1980s, the Haida Nation has been creating Haida Heritage Sites designated under Haida law to protect key areas within Haida territory. The Haida Nation has partnered with the Governments of Canada and British Columbia to protect some of these areas as Crown protected areas (e.g. Gwaii Haanas Haida Heritage Site, National Park Reserve, and National Marine Conservation Area Reserve discussed above). These collaborative arrangements are premised on joint jurisdiction of the Haida Nation and the Crown. In the various establishment agreements, the Haida Nation and Crown governments 'agree to disagree' about underlying sovereignty to the protected areas and instead focus on their shared interest of conserving these unique areas. These examples highlight how Indigenous and Crown laws can operate alongside one another within protected areas. The following case study will focus on the role of Haida law in the establishment and governance of SGaan Kinghlas- Bowie Seamount Marine Protected Area and how Canadian law and Haida law operate together.

SGaan Kinghlas- Bowie Seamount is an ancient underwater volcano located 180km offshore of Haida Gwaii. According to Haida oral histories (gin k'iiygangaas), the seamount is home to SGaan Kinghlas, a supernatural being whose name means "Supernatural being looking outwards." The Haida have an intimate interconnection with supernatural beings, who inhabited the earth before the time of humans.

SGaan Kinghlas holds tremendous spiritual and cultural value.[53] The area is intimately entwined with Haida stories and oral traditions and continues to be a contemporary source of physical and spiritual sustenance for many Haida, including as a fishing area.[54]

> According to oral traditions, at the beginning of time, Haidas "gin siigee tl'a kaatl'aagangs" (came out of the ocean) at many locations around Haida Gwaii in the presence of supernatural beings. SGaan Kinghlas, one of those supernatural beings, reflects the Haida belief in these ocean origins.[55]

Other Haida stories detail the reciprocal relationships that have existed between Haida and the seamount for countless generations.

> Haida elders tell the story of two young siblings who set out to find a fog shrouded puffin colony to restore their family's wealth and prestige. After a lengthy journey, they discover a hidden island far off the northwest coast of Haida Gwaii, believed to be SGaan Kinghlas at a time of lower sea levels. The island is covered in kwa.anaa kun (puffin beaks), and the brother and sister return to their village with a canoe full of beaks. By distributing the beaks at a potlatch, the family ultimately regains their status in the community.[56]

The uniquely shallow seamount, which ranges from 3,000 metres below ocean's surface to just 24 metres,[57] creates unique ocean currents and eddies which trap nutrients and support abundant, diverse habitat and feeding areas for fish and marine mammals.[58] However, the ecosystem is also fragile because the species on seamounts grow and reproduce slowly, making it vulnerable to human activities and overexploitation.[59]

This case study provides an overview of Haida governance structures and processes and Haida Heritage Sites, and then explains how Haida laws inform the establishment, governance, and monitoring/enforcement of SGaan Kinghlas – Bowie Seamount MPA.

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[53] Haida Nation, *SGaan Kinghlas-Bowie Seamount*, *supra* note 6 at 4: "The Haida have a historical, spiritual and cultural connection with the SGaan Kinghlas–Bowie Seamount area. According to Xaads gin k'iiygangaas (Haida oral traditions), before the time of humans, supernatural beings made their home beneath numerous places around Haida Gwaii including mountains, creeks, shoals and reefs and, in this case, the site of an ancient volcano. The seamount is said to be the home of a supernatural being known as SGaan Kinghlas, which in the Masset dialect means "supernatural being looking outwards."
[54] *Ibid* at 16.
[55] *Ibid*.
[56] *Ibid.*
[57] *Ibid* at 4.
[58] *Ibid.*
[59] *Ibid* at 14.

Overview of Haida Governance Structures

Haida Governing Bodies

The designation and governance of SGaan Kinghlas – Bowie Seamount MPA is embedded within broader Haida legal and governance systems. All governing bodies within the Haida Nation are responsible to uphold the principles embodied in the *Haida Accord*,[60] which states:

> The Haida Nation is the rightful heir to Haida Gwaii. Our culture is born of respect; and intimacy with the land and sea and the air around us. Like the forests, the roots of our people are intertwined such that the greatest troubles cannot overcome us. We owe our existence to Haida Gwaii. The living generation accepts the responsibility to ensure that our heritage is passed on to following generations. On these islands our ancestors lived and died and here too, we will make our homes until called away to join them in the great beyond.[61]

Haida governing bodies and the agreements they enter into are infused with Haida legal principles and processes. As Haida lawyer, gid7ahl-Gudsllay Terri-Lynn Williams-Davidson writes:

> The history of the Haida people is much like creating art, and the central elements of that art form. One of those elements is called kuugan jaad, or Mouse Woman…Mouse Woman is a powerful force to be reckoned with. In Haida art, she is a being that an artist creates consciously or unconsciously. Similarly, the Haida apply Haida laws consciously and unconsciously because they too are an innate part of our identity. Council of Haida Nation's journey to reconciliation has consciously and unconsciously incorporated our laws into governance structures, decision-making and relationships with others.[62]

The Haida citizens formed the Council of Haida Nation (CHN) in 1974 to provide one unified political body for Haida citizens. It has since grown into "a National government enacting legislation and policy affecting many aspects of life on Haida Gwaii."[63] CHN is an elected body, formed entirely of Haida citizens.[64] Its mandate is "to steward the lands and waters of the Haida Territories on behalf of the Haida Nation, and to perpetuate Haida culture and language for future generations."[65] As Williams-Davidson asserts, "CHN is not a Tribal Council or a Band

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[60] *Constitution of the Haida Nation,* House of Assembly, 2018-10.
[61] *Ibid.*
[62] Terri-Lynn (gid7ahl-Gudsllay) Williams-Davidson, "Weaving Together Our Future: The Interaction of Haida Laws to Achieve Respectful Co-Existence," Paper 6.2 Indigenous Legal Orders and the Common Law (Vancouver: Continuing Legal Education Society of British Columbia, November 2012) at 12, online (pdf): <static1.squarespace.com/static/58e686a21b631b6892bf4261/t/5b478c3188251b2d51cfc2c7/1531415626968/Weaving+Together+Our+Future.pdf>.
[63] Council of the Haida Nation," (accessed 4 May 2021), online: *Haida Nation* <haidanation.ca/?page_id=20>.
[64] *Constitution of the Haida Nation, supra* note 60, A7.S5.
[65] *Ibid,* A6.S1.

Council; its authority is not derived from the Government of Canada. It is not a society, governed by provincial or federal society laws. Its authority is derived from the land itself."[66]

CHN is tasked with establishing "land and ocean resources policies consistent with nature's ability to produce. The policies will be applicable to all users of the territories."[67] The SG̲aan K̲inghlas – Bowie Seamount MPA's objective of conserving and protecting the biodiversity and productivity of the area's marine ecosystem[68] aligns with this mandate. As Williams-Davidson notes:

> like Raven's transformation into a human child to steal the sun and the moon, the CHN has taken different forms in order to ensure their achievement of these objectives. The CHN has used the tools external to our culture to achieve our national mandate. The paramountcy of CHN's mandate to ensure there is land and culture intact for future generations has required no less. CHN has been meticulous in ensuring that all steps are made under Haida authority and jurisdiction, such as land designations, tenures, and Agreements with the Crown.[69]

Other governing bodies and institutions of the Haida Nation include the Hereditary Chiefs Council, Village Councils, and citizens.[70] The Haida Nation is a matrilineal society and hereditary matriarchs are explicitly recognized to hold prominent roles in the governing body.[71] Members of the Hereditary Chiefs Council are determined based on heredity which "is an internal matter formalized through the ancient clan customs of the Haida Nation."[72]

The Haida Village Councils, Old Massett Village Council (OMVC) and Skidegate Band Council, (SBC) act like local governments for their respective communities and provide cultural, social, education, health, economic, and municipal services.[73]

Governance Processes

Pursuant to the Haida Accord,[74] Haida Hereditary Chiefs and leaders from the Council of the Haida Nation, Old Masset Village Council, and Skidegate Band Council agreed to govern pursuant to the Haida Constitution.[75] With representation from all Haida communities (HlG̲aagilda *Skidegate* and G̲ aaw *Old Massett*), the CHN is also composed of regional

[66] Williams-Davidson, *supra* note 62 at 5.
[67] *Constitution of the Haida Nation, supra* note 60, A6.S6.
[68] Haida Nation, *SGaan K̲inghlas-Bowie Seamount, supra* note 6 at vi.
[69] Williams-Davidson, *supra* note 62 at 5.
[70] *Constitution of the Haida Nation, supra* note 60, A5.
[71] *Ibid,* A9.S1.
[72] *Ibid.*
[73] *Ibid,* A10.S1 and S3.
[74] *Haida Accord* (Haida Nation, 13 May 2013), online (pdf): <haidanation.ca/wp-content/uploads/2017/03/the_haida_accord.pdf>.
[75] *Constitution of the Haida Nation, supra* note 60.

representatives from T'agwan *Vancouver* and Kxeen *Prince Rupert*,[76] as well as elected councillors from Old Massett Village Council and Skidegate Band Council.[77]

The potlatched hereditary chiefs address Haida Nation issues through the Hereditary Chiefs Council, and the CHN requests their attendance at sittings of the CHN.[78] Lawmaking authority rests with the House of Assembly, a gathering of Haida Nation citizens that occurs at least three times per year.[79] The CHN is bound by the decisions of voting Haida citizens at a House of Assembly.[80]

The *Constitution of the Haida Nation* stipulates that in order for a final draft of an international agreement to be accepted it must:

> …first be accepted by the Council of the Haida Nation and must then receive a minimum of a three-quarter majority of the Hereditary Chiefs Council, and if so accepted, the Council of the Haida Nation will conduct a vote of the Haida citizens. International agreements must receive approval of a majority of at least three-quarters of the votes cast.[81]

To come into force, the SGaan Kinghlas-Bowie Seamount MPA was legally required to be approved by all levels of the Haida government, including the Hereditary Chiefs Council and three quarters of Haida citizen votes.

Haida Heritage Sites

The agreements and processes which established the SGaan Kinghlas-Bowie Seamount MPA were situated within a broader context of cooperative governance between the Haida Nation and Crown governments. These unique governance approaches to the lands and waters of Haida Gwaii emerged from disputes between the Haida Nation and Canadian logging companies during the 1970s and 80s. In 1985, the Haida responded to unsustainable logging on Lyell Island by designating the island as a "Haida Heritage Site" while simultaneously establishing blockades on the island to protect it from unsustainable logging.[82]

A year later, the CHN and Canada signed the *South Moresby Agreement*, which set the stage for Canada's designation of the area as a National Park Reserve.[83] Subsequent agreements between the two governments include the signing of the *Gwaii Haanas Agreement* in 1993 which "expresses respect for Canadian and Haida interests and designations, and includes a mutual

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[76] *Ibid,* A5.S3.
[77] *Ibid,* A5.S6.
[78] *Ibid,* A5.S7.
[79] *Ibid,* A5.S11 and A7.S32.
[80] *Ibid,* A5.S.
[81] *Ibid,* A13.S5.
[82] Parks Canada, "Gwaii Haanas National Park Reserve, National Marine Conservation Area Reserve, and Haida Heritage Site History of Establishment," (9 May 2019), online: *Government of Canada* <pc.gc.ca/en/pn-np/bc/gwaiihaanas/info/histoire-history>.
[83] *Ibid.*

commitment to protect Gwaii Haanas."[84] This agreement resulted in the establishment of the AMB, a cooperative governance structure made up of an equal number of representatives from the CHN and the Government of Canada.[85] In 2010, the *Gwaii Haanas Marine Agreement* was signed. This agreement expanded the AMB to include representation from Fisheries and Oceans Canada.[86]

Establishment of the SGaan Kinghlas-Bowie Seamount MPA

Timeline

In 1997, the CHN designated SGaan Kinghlas-Bowie Seamount MPA as a Xaads siigee tl'a damaan tl'a king giigangs (Haida marine protected area).[87] The next year, the DFO announced that the Bowie Seamount Complex was an area of interest for consideration as a MPA under the *Oceans Act.*[88]

In 2007, the Haida Nation and Canada signed a MOU that committed to facilitating the "cooperative planning and management of the area through the establishment of a Management Board."[89] In 2008, the SGaan Kinghlas-Bowie Seamount was designated as Canada's seventh MPA under the *Oceans Act.*[90]

The SGaan Kinghlas-Bowie Seamount MPA Advisory Committee was established in 2011[91] followed by the SGaan Kinghlas-Bowie Seamount MPA Management Plan in 2018.[92]

Cooperative Governance

The MOU established between the Haida Nation and Canada in 2007 committed the two nations to "a relationship based on mutual respect and understanding."[93] The SGaan Kinghlas-Bowie Seamount MPA Management Board consists of two CHN representatives and two representatives from the DFO. The Management Board seeks to operate by consensus and makes recommendations to the CHN and DFO for their final decisions.[94]

The Management Board is supported by an Advisory Committee, a multi-stakeholder group that works collaboratively to provide advice to the planning and management of the MPA.

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[84] *Ibid.*
[85] *Ibid.*
[86] *Ibid.*
[87] Haida Nation, *SGaan Kinghlas-Bowie Seamount*, *supra* note 6 at 5.
[88] *Ibid.*
[89] *Ibid.*
[90] *Ibid.*
[91] *Ibid.*
[92] *Ibid.*
[93] *Ibid* at 8.
[94] *Ibid.*

Guiding Principles

The six guiding principles developed to support the planning of the SGaan Kinghlas-Bowie Seamount MPA are based on Haida ethics, values, and laws.[95] These principles are Yahgudang (respect); Gin'laa hl isdaa.uu. (responsibility); Gin 'waadluwaan gud ahl k waagiidang (interconnectedness); Gin'waadluwaan damaan tl'kinggang (balance); Gin k'aaydaangga Giiy uu tl'a k'anguudangs (seeking wise counsel); and 'Isda isghyaan diigaa isdii (giving and receiving). These principles and their definitions are listed below:

- **Yahgudang (respect):** *We respect each other and all living things. We take only what we need, we give thanks, and we acknowledge those who behave accordingly.*
- **Gin'laa hl isdaa.uu. (responsibility):** *We accept the responsibility to manage and care for the land and sea together. We work with others to ensure that the natural and cultural heritage of SK-B MPA is passed onto future generations.*
- **Gin 'waadluwaan gud ahl k waagiidang (interconnectedness):** *We respect each other and all living things. We take only what we need, we give thanks, and we acknowledge those who behave accordingly.*
- **Gin'waadluwaan damaan tl'kinggang (balance):** *The world is as sharp as the edge of a knife. Balance is needed in our interactions with the natural world. Care must be taken to avoid reaching a point of no return and to restore balance where it has been lost. All practices in the SK-B MPA must be sustainable.*
- **Gin k'aaydaangga Giiy uu tl'a k'anguudangs (seeking wise counsel):** *Haida elders teach about traditional ways and how to work in harmony with the natural world. Like the forests, the roots of all people are intertwined. Together we consider new ideas, traditional knowledge, and scientific information that allow us to respond to change in keeping with culture, values and laws.*
- **Isda isghyaan diigaa isdii (giving and receiving):** *Reciprocity is an essential practice for interactions with each other and the natural and spiritual worlds. We continually give thanks to the natural world for the gifts that we receive.*[96]

As Williamson-Davidson asserts, "these values underpin Haida laws and are reflected in them."[97] In other words, through the inclusion of these guiding principles, Haida laws and ethics play a major role in shaping and guiding the establishment and management of the SGaan Kinghlas-Bowie Seamount MPA.

Strategic and Operational Objectives

The SGaan Kinghlas-Bowie Seamount MPA Management Framework is composed of five goals which are further broken down into strategic and operational objectives.[98] Haida laws and knowledge are reflected at all levels of the framework including in multiple goals, strategic objectives, and operational objectives.

[95] *Ibid* at 10.
[96] *Ibid* at 11.
[97] Williams-Davidson, *supra* note 62 at 8.
[98] Haida Nation, *SGaan Kinghlas-Bowie Seamount*, *supra* note 6 at 23.

For example, Goal 3 states that "best available information and effective monitoring increase understanding of ecosystem variability and impacts related to human activities in the SGaan Kinghlas-Bowie Seamount MPA." One of the strategic objectives embedded within this goal states that "Best science, *including Haida traditional knowledge and local knowledge,* is used to support decision-making."[99] In terms of the operational objectives for this goal, decision-making is supported by "incorporating Haida traditional knowledge that is shared as appropriate."[100]

Goal 5 states that, "public awareness of the SGaan Kinghlas-Bowie Seamount MPA is increased." An operational objective embedded in this goal is *the use of Haida language and oral traditions in SK-B communications materials*.[101] This prioritizes the sharing of information with Haida citizens and emphasizes the importance of oral traditions in the development of resources to support knowledge around and protection of the SGaan Kinghlas-Bowie Seamount MPA.

Finally, at the level of operational objectives, the Management Board identifies indicators to monitor the implementation of the operational objectives.[102]

Haida Fisheries Program and Haida Fisheries Guardians

Monitoring and enforcement of regulations relating to the SGaan Kinghlas-Bowie Seamount MPA are shared by Haida and Canadian officials. The aerial surveillance program is managed by the DFO's conservation and protection branch and provides the primary means of surveillance and monitoring in the MPA.[103] The Canadian Coast Guard also provides surveillance and enforcement through its various programs.[104]

The CHN operates the Haida Watchmen program to ensure Haida lands and waters are managed sustainably. The Haida Watchmen now provide education for visitors at village sites located around Haida Gwaii.

> Three human figures wearing high hats are often carved at the very top of Haida poles. In the past, Haida watchmen were posted at strategic positions around a village to raise the alarm in advance of an approaching enemy. The carved figures crowning the monumental poles stood sentinel over the village. The three carved watchmen form the symbol adopted by the Haida for the Haida Gwaii Watchmen Program. Today the Haida Gwaii Watchmen have their own management structure and they are funded by Parks Canada. From May to October the program has provided seasonal employment for Haida men and women as young as 16 and as old as 78. For many visitors, meeting the watchmen is their favourite part of a memorable trip to Haida village sites. They offer a first-hand

[99] *Ibid* at 28.
[100] *Ibid.*
[101] *Ibid* at 29.
[102] Nigel Baker-Grenier, et al, *Reconciliation Agreements: Implementation Across Land- and Sea-Scapes* (Vancouver: Continuing Legal Education Society, 2021).
[103] Haida Nation, *SGaan Kinghlas-Bowie Seamount*, *supra* note 6 at 30.
[104] *Ibid.*

introduction to Haida culture by sharing their knowledge of the land and sea, their stories, songs, dances and traditional foods.[105]

DFO Fisheries Officers and Fishery Guardians, including Haida Fishery Guardians, are responsible for enforcing the *Oceans Act*, *Fisheries Act* and the *Species at Risk Act*.[106] Specifically, Haida Watchmen are involved in "monitoring river systems and fishing activity," in addition to the educational roles that they play.[107]

Education and Outreach

One of the goals outlined in the SGaan Kinghlas-Bowie Seamount MPA Management Framework is education and outreach.[108] The management plan connects this goal to the guiding principle of Gin 'laa hl isdaa.uu. (responsibility).[109] A recent project, titled "SGaan Kinghlas aauu tl'a 'waadluwaan hlGajagang" or "We all take care of SGaan Kinghlas," engaged Haida artists and dance groups to share Haida cultural connections to the MPA. It involved two Haida artists, a Haida composer, a Haida videographer and two youth dance groups. A film documenting this project can be accessed online here.[110] The story and video detail Haida legal principles and processes including the redistribution of wealth, the obligations of youth in caring for their families and communities, and the expression of these laws and values through various forms of art.

Thaidene Nëné

Thaidene Nëné ("TDN") was established within 26,376 square kilometres of Denesuline territory that encompasses boreal forest, tundra, and freshwater ecosystems in what is now the Northwest Territories.[111] Literally described as the "Land of the Ancestors", Thaidene Nëné has sustained the Łutsël K'é Denesǫłine for generations.[112]

Following nearly 20 years of deliberations and negotiations, the LKDFN designated Thaidene Nëné as an Indigenous Protected Area under Dene Law in February 2019 through a referendum of its membership.[113] Several months later, in August 2019, the Government of Canada and the Government of the Northwest Territories entered into Establishment Agreements with LKDFN,

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[105] "Haida Gwaii Watchmen" (9 May 2019), online: *Government of Canada, Parks Canada* <pc.gc.ca/en/pn-np/bc/gwaiihaanas/culture/gardiens-watchmen>.
[106] Haida Nation, *SGaan Kinghlas-Bowie Seamount*, *supra* note 6 at 30.
[107] "Coastal Guardian Watchmen Support" (accessed 22 February 2021), online: *Coastal First Nations Great Bear Initiative* <coastalfirstnations.ca/our-environment/programs/coastal-guardian-watchmen-support/>.
[108] Haida Nation, *SGaan Kinghlas-Bowie Seamount*, *supra* note 6 at 35.
[109] *Ibid* at 13.
[110] Council of the Haida Nation, "We all take care of SGaan Kinghlas" (19 June 2017), online (video): *YouTube* <youtu.be/1Wak5JW0h1w>.
[111] Łutsël K'é Dene First Nation, "2020-2025 Strategic Plan" at 3, online (pdf): *Land of the Ancestors* <landoftheancestors.ca/uploads/1/3/0/0/130087934/thaidene_nene_strategic_plan_2020-2025.pdf>.
[112] *Ibid*.
[113] Łutsël K'é Dene First Nation, "What is Thaidene Nëné?" (accessed 4 May 2021), online: *Land of the Ancestors* <landoftheancestors.ca/>.

and agreed to designate portions of Thaidene Nëné as a federal National Park Reserve,[114] a Territorial Protected Area,[115] and territorial Wildlife Conservation Area.[116] Thaidene Nëné is governed by agreements between LKDFN and Parks Canada,[117] the Government of the Northwest Territories[118] and with neighbouring Indigenous groups who exercise certain rights and responsibilities within the area.

For the LKDFN, Thaidene Nëné is a way of implementing the Treaty of 1900, which is how LKDFN understands their adhesion to what Canada calls "Treaty 8."[119] The LKDFN ancestors who signed the Treaty understood it to be an agreement of "peace and friendship" that did not give up aboriginal rights or land.[120] From the Dene perspective, it was an agreement to provide for "the sharing of land and resources – and the associated responsibilities and benefits – between the Crown and Indigenous governments."[121]

For Łutsël K'é, Thaidene Nëné implements the Treaty of 1900 because the Parties agree to share responsibilities, authority, and resources to pursue their common interest of conservation.[122] As nation-to-nation agreements, the Treaty of 1900 and the Establishment Agreements for Thaidene Nëné affirm rather than diminish Dene jurisdiction. Furthermore, both agreements reflect the Dene legal principles of equality and reciprocity.

Dene Law: Equality and Reciprocity

The Dene received their laws from Yamoria, "The Great Lawmaker," who was a powerful medicine person who lived long ago. Yamoria gave the people laws so that they could live a good, lawful life.[123] Yamoria's teachings are passed on in the oral tradition.[124] In 2019, Metis legal scholar, Professor Larry Chartrand, interpreted multiple Dene stories to identify

[114] The National Park Reserve is 14,305 km2 and was enacted under the *Canada National Parks Act*, SC 2000, c 32.
[115] The Territorial Protected Area is 8906 km2 and was enacted under the *Territorial Protected Areas Act*, SNWT 2019, c 11.
[116] The Wildlife Conservation Area is 3165 km2 and was enacted under the *Wildlife Act*, SNWT 2013, c 30.
[117] *Agreement to Establish Thaidene Nëné Indigenous Protected Area and National Park Reserve between Łutsël K'e Dene First Nation and Parks Canada Agency* (January 21 2019) [Canada Agreement].
[118] *Agreement to Establish Thaidene Nëné Indigenous Protected Area, Territorial Protected Area, And Wildlife Conservation Area between Łutsël K'é Dene First Nation and The Government of Northwest Territories*, (nd), online (pdf): *Government of the Northwest Territories* <enr.gov.nt.ca/sites/enr/files/resources/tdn_-_lkdfn_agreement_final_signed.pdf> [NWT Agreement].
[119] ICE Report, *supra* note 1 at 53.
[120] Northwest Territories Aboriginal Affairs and Intergovernmental Relations, "Understanding Aboriginal and Treaty Rights in the Northwest Territories: Chapter 2: Early Treaty-making in the NWT" at 3, online (pdf): <eia.gov.nt.ca/sites/eia/files/2_early_treaty_making_in_the_nwt_0.pdf>.
[121] ICE Report, *supra* note 1 at 84.
[122] *Ibid*.
[123] Larry Chartrand, "Applying Dene Law to Genetic Resources Access and Knowledge Issues" in Chidi Oguamanam, ed, *Genetic Resources, Justice and Reconciliation* (Cambridge: Cambridge University Press, 2018) 138 at 143.
[124] Val Napoleon & Hadley Friedland, "An Inside Job: Engaging with Indigenous Legal Traditions through Stories" (2016) 61:4 McGill LJ 725 at 738-9.

fundamental Dene legal principles.[125] Although there are many methods of engaging with and learning about Indigenous laws, analyzing Indigenous stories, narratives, and oral histories to uncover Indigenous legal principles and laws is a common practice.[126]

According to Professor Chartrand's analysis, two fundamental legal principles within the Dene legal tradition include (1) equality and interdependency; and (2) reciprocity, sharing, and mutual aide.[127] Both of these legal principles heavily influence Dene decision making processes, and are evident in the Indigenous legal foundations of Thaidene Nëné.[128]

Equality and interdependency

All of the stories interpreted by Professor Chartrand discuss the relationship between the Dene and all of Creation, including the natural environment and animals. The stories always place Dene on equal footing with their non-human relatives.[129] The stories explain that there is no hierarchy involved in the distinction between humans and non-humans and there is flexibility between the human and non-human world.[130] This fundamentally egalitarian worldview influences the belief that humans and nature are interdependent and rely on each other to survive.[131] Humans must treat animals and the environment with the same respect and dignity as other humans and Dene must always take animals and the environment into account when making decisions.[132] If animals are disrespected, they can use their medicine power to exert power and control over humans.[133]

Reciprocity, sharing, and mutual aide

The first law brought by Yamoria was to "share everything."[134] This obligation exists towards humans and animals.[135] The story *Meeting between Humans and Animals* explains the responsibilities Dene have in relation to animals:

> When the world was new, a conference took place between humans and animals where they determined how they would relate to each other. During this conference, Yamoria used his medicine powers to control everyone's minds to arrive at a fair resolution. It was agreed that humans may use animals, birds, and fish for food, provided that humans

[125] As an arbitrator for the Sahtu Dene and Metis Comprehensive Land Claim Agreement, Professor Chartrand has worked extensively with Dene peoples and law. His legal analysis of Dene law draws directly from Dene stories that have been written down by Dene Elders. See Chartrand, *supra* note 124.
[126] See generally Indigenous Law Research Unit at the University of Victoria; see also "RELAW – Revitalizing Indigenous Law for Land, Air and Water" (accessed 4 May 2021), online: *West Coast Environmental Law* <wcel.org/program/relaw>.
[127] Chartrand, *supra* note 124 at 147-150.
[128] *Ibid*, at 152.
[129] *Ibid*, at 147.
[130] *Ibid*, at 148
[131] *Ibid*.
[132] *Ibid*, at 147-148.
[133] *Ibid*, at 148.
[134] *Ibid*, at 143.
[135] *Ibid*.

> killed only what they need to survive and that they treat the animals with great respect. This respect included using the whole animal, thinking well of the animals, and thanking the Creator for putting them on earth.[136]

Dene have obligations to help all nations, both human and non-human.[137] Dene work together and with non-human relatives to solve problems, help each other, and ensure each other's survival.[138] In return, animals have an obligation to share their gifts with humans.[139]

Equality and Reciprocity in the Thaidene Nëné Establishment Agreements

Dene law is present within the Establishment Agreements governing Thaidene Nëné. The following analysis is not comprehensive, as the operation of Dene law within Thaidene Nëné will continue to evolve, but the following principles can be identified at the outset:

Objective of Thaidene Nëné

Under the Agreements, the primary objective of Thaidene Nëné is to maintain the "ecological integrity" of the area and to "ensure the Denesǫłine Way of Life will be maintained and promoted for the use, benefit, education and enjoyment of future generations."[140] Ensuring the ecological integrity of the area reflects the principle of interdependency between the Dene and the living world and assists the Dene in carrying out their obligations under the treaty with the animals. Ensuring that the Denesǫłine Way of Life will be maintained and promoted for the use, benefit, and education of future generations facilitates the law of transferring the teachings because landscapes include stories, spiritual sites, place names, and so on.[141]

Non-Interference with Indigenous Rights

The agreements allow members of the LKDFN and other section 35 rights holders to exercise their constitutionally protected rights (such as the right to hunt, fish, trap, etc.) as though the park was "invisible."[142] Under this provision, Dene can continue to live a lawful life, and maintain their relationships between each other and with other beings.

Shared Authority & Consensus Based Decision Making

The Agreements also establish a decision-making body called Thaidene Nëné xá dá yáłtı ("those who speak for Thaidene Nëné").[143] Thaidene Nëné xá dá yáłtı makes management decisions about ecological protection, cultural promotion, budgets and expenditures, access and use

[136] *Ibid*, at 145.
[137] *Ibid*, at 150.
[138] *Ibid*, at 148.
[139] *Ibid*, at 151.
[140] Canada Agreement, *supra* note 118 at 12, s 3.1.1; NWT Agreement, *supra* note 119 at 8.
[141] Tran, *supra* note 27 at 5.
[142] Canada Agreement, *supra* note 118 at 10, ss 2.5-2.8; NWT Agreement, *supra* note 119 at 7, ss 2.1.5.-2.1.7.
[143] Canada Agreement, *supra* note 118 at 9, s 1.1.1.

permits, and research and monitoring.[144] Representatives on Thaidene Nëné xá dá yáłtı also share joint governance responsibilities. All three governments appoint an equal number of people to Thaidene Nëné xá dá yáłtı[145] but Parks Canada appointees only participate in decisions relevant to the National Park Reserve, and territorial appointees only participate in decisions relevant to the territorial areas.[146]

All decisions of Thaidene Nëné xá dá yáłtı are made by consensus, meaning one party cannot act without the consent of the other.[147] Where there are disputes about carrying out a management decision, appointees on Thaidene Nëné xá dá yáłtı will strive to resolve the issue through a consensus-based process.[148] If the disagreement cannot be resolved, no single party has a veto. The dispute will be referred to the Chief and the appropriate Minister to come to a resolution.[149]

As discussed above in the governance section of this paper, the question of how Indigenous laws can be applied to inform what would normally be unfettered territorial or federal decision-making powers under Canadian law is to be addressed in the context of the establishment agreement, and requires the decision-maker to engage both in a consensus-based process of shared decision-making, and to be subject to a robust dispute resolution process in the event of a disagreement. This significantly 'rebalances' the decision-making structures. Within this context, Crown decision-makers must not only consider Indigenous views, but must seek to achieve an alignment between how Crown jurisdiction and Indigenous jurisdictions can be directed towards meeting common interests – or alternatively, how any disputes can be resolved in a harmonious way.

Dene laws requiring sharing are therefore embedded in the governance and management structure of Thaidene Nëné xá dá yáłtı and the body's decision-making process because each party shares responsibilities (including decision making power) and is treated equally and respectfully, each according to their own jurisdiction and authority.

Permitted Activities

Industrial or extractive development such as oil and gas, mineral exploration, and mining is not allowed on Thaidene Nëné.[150] Infrastructure corridors are also not allowed in the National Park Reserve, but are allowed in the territorial areas (located on the periphery of the National Park Reserve) if there is no feasible alternative, impacts are minimized, and there is approval by

[144] Canada Agreement, *supra* note 118 at 15-16, ss 4.1.2.-4.1.3; NWT Agreement, *supra* note 119 at 10-11, ss 4.1.3.-4.1.4.
[145] Canada Agreement, *supra* note 118 at 18, s 4.3.1; NWT Agreement, *supra* note 119 at 14, s 4.3.1.
[146] Canada Agreement, *supra* note 118 at 60, Appendix M, ss 3.4-3.5; NWT Agreement, *supra* note 119 at 50, Appendix K, ss 3.4-3.5.
[147] Canada Agreement, *supra* note 118 at 17, s 4.2.1; NWT Agreement, *supra* note 119 at 13, s 4.2.1.
[148] Canada Agreement, *supra* note 118 at 24-25, s 5.4; NWT Agreement, *supra* note 119 at 19-20, s 5.4.
[149] Canada Agreement, *supra* note 118 at 25, s 5.4.2.(g); NWT Agreement, *supra* note 119 at 20, s 5.4.2.(g).
[150] *Ibid* at 23, s 7.23. The NWT Agreement defines "Extractive Use" as any process that involves the extraction or use of surface or subsurface resources occurring within or flowing through Thaidene Nëné, including timber and non-timber forest resources, minerals, energy, and water, but does not include the extraction or use of resources required for the operation and management of Thaidene Nëné: *Ibid* at 4, s 1.1.1.

Thaidene Nëné xá dá yáłtı.[151] Small scale hydroelectric development and quarrying are allowed throughout the IPCA to serve community needs or provide for park infrastructure, subject to Thaidene Nëné xá dá yáłtı approval.[152] Artisanal scale commercial extraction[153] is also allowed subject to Thaidene Nëné xá dá yáłtı.[154]

These allowances reflect the reciprocal and interdependent relationship between the Dene and the land; the Dene take care of the land and the land sustains the Dene. Professor Chartrand notes that like the animals, the land may also have a lawful obligation to provide for the Dene.[155] Small scale harvesting honours that relationship while ensuring that the land and animals are respected. Large scale extraction, by contrast, may not be considered lawful because it is not respectful towards the land and is known to cause harm.

LKDFN Trust Fund

One of the main challenges facing IPCAs in Canada and elsewhere is the lack of public funding and support.[156] In this respect, Thaidene Nëné is unique, as a grant of 15 million dollars was advanced to an LKDFN trust fund by Parks Canada, and matched by philanthropic donors.[157] The Trust money will be used to pay for LKDFN management and operational costs, support the education and training of Thaidene Nëné xá dá yáłtı, and promote the Denesǫłine Way of Life.[158]

The grant from Parks Canada can be viewed from a Dene perspective as an act of recognition, respect and reciprocity for all that LKDFN is bringing to the partnership, including traditional knowledge, familiarity with the land, and for allowing both governments to carry out their responsibilities.

This is one of the keys to the success of Thaidene Nëné. One of the challenges with the co-management processes used prior to the advent of IPCAs is that while Indigenous parties may be consulted, or may even have consented to a particular course of action at the strategic level, it is the government agency (i.e. Parks Canada) that ends up implementing the decision. This results in many gaps in understanding, as parks staff may lack cultural context or competency, or operate within structures that are 'foreign' from an Indigenous perspective.

In Thaidene Nëné, the establishment agreement recognizes that each party has operational responsibilities. Accordingly, it is not only Parks Canada that is resourced to implement the recommendations of the joint decision-making body. LKDFN is both situated and resourced to take an active role in the operations of the IPCA, and is doing so in accordance with its own authorities and resources while respecting the consensus that has been achieved. This fills a

[151] *Ibid* at 22, s 7.1.3.-7.1.5.
[152] *Ibid* at 23, s 7.2.3.(a).
[153] The LKDFN – NWT Establishment Agreement defines "Artisanal" as the non-industrialized, labor-intensive extraction or use of surface and subsurface resources that utilizes local skills and knowledge to produce value-added products for individual sale, domestic use, or community purposes: *Ibid* at 3, s 1.1.1.
[154] *Ibid* at 23, s 7.2.3.(b).
[155] Chartrand, *supra* note 124 at 151.
[156] Tran, *supra* note 27 at 1.
[157] Canada Agreement, *supra* note 118 at 49, Appendix G, s G.2.2.
[158] *Ibid* at 49, Appendix G, s G.3.1.

critical gap between the higher-level decision-making that occurs between the parties by ensuring that Indigenous laws, knowledge and practices are directly informing operational activities.

CONCLUDING OBSERVATIONS

This paper outlines the legal foundations for IPCAs in Canada, and locates different forms of IPCAs on a jurisdictional spectrum depending on whether they are established entirely under Indigenous law, Crown law or both. Through detailed examination of several case studies, we have also discussed how Indigenous law informs the establishment and operation of IPCAs in practical terms, in respect to how they are established, governed and managed. In our conclusion, we now return to the transformative potential of IPCAs as a mechanism for advancing conservation and reconciliation in Canada, building on these themes, and make the following observations.

Recognizing that how Indigenous laws themselves and the vision for how they are being revitalized and applied in a modern context vary from nation to nation, and that it is fundamentally a matter of self-determination for each Indigenous nation to determine what form of IPCA they may wish to pursue, there are several opportunities that IPCAs may provide:

Bridges, Layers and Pathfinders

1. Bridging Indigenous and Crown Laws

Recognizing and creating space for Indigenous jurisdiction and law within IPCAs can expand the notion of Crown protected areas, foster greater intercultural understandings within and between Indigenous and Crown governments and officials, and contribute to public awareness and understanding of Indigenous laws.

Under Canadian law, protected areas are usually established to protect ecological features and biodiversity or to serve as a recreation area. In Indigenous law, there may be other purposes for protecting an area, including protecting supernatural beings and sacred places, upholding stewardship responsibilities for the area, and fulfilling intergenerational obligations. For example, the Haida Nation established the SGaan Kinghlas-Bowie Seamount MPA to protect SGaan Kinghlas, a supernatural being, under Haida law. The federal government established a MPA under section 35 of the *Oceans Act* to protect the ecological significance of the area. The two legal orders were able to utilize their distinct traditions to come to an agreement about how the marine area should be managed to achieve shared objectives.

Crown protected areas often operate in jurisdictional siloes – provincial/territorial and federal, terrestrial and marine, forests and mines - that do not reflect the interconnected nature of ecosystems understood in many Indigenous legal orders. The new Gwaii Haanas Gina 'Waadluxan KilGulGa (Talking about Everything) Land-Sea-People plan is unique in acknowledging the interconnectedness of terrestrial and marine environments and the need to

manage them all together.[159] The Haida Nation has recognized the interconnectedness of Gwaii Haanas from the beginning by designating both marine and terrestrial areas in the Haida Heritage Site. Now, the Gwaii Haanas area brings multiple Crown agencies together to more comprehensively care for the area. Similarly, as with Thaidene Nëné, in circumstances where multiple Indigenous nations have rights and relationships in the same area, mechanisms for collaboration between Indigenous nations will be required.

Internationally, some of the strongest examples of governance bodies that bridge Crown and Indigenous laws are the legal personhood boards in New Zealand. The concept of granting 'legal personhood' to natural entities is a novel legal concept in Crown law that has existed in Māori worldviews and laws since the beginning of time. In 2014, Te Urewera — a National Park since 1954 — was granted its own legal personhood with the passing of the *Te Urewera Act*.[160] The *Te Urewera Act* enshrines the ancestral relationship between the Tūhoe iwi (or tribe) and Te Urewera and uses te reo Māori (the Māori language) to accurately represent the Māori legal system and worldview. As Māori legal scholar Jacinta Ruru notes: "Te Urewera Act is undoubtedly legally revolutionary here in Aotearoa New Zealand and on a world scale."[161]

In addition to recognizing novel concepts in legal personhood, the *Te Urewera Act* offers lessons in shared decision-making that can be applied to IPCAs here in Canada. Decisions about management are made by the Te Urewera Board, which acts "on behalf of, and in the name of, Te Urewera."[162] While the Board began with equal Tūhoe and Crown membership, the ratio of Tūhoe members will increase over time, and the Board is directed to reflect Māori values and law that are set out in the Act.[163] The passing of the *Te Urewera Act* is a creative example of Crown and Indigenous governments bringing their authorities, responsibilities and laws together to care for a natural entity.

The *Te Urewera Act* is also notable for how it deals with underlying disputes to the title of protected areas. Underlying title to Te Urewera was claimed by the Tūhoe and by the New Zealand government.[164] By granting the area legal personhood, Te Urewera now, in effect, owns itself, thereby neutralizing title disputes. Another way to deal with underlying disputes to title used in Canada in the Gwaii Haanas Agreement is to 'agree to disagree' about underlying title while agreeing to care for the area together.

Indigenous laws are lived and practiced by Indigenous peoples both consciously and unconsciously and may not be written down in a form accessible to others. As Terri-Lynn Williams-Davidson explains, "the Haida apply Haida laws consciously and unconsciously because they too are an innate part of our identity. Council of Haida Nation's journey to reconciliation has consciously and unconsciously incorporated our laws into governance

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[159] Haida Nation, *supra* note 45.
[160] The bi-cultural nature of the Te Urewera Board is reflected in the inspiring language in the Background to the Act. See *Te Urewera Act 2014*, 2014 No 51 (New Zealand), s 3.
[161] Jacinta Ruru, "Tūhoe-Crown settlement – Te Urewera Act 2014" (October 2014), online: *Māori Law Review* <maorilawreview.co.nz/2014/10/tuhoe-crown-settlement-te-urewera-act-2014/>.
[162] *Te Urewera Act*, *supra* note 161, s 17.
[163] Ruru, *supra* note 162.
[164] *Ibid.*

structures, decision-making and relationships with others."[165] Indigenous legal principles shared with the Crown to inform management plans or establishment agreements are likely to be just the tip of the iceberg. Indigenous laws, like all laws, change with the times. Mechanisms for adaptive management and the revisiting of governance arrangements and management plans will help create the space needed for IPCAs to remain responsive to current needs. Finally, governance bodies that enable an increase in Indigenous representation over time, as set up in the *Te Urewera Act*, may be a useful way to address capacity challenges.

"Bridging" between different concepts and understandings of what constitutes proper protection and stewardship, and how management decisions should be made, is an essential component of IPCAs. It will require new skills on the part of conservation managers. Learning to operate in ethical space, respect Indigenous laws and knowledge systems, and engage in intergovernmental and intercultural dialogues about policy decisions will be necessary to realize the potential for IPCAs to operate as a bridge between Indigenous and Crown legal orders and understandings.

2. Exercising Concurrent Jurisdictions and Authorities Requires Cooperation

While it is open to Indigenous nations to establish IPCAs under their own inherent jurisdiction using their governance and legal processes, there are opportunities for cooperation and collaboration through joint designations of areas as both Crown protected areas and as IPCAs. Joint designations require mutual respect for the jurisdictions and authorities of each party, and a mechanism for shared decision-making.

Further, "layers" of protection through joint designations are an effective way to better coordinate between Crown and Indigenous governments, and to better achieve mutual objectives that may not be achieved by one party acting alone. The limits of Crown authorities can be addressed collaboratively by layering with Indigenous-led designations, so that Indigenous laws can fill the gaps that might otherwise exist in Crown regulatory systems that must avoid infringements of constitutionally protected section 35 rights. Indigenous governments exercising their own authorities are governing, not infringing, when they regulate activities undertaken by their members.

Successful "layering" requires a clear mechanism to establish how different designations will work together and to set out how decisions will be made in an area. This is most commonly achieved through agreements or statutes. For example, the *Gwaii Haanas Agreement* explains how the Council of Haida Nation and Government of Canada will work together to manage the area and establish a joint decision-making body. The Memorandum of Understanding (MOU) between the Government of Canada and the Council of Haida Nation (CHN) for the SGaan Kinghlas-Bowie Seamount Protected Area also establishes a joint decision-making body.[166] A crucial part of these agreements is that they are based upon mutual, reciprocal and overlapping designations by each of the parties.

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[165] Williams-Davidson, *supra* note 62 at 12.

[166] *Memorandum of Understanding, Government of Canada, Minister of Fisheries and Oceans and The Haida Nation, Council of the Haida Nation* (2007), online (pdf): <pac.dfo-mpo.gc.ca/oceans/protection/mpa-zpm/bowie/docs/Bowie%20MOU_Apr18_07_signed_version.pdf>.

Operating in concurrent jurisdictions can come with challenges. In a discussion on the barriers to true reconciliation, Terri-Lynn Williams-Davidson lists some major challenges that may be sources of conflict between nations that are involved in the cooperative governance of IPCAs:

1. "A blatant non-recognition of our existence."[167]
2. Lack of assistance for the documentation and preservation of oral traditions.[168]
3. "The failure to recognize the expertise of the elders to maintain and transmit oral traditions."[169]
4. "An unwillingess to acknowledge the resilience, knowledge and capabilities of First Nations to manage land, waters and resources and to develop political institutions to govern in a new landscape."[170]

Moving forward, both Indigenous and Crown governments can learn from the barriers set out above and work to proactively address them.

3. Pathfinders

The premise of the *Pathway to Target 1* will only be realized if there are "pathfinders" who can break new trails, and people from both legal traditions who can learn to travel together.

Framing Indigenous laws and Canadian laws as being in a jurisdictional relationship does not adequately describe the complexity of that relationship. On its face, such language may not explain how the laws can adapt in different contexts to reflect the needs of Indigenous nations. As put by Laura Nader and Jay Ou, "disputing may be a means to harmony and to autonomy and self-determination" and "conflict may be part of the struggle in life that keeps people bound together."[171] Disputes, conflict, and concessions will most certainly arise. Having clear processes for resolving these conflicts can increase learning opportunities and mutual growth. For example, many management boards that govern IPCAs require their members to come to consensus in decision-making.

One important challenge for IPCAs will be to learn how to adapt to the changing context of conservation. Indigenous Guardians can be pathfinders who will lead the way. According to the Indigenous Leadership Initiative: "Indigenous Guardians help Indigenous Nations honour the cultural responsibility to care for lands and waters. They serve as the 'eyes and ears' on traditional territories."

Guardians are trained experts who manage protected areas, restore animals and plants, test water quality and monitor development. They play a vital role in creating land-use and marine-use

[167] Williams-Davidson, *supra* note 62 at 11.
[168] *Ibid.*
[169] *Ibid.*
[170] *Ibid.*
[171] Laura Nader & Jay Ou, "Idealization and Power: Legality and Tradition in Native American Law" (1998) 23:1-2 Okla City U L Rev 13 at 41.

plans. They connect youth with Elders and provide training that prepares young people to become the next generation of educators, ministers and leaders.

Guardian programs build capacity to engage with other land users, industry representatives and governments. Having Guardians on the ground helps strengthen decision-making that determines what happens on the lands and waters. This is an essential element of nation building. Guardian programs also create well-paid jobs and foster local and regional economic opportunity.[172]

Guardians can play a role in monitoring and data collection and may also play a role in the enforcement of Canadian and/or Indigenous laws within an IPCA. When playing an enforcement role, the authority of Guardian programs needs to be made clear otherwise there is a risk that they will not be respected.[173] Monitoring and enforcement can be undertaken by federal, provincial, territorial and Indigenous government agencies separately or through a coordinated agency.

Regardless of the approach taken, there needs to be a mechanism to ensure proper collaboration. For example, management and operations of the Edéhzhíe Protected Area will be done jointly by the Dehcho K'éhodi Stewardship and Guardian Program and Canada. The Dehcho First Nations and Canada must designate an individual responsible for ensuring the "Dehcho K'éhodi Stewardship and Guardian Program and Canada are integrated and coordinated to the extent reasonably possible."[174] Creating a role for coordination contributes to ongoing collaboration and communication between Indigenous and Canadian governing bodies.

The enforcement authority of Indigenous Guardians can be recognized under Crown law through statutes (i.e., as Park Rangers or another existing designation) or government-to-government agreements. Some Indigenous Guardians programs have expressed interest in a "dual patch" system where they have authority under their own jurisdiction to enforce their Indigenous laws and also have authority under Crown law to enforce Crown laws. In these and other approaches, Guardian programs involve the application of Indigenous law and knowledge, both through the agreements that govern these roles and give them authority, and through the actions of individual Guardians on the lands and waters. Guardian programs are often employed in the management of IPCAs. Guardian programs that operate in a few IPCAs examined earlier are discussed below.

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[172] "Indigenous Guardians" (accessed 22 February 2021), online: *Indigenous Leadership Initiative* <ilinationhood.ca/guardians>.

[173] West Coast Environmental Law, "Guardian Watchmen: Upholding Indigenous Laws to Protect the Land and Sea" (March 2018), online (pdf): <wcel.org/sites/default/files/publications/gw_laws_to_protect_land_and_sea_final.pdf>.

[174] *Agreement Regarding the Establishment of Edéhzhíe Between Her Majesty the Queen in Right of Canada and Dehcho First Nations* (11 October 2018), online (pdf): *Dehcho First Nations* <dehcho.org/docs/Edehzhie-Establishment-Agreement.pdf>.

Haida Gwaii Watchmen – Haida Nation

The Haida Gwaii Watchmen steward Haida territory, including protected areas and Heritage Sites, according to Haida law.[175] Though the Haida Gwaii Watchmen are funded, in part, by Parks Canada, they have their own management structure and share Haida culture through "their knowledge of the land and sea, their stories, songs, dances and traditional foods."[176] As explained above, in SGaan Kinghlas-Bowie Seamount MPA, monitoring and enforcement of regulations are shared by Haida and Canadian officials. The CHN operates the Haida Watchmen program to ensure Haida lands and waters are managed sustainably. DFO Fisheries Officers and Fishery Guardians, including Haida Fishery Guardians, are responsible for enforcing the *Oceans Act*, *Fisheries Act* and the *Species at Risk Act*.[177]

Coastal Guardian Watchmen Network

The work of the Haida Gwaii Watchmen led to the development of the Coastal Guardian Watchmen Network, made up of several coastal nations from BC's North and Central Coasts and Haida Gwaii.[178] The Guardian Watchmen uphold and enforce Indigenous laws to protect, monitor, and restore the cultural and natural resources of their territories,[179] while the Network provides programming, support, and coordination for First Nations stewardship in the area.[180]

Ni Hat'ni Dene – Łutsël K'é Dene First Nation

Ni Hat'ni Dene ("watchers of the land") are the stewards of Thaidene Nëné, over which they assert the rights and authority of the Łutsël K'é Dene First Nation.[181] Through their work, they "practice a traditional subsistence lifestyle, maintaining the integrity of cultural sites, conducting environmental monitoring, and interacting with visitors to Thaidene Nëné."[182] Ni Hat'ni Dene help preserve Denesǫłine culture, history, and language; inspire youth to become future guardians; provide employment training and skills development; and provide skills training for a park-based sustainable economy.[183]

Conclusion

Conservation biologists tell us that representative protected and conserved areas in the range of 25 to 75% of land and water are required to "avoid catastrophic climate change, conserve

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[175] "A National Indigenous Guardians Network: Backgrounder" (accessed 22 February 2021), online: *Indigenous Leadership Initiative* <ilinationhood.ca/publications/backgrounder-a-national-indigenous-guardians-network>.
[176] "Haida Gwaii Watchmen" *supra* note 106.
[177] Haida Nation, *SGaan Kinghlas-Bowie Seamount*, *supra* note 6 at 30.
[178] "Coastal Stewardship Network" (accessed 22 February 2021), online: *Coastal First Nations Great Bear Initiative* <https://coastalfirstnations.ca/our-environment/coastal-stewardship-network/>.
[179] "Coastal Guardian Watchmen Support," *supra* note 108.
[180] "Coastal Stewardship Network," *supra* note 179.
[181] "Ni Hat'ni Dene on the Land" (accessed 22 February 2021), online: *Thaidene Nëné Land of the Ancestors* <landoftheancestors.ca/ni-hatni-dene.html>.
[182] *Ibid.*
[183] Lutsel K'e Dene First Nation, *Ni Hat'ni Dene* (2016) at 7-8, online (pdf): <landoftheancestors.ca/uploads/1/3/0/0/130087934/ni-hat-ni-overview-2016.pdf>.

species, and secure essential ecosystem services."[184] As the interconnected climate and ecological crises deepen, IPCAs can serve as places of refuge to curb biodiversity loss and to serve as buffers in the face of a drastically changing climate. IPCAs also provide space for Indigenous laws and worldviews to re-establish right relationships among humans and with the living world. As Professor Borrows notes, "First Nations legal traditions are strong and dynamic and can be interpreted flexibly to deal with the real issues in contemporary Canadian law..."[185] including climate change and biodiversity loss.

Indigenous laws, governance and knowledge systems are the foundation of IPCAs, and there is nothing preventing Indigenous nations from establishing IPCAs under their own jurisdiction and authority using their own laws. However, recognition of IPCAs in Crown law may be desirable in some circumstances to minimize conflict with other governments and stakeholders, to provide long-term protection under Crown laws, and to acquire Crown support for monitoring and enforcement through Guardians programs.

The Government of Canada has committed to international conservation targets to protect 30% of the land and waters by 2030.[186] Crown governments are increasingly recognizing that their protected area targets, and constitutional obligations, cannot be met without the support and consent of Indigenous nations. At the same time, Indigenous nations are motivated to establish IPCAs for a wide range of purposes including to uphold their responsibilities to their territories and to maintain them for future generations. This creates an opportunity for Crown and Indigenous governments to come together in ethical spaces to establish and govern IPCAs grounded in both Indigenous and Crown laws and knowledge systems.

To successfully maintain Nation-to-Nation and Crown-to-Inuit relationships, and to recognize the underlying authority of Crown and Indigenous nations, IPCA governance arrangements must find ways to bring together Indigenous and Crown governance and legal systems.

This includes, 1) the degree to which Indigenous and Crown jurisdictions and authorities are expressly recognized, 2) how Indigenous and Crown laws define and structure the goals, purposes and objectives of the IPCA; and 3) how Indigenous and Crown laws are operationalized in management decisions and actions.

IPCAs accordingly provide an opportunity to rebuild relationships that have long been fractured, and to establish common ground through conservation action. Acknowledging Indigenous and Crown legal orders in the establishment and operation of IPCAs has the potential to demonstrate how Indigenous peoples can be full partners in both conservation and in Confederation.

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[184] See e.g., Reed F. Noss, et al., "Bolder Thinking for Conservation" (2012) 26:1 Conservation Biology 1; Bethan C. O'Leary, et al*,* "Effective Coverage Targets for Ocean Protection" (2016) 9:6 Conservation Letters 396.
[185] Borrows, *Canada's Indigenous Constitution*, *supra* note 4 at 27.
[186] See Environment and Climate Change Canada, "Canada Joins the High Ambition Coalition for Nature and People" *Cision* (September 28, 2020), online: <newswire.ca/news-releases/canada-joins-the-high-ambition-coalition-for-nature-and-people-847311784.html>.